



Neutral Citation Number: [2022] EWHC 3159 (Admin)

Case No: CO/2780/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/12/2022

Before :

MRS JUSTICE HILL DBE

Between :

THE KING (on the application of)
(1) HPSPC LIMITED
(2) NATIONAL EDUCATION UNION

Claimants

-and-

SECRETARY OF STATE FOR EDUCATION

Defendant

-and-

HOLLAND PARK SCHOOL

Interested Party

David Wolfe KC, Sarah Sackman and Aidan Wills (instructed by Leigh Day) for the
Claimants

Jonathan Auburn KC and Katharine Elliot (instructed by the Government Legal
Department) for the **Defendant**

The Interested Party did not appear and was not represented

Hearing date: 24 November 2022

Approved Judgment

This judgment was handed down remotely at 10.00am on 09/12/2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mrs Justice Hill DBE :

Introduction

1. By this claim, issued on 2 August 2022, the Claimants seek judicial review of the process that led to the Defendant’s decision, later taken on 19 August 2022, to approve the transfer of Holland Park School (“HPS”) to a Multi-Academy Trust (“MAT”), and that the MAT in question would be United Learning Trust (“ULT”). The effect of the decision is that HPS would cease to exist as a standalone, autonomous academy and would instead become part of a national network of academy schools.
2. The Holland Park School Parents Collective (“HPSPC”) is a group of around 350 parents and carers of current HPS pupils, formed to discuss the future of the school and to make representations to the HPS Board. A smaller group of parents and carers have formed the First Claimant, a company limited by guarantee incorporated in May 2022. Its individual members have different views as to what is best for HPS but share the view that transparency and proper consultation is essential. Their case is that they have not been properly consulted during the process that led to the decision, in breach of the principles set out in *R v Brent LBC, ex p Gunning* (1985) 84 LGR 168 and *R (Moseley) v Haringey LBC* [2014] UKSC 56; [2014] 1 WLR 3947.
3. The Second Claimant (“the NEU”) is the largest independent trade union for educational professionals in England and Wales. It has 76 members at HPS including teachers, leadership and support staff members. A new arrangement with ULT would be a significant legal change for them and they are very concerned as to how the school would be governed in future if the transfer is effected. They also consider that they have not been adequately consulted during the discussions around the proposed transfer.
4. The Defendant is the Secretary of State with responsibility for education. The Education and Skills Funding Agency (“ESFA”) is an executive agency of the Department for Education (“DfE”) which oversees the funding of academies. Regional Directors, formerly known as Regional Schools Commissioners, exercise the Defendant’s contractual powers in many decisions relating to academies, including in respect of

transfers. Some academy-related decisions, such as the ultimate decision in this case, are also made by the Minister.

5. The Interested Party is HPS's Board of Governors.
6. By a consent order sealed on 14 October 2022 it was agreed that it was necessary for this claim to follow an expedited timetable and for there to be a "rolled-up" hearing of the permission and substantive stages. This was because if it is decided that HPS should transfer to a MAT, the transfer will need to take place as soon as possible. The Defendant has agreed not to take the irreversible step of signing a new funding agreement with ULT, pending the outcome of this challenge.
7. The rolled-up hearing took place before me on 24 November 2022. The Claimants relied on witness statements from Ranbir Hunjan, Sebastian Peattie, Shane Leonard, Palmira Morais, Sam Hesketh (all parents at HPS) and Clive Romain (Head of Legal Strategy for the NEU). Sam Hesketh is also one of the elected parent governors on the HPS Board. The Defendant relied on witness evidence from Dame Kathleen Dethridge, the Regional Director ("RD") for South-East England. The Interested Party relied on witness evidence from Vic Daniels (the current Chair of the HPS Board), but otherwise played no active part in these proceedings. The parties also provided a core bundle of documents and a three volume supplementary bundle.
8. I am grateful to all counsel for their detailed written and oral submissions. Having considered all the arguments advanced, I find the claim arguable. I therefore grant the Claimants permission. The remainder of this judgment addresses the substance of their claim.
9. The issues are:
 - (1) Did the Defendant undertake a consultation which met the minimum legal requirements?
 - (2) Can the Defendant show that it is highly likely that the outcome would not have been substantially different for the Claimants in any event?
 - (3) Should the court exercise its discretion to refuse to grant the Claimants relief?

The facts

HPS

10. HPS is a co-educational state secondary school located in the Royal Borough of Kensington and Chelsea ("RBKC"). It serves a diverse local community which characterises this area of central London. It has around 1,400 students. From 1958 it operated as a state maintained comprehensive school.
11. In September 2013, HPS became an academy school. It is operated by an academy trust, which is a company limited by guarantee, pursuant to a Funding Agreement with the Defendant dated 19 December 2012. Under clauses 13 and 14 of this agreement, the school is governed by a Governing Body who are the directors of the company

constituted under the articles of the trust. The trust is a Single Academy Trust (“SAT”), meaning that the trust operates only one academy, HPS.

12. The December 2014 Ofsted inspection report judged HPS as “outstanding”.

Events from 21 July 2021 – 1 November 2021

13. On 21 July 2021 the ESFA received a whistleblowing report from 57 former staff members of HPS. They stated that unfavourable Ofsted staff questionnaires had been read by the HPS senior leadership team but not shared with the Ofsted inspectors during the January 2020 inspection. They also raised concerns about a toxic work environment, teachers being bullied, abuses of power, high staff turnover and staff being signed off work due to stress and anxiety. There was press coverage of the issue and the RD was alerted to it.
14. On 9 September 2021 the ESFA received a further whistleblowing report signed by 117 former HPS students. They indicated that they “recognise[d] the characterisation of [HPS] as a toxic environment” and “believe[d] the allegations made by these former teachers mirror our own experiences our students at the school”.
15. On 10 September 2021 the then Chair of the HPS Board resigned. HPS made contact with the DfE. The RD commissioned a review of governance at HPS, which identified that (i) there was no Chair in place; (ii) there had been non-compliance with the Academies Handbook because all five HPS members were also acting as trustees, meaning that lines of accountability were unclear; (iii) financial oversight appeared to be weak; and (iv) there were no steps in place to manage the potential conflict of interest arising from the fact that the two parent trustees on the HPS Board were married.
16. The DfE put forward an experienced academy trust chair as a potential Chair for the HPS Board, together with four further potential trustee candidates. These were all appointed by the HPS Board in late September 2021.
17. On 22 September 2021 RBKC confirmed that the Local Safeguarding Children’s Partnership would be commissioning a learning review in which the concerns with the organisation and culture at HPS would be considered.
18. Between September and December 2021, seven trustees stepped down from the HPS Board leaving only one parent trustee. Under the HPS Articles of Association, the minimum number of parent trustees is two.

The 2 November 2021 Notice to Improve and the HPS Board’s actions in response

19. On 2 November 2021 the ESFA issued a Notice to Improve (“NtI”) to HPS on the basis that there were “continued concerns relating to the governance and oversight of financial management by the Board prior to [the new Chair’s] arrival and that of the other trustees and members in September 2021”. The NtI set out a series of conditions to address these concerns. One of these was “The trust to consider starting the process of moving the school into a [MAT]”. The RD had agreed with the ESFA that this condition would be included because she remained concerned by the issues raised by the former teachers and

students and the significant turbulence caused by a resignation of a large number of HPS trustees.

20. On 22 November 2021 the newly constituted HPS Board instructed an independent investigator from B3sixty to undertake an investigation into the complaints that had been raised by former students and staff.
21. On 13 December 2021 the HPS Board discussed the condition of considering joining a MAT and agreed to form a working group of four trustees to consider this issue.
22. On 14 December 2021 at the request of the HPS Board, and in accordance with standard DfE practice, the DfE provided a list of MATs operating in the local area who, based on the DfE's knowledge of their capacity and expertise, could potentially be suitable trusts for HPS to join. The HPS Board reviewed the DfE's list and added other MATs that they thought should also be considered when coming up with their own shortlist.
23. On 17 January 2022 the HPS Board identified a list of six potential MATs and agreed to explore these options further.
24. On 1 February 2022 the DfE was informed that the HPS Headteacher would be taking a leave of absence, following a previous period of ill-health absence, and bringing forward his retirement to 31 March 2022. An interim Headteacher was appointed in February 2022.

The HPS Board's proposed voluntary transfer to a MAT and the Engagement Guidance

25. On 1 March 2022 the MAT working group made a presentation to the HPS Board explaining that its recommendation was that it was in the best interests of HPS to join a MAT. The DfE was informed that HPS would be applying to join the ARK Schools MAT ("ARK").
26. The minutes of the 1 March 2022 meeting record some concerns in the community that a local solution involving Kensington Aldridge Academy ("KAA") had not been properly considered. KAA is a school local to HPS, operating as a SAT. A proposal was developed whereby KAA would sponsor HPS. This later secured support from RKBC including through a loan facility.
27. The RD explained that ARK were unwilling to facilitate the transfer of HPS until September 2023. The RD indicated to the HPS Board that September 2023 was not an acceptable date of transfer, because of the urgent need to stabilise HPS. The HPS Board agreed and ended their discussions with ARK.
28. On 10 March 2022 the HPS Board informed DfE that they had approached ULT about joining their MAT.
29. On 14 March 2022 the Board published a statement on the HPS website informing the school community that ULT was their "preferred [MAT] home for the school". The Board indicated that it had "explored a number of options, including the consideration that [HPS] might remain a [SAT]. Given the issues facing the school and having carefully work through all the options using a robust, open and clear process, the governors have

decided the future of the school is best secured and leadership stabilised through joining a MAT”.

30. The DfE wrote to the HPS Board setting out the DfE’s requirements for a stakeholder engagement process (“SEP”) to take place in light of the Board’s decision to proceed with a voluntary transfer to ULT. The process is derived from internal DfE guidance (i) *Academy Transfer Framework - Internal guidance for staff* (“the Framework”); and (ii) *Academy Transfer: Stakeholder Engagement and Communications Guidance for Project Leads* (“the Engagement Guidance”).
31. Paragraph 2 of the Engagement Guidance sets out the following under the heading “Purpose”:

“Stakeholder engagement is important because stakeholders can provide invaluable local knowledge; it is vital that we use that to inform decision-making. In addition, given the impact academy transfer can have on the school and local community, it is also important that the [DfE] (represented by you, the Project Lead) and trusts engaged with stakeholders to increase transparency and give them the opportunity to ask questions and share their views. This in turn provides an early opportunity for the [DfE] and trusts to tailor their approach to respond to the needs of the community”.
32. The Engagement Guidance continues by providing that in “all cases” three specific actions should be undertaken, but that:

“[a]side from this, the level of engagement required will depend on the proposed transfer and should be determined...on a case-by-case basis. For example, if it is voluntary with support from the local community, only the mandatory aspects outlined in this guidance will be required. If you are managing a more contentious transfer where there is likely to be opposition from parents or the local MP, you should consider what additional engagement may be required. In this situation, you may want the [RD] to write to or meet with the local MP before the transfer is [publicly] announced”.
33. The three mandatory actions are (i) a public announcement of the preferred trust to whom the academy will be transferred; (ii) the sharing of information about a representations inbox (“the RD inbox”) with stakeholders so that they can submit their views; and (iii) a stakeholder engagement meeting between the two trusts (ie. the SAT and the preferred MAT sponsor) and stakeholders, led by the trusts. These actions take place before the meeting of the RD’s regional Advisory Board (“the AB”) (formerly, the Regional Head Teacher Board Meeting).
34. Actions (i) and (ii) are usually done through publication of the agenda for the AB meeting. The AB’s role is to provide independent advice and challenge on key decisions on academies taken by the RD, including academy transfers. After the SEP and the AB meeting, the RD will make a final decision on transfer or make a recommendation to the Minister who will take the final decision, depending on the circumstances of the case.

35. Paragraph 7 of the Engagement Guidance states that implementing stakeholder engagement prior to the AB meeting “means that stakeholders’ views are fully considered, and their local knowledge is fed into the decision-making process, prior to a trust being approved by the [RD]”. Paragraph 17 emphasises that “[l]istening to stakeholders’ views is an important part of the decision-making process”; “[y]ou should listen to and seriously consider stakeholders’ views” and “consider...whether action is required based on the information received”.
36. There were strong feelings among some members of the HPS community regarding the transfer proposed by the Board. For example, on 10 March 2022 Mr Hunjan had sent a letter of claim in his own capacity to the HPS Board expressing concern that there had been a lack of consultation about the proposed transfer to a MAT; and on 29 March 2022 the NEU’s Regional Officer wrote to the Board in similar terms, saying that it was unacceptable that the Board was proposing a transfer to ULT without any consultation.
37. The RD’s evidence was that given these concerns, the HPS Board decided to take steps to engage with stakeholders that went beyond those set out in the Engagement Guidance. The RD was content for the Board to take such steps as they thought were necessary to “build bridges” locally. By a letter dated 1 April 2022 the Chair of the Board indicated that there had already been two meetings and a period of time during which people could submit their questions or views; that the formal engagement process would commence the following week and run for 8 weeks; and that it would comprise an in person consultation event, a virtual meeting, a visit to at least one ULT school for students, parents and staff; an online and hard copy question form; separate outreach to wider stakeholders; and a dedicated website.
38. On 11 April 2022 the HPSPC sent a pre-action protocol letter to the HPS Board arguing that the consultation process was flawed due to a lack of information being provided about the alternatives to a MAT with ULT and because the in principle decision had already been made by the Board. The proposed claim was refuted in correspondence by the Board’s solicitors. A judicial review claim was later brought by the HPSPC but was withdrawn as the subsequent intervention of the Defendant rendered it academic.

Interim support provided to HPS and the B3sixty investigation findings

39. On 25 April 2022 the HPS Academy Head (a further member of the HPS senior leadership team) was taken seriously unwell and was unable to be in school. Shortly thereafter, the HPS Board contacted the RD to raise their concerns over the lack of senior leadership capacity at the school. Unlike in other schools, there was no Middle Leadership Team (“MLT”) who might otherwise be able to step in. It was also understood that the outcome of the B3sixty investigation was going to lead to the suspension of some senior staff. These factors meant that there was an urgent need for additional support which would have to be sourced externally.
40. The RD therefore identified several local trusts which might be able to provide additional immediate short term leadership capacity to HPS and the HPS Board made contact with them. A consortium of support, funded by HPS, was put in place to provide additional leadership and pastoral support to the school from May to July 2022. The additional staff were sourced from five different academy trusts: ULT, KAA, Oasis Community Learning, Mulberry Schools Trust and the Inspiration Trust. The RD described this as a

“a short-term ‘fix’ to ensure HPS remained open and able to function safely”. It was understood by all involved that the staff would return to their “home” academy trusts at the end of the academic year in July 2022.

41. On 4 May 2022 a summary of the findings of the B3sixty investigation was published on the HPS website. The investigation found that there had been (i) breaches in safeguarding in respect of both students and staff including a failure to support students who had been the victims of peer-on-peer sexual abuse; (ii) bullying, discrimination and inequality towards both students and staff; (iii) discrimination against those with protected characteristics and a lack of knowledge around mental health and medical and physical issues for staff and students; (iv) ineffective leadership and management; (v) a misleading of the Ofsted inspectors by senior leaders during the January 2020 inspection; and (vi) breaches of the COVID-19 lockdown guidelines. The RD’s evidence was that the key findings of the as yet unpublished RBKC learning review reflect the themes identified in the B3sixty investigation summary report.

The April 2022 Ofsted inspection and its consequences

42. On 20, 21, 25 and 26 April 2022 Ofsted carried out an inspection at HPS under the Education Act 2005, section 5. NEU members were dismayed at the timing of the inspection. The RD’s evidence was that section 5 inspections are carried out on all state-funded schools as a matter of routine, at specified intervals; the precise timing of an individual school inspection is a matter for Ofsted; and neither the Secretary of State nor ministers have the power to determine the precise timing of a section 5 inspection.
43. On 11 May 2022 the Ofsted inspector informed the DfE of the provisional conclusions that HPS was judged inadequate in respect of ‘Leadership and Management’ and ‘Behaviour and Attitudes’.
44. On 25 May 2022 Ofsted indicated to the DfE that the provisional inadequate rating of HPS had been subject to moderation by a senior inspector and agreed.
45. The Ofsted report found that HPS needed to improve given the following issues: (i) leadership was poor and not fit for purpose; (ii) there was mistrust and disharmony between the governing body, some school leaders, some parents, the local authority and some people in the wider community; (iii) leaders had not put in place clearly defined, understood and coherently implemented strategies for managing pupils’ behaviour; (iv) the school’s curriculum was overly focused on pupils passing GCSE examinations early; (v) when planning the curriculum, leaders did not routinely give enough thought to how it needed to be developed and adapted to meet the needs of pupils with special educational needs and disabilities (“SEND”); and (vi) careers information, education, advice and guidance were not as developed as they should be.
46. On 6 June 2022 the HPS Board met to consider the results of the SEP on voluntary transfer to a MAT. The Board voted to recommend to the RD that HPS should transfer to a MAT with ULT. This decision was communicated to the staff, parents, carers and pupils by a letter from the Board the following day. However, Ofsted’s decision to downgrade HPS to inadequate in two areas had the effect of triggering the potential exercise of the Defendant’s powers under the Academies Act 2010, section 2A.

The Defendant's powers under the Academies Act 2010, section 2A

47. Under the Academies Act 2010, section 2A(1), academy funding agreements may be terminated by the Defendant where special measures are required to be taken in relation to the academy or the academy requires significant improvement. The RD explained that in practice the Defendant will use this power to either facilitate an academy transfer if the academy is viable; or facilitate the closure of the academy if it is not.
48. The DfE has issued statutory guidance explaining what should happen when an academy has been found to be inadequate by Ofsted: *Schools Causing Concern - Guidance for local authorities and Regional Schools Commissioners on how to work with schools to support improvements to educational performance and on using their intervention powers* (the "SCC Guidance").
49. Chapter 1 of the SCC Guidance explains that it is essential that action is taken wherever a school is judged inadequate and that interventions are about "acting swiftly to address underperformance and financial or governance failures, and helping schools to deliver the best outcomes for their pupils".
50. Chapter 4 addresses the position specifically in relation to academies causing concern. Chapter 4, page 34 notes that the RD "will respond just as swiftly if an academy has been judged inadequate by Ofsted as they would for a maintained school". Further:

"When an academy has been judged inadequate, the RD may identify a new academy trust to take on responsibility for the academy, and will enter into a new funding agreement in respect of the academy (this is sometimes referred to as an academy transfer). The RD will assess these cases on an individual basis, and may not affect a transfer. If the academy that was judged inadequate was previously a 'standalone' academy, this will generally mean it will join a strong trust that has been assessed as having the capacity to improve the school. The academy will continue to function, and the RD and the new academy trust will work to ensure minimal disruption to pupils' education during the transition. In some exceptional cases, where the academy is not considered viable in the long term the RD can move to terminate the funding agreements in order to close it." [emphasis added]

51. If it is decided that a transfer is the best option for an academy, the RD will decide on a preferred "MAT sponsor" by considering a number of factors, as set out in further DfE guidance, *Regional School Commissioners' Approach to Sponsor Matching* ("the Sponsor Matching Guidance").
52. Once the RD has taken a decision in principle on transfer and identified a preferred MAT sponsor the DfE carries out a SEP. The SEP is the same following intervention by the RD as in the case of a voluntary transfer, in accordance with the Engagement Guidance (see [30]-[35] above).

Events leading to the 10 June 2022 Termination Warning Notice and the HPS Board's response

53. Before exercising the section 2A power the Defendant is required to give the proprietor of an academy (ie. the trust board) an opportunity to make representations about the

future of the school. The DfE generally discharges this obligation by the relevant RD issuing a Termination Warning Notice (“TWN”) to the board.

54. On 10 June 2022 the RD issued a TWN to the HPS Board informing them that the Defendant’s powers of intervention had been engaged following the Ofsted inadequate rating and that the Defendant’s decision-making process on termination of the funding agreement and (if appropriate) transfer of HPS to a MAT would supersede the HPS Board’s voluntary decision. The RD advised that any written representations the Board wished to make in response to the TWN would be considered.
55. On 14 June 2022 the new Chair of the HPS Board submitted representations regarding the TWN. The letter enclosed the plan for leadership support and the governors’ action plan for the year which “demonstrate[d] how we are making our best efforts to ensure that the school is ready for September”. The letter continued: “there are key challenges for the school which governors feel bound to acknowledge” and “[o]ur trust does not have the capacity to deliver successfully against these challenges and the improvements required by Ofsted”. For these reasons the HPS Board would agree to the transfer of the HPS to a MAT. The letter “strongly recommend[ed]” ULT, noting that there had been a “complete due diligence process between [HPS] and ULT as well as full stakeholder engagement”.

Events leading to the Defendant’s 30 June 2022 in principle decision

56. The RD began the process of considering whether HPS should join a MAT and if so who the MAT sponsor should be, in accordance with the Sponsor Matching Guidance. A desktop analysis of potential sponsor options for HPS that were within a 3-mile radius at the school was conducted. This led to a long list of seven trusts, from which a shortlist of three was identified.
57. The first two, ULT and Harris Federation (“Harris”), are both MATs. The RD’s evidence was that these were the only two from the shortlist who met the criteria required (ie. that the trust would be able to take on the school as soon as possible, must have capacity to take on a challenging secondary school and have an established track record in school improvement).
58. The third was KAA. The RD explained that ordinarily when the DfE has suitable existing MAT sponsor options as they did here, they would not consider a SAT to sponsor another SAT that had been judged as inadequate. However, in this case it was considered reasonable to include KAA’s proposal on the shortlist, because of the views historically expressed by some stakeholders during the HPS Board voluntary transfer process and because RBKC had expressed support for this option.
59. The three potential sponsors were invited to submit information in support of their sponsorship via a standard form information gathering template.
60. On 16 June 2022 a letter signed by 316 HPS parents was emailed to the RD. This expressed concerns about the voluntary transfer process carried out by the HPS Board and about ULT. The letter expressed commitment to a local MAT. On the same day the joint general secretaries of the NEU wrote to the then Minister for Schools. The NEU’s position was that there should be a complete “re-set” of the process for deciding on the

future of the school and emphasised the need for full and meaningful consultation with parents and staff.

61. On 21 June 2022, having considered the 14 June 2022 representations from the HPS Board and a submission prepared by DfE colleagues, the RD decided in principle that it was in the best interests of pupils in the HPS community for HPS to transfer to a strong MAT, subject to the RD making a final recommendation to the Minister for approval.
62. On 22 June 2022, the Defendant emailed the NEU indicating that any proposal to transfer HPS to a new MAT would be discussed at the upcoming AB and that “as part of that process, stakeholders will be able to share their views in writing”. Reference was made to the dedicated inbox that would be opened.
63. On 23 June 2022 the RD met with representatives of all three potential sponsors to discuss their respective proposals for HPS. The RD used this as an opportunity to raise issues that had been identified by stakeholders as being of concern regarding transfer to a MAT. For example, ULT and Harris were asked how they would respond to the criticism that they did not know or understand the local area because they were large MATs. The representatives of ULT were also asked to respond to various concerns which stakeholders had raised directly with the DfE. The RD considered that ULT adequately dealt with each concern. Following the meeting with KAA, the RD remained concerned that they lacked capacity to take on the challenge of forming a new MAT with HPS and sufficiently and speedily improving the situation at the school. KAA provided further information after the meeting which was taken into account in the MAT sponsor decision-making process.
64. On 29 June 2022 the RD responded to the 316 parents who had written on 16 June 2022. The RD explained that following the inadequate Ofsted judgement, a new process had begun which superseded the voluntary “SAT to MAT process” that the trustees had been taking forward. The letter referred to the SCC guidance and its indication that where a ‘standalone’ academy was judged inadequate, this would generally mean that it would join a strong trust that had been assessed as having the ability to improve the school. The letter outlined the process that was to come, as follows:

“If as [RD] I decide to transfer the school, I will review the trusts already operating nearby with an open mind against a consistent set of criteria that are available online [Regional Schools Commissioners’ Approach to Sponsor Matching \(publishing.service.gov.uk\)](https://publishing.service.gov.uk).

If I have identified a preferred academy trust to run HPS, I will discuss this with my Advisory Board (which is comprised of experienced serving or former head teachers and successful trust leaders and trustees) before making a recommendation to the Schools Minister, who will make the final decision on the school’s future.

The announcement of the preferred trust will be made in the agenda for the Advisory Board meeting, which will be published in advance. A dedicated inbox will be opened and details of how you can email with your thoughts will be shared in advance.

Any decision made will be taken in the best interests of pupils, staff, parents/carers and the local community to ensure that there is rapid and sustained improvement at Holland Park School”.

65. On 30 June 2020 a detailed paper was prepared for the RD detailing the three sponsor options for HPS. The RD considered these options in accordance with the Sponsor Matching Guidance. The RD’s evidence was that consideration was given to the background of each of the sponsor options, their academic record and school improvement experiences, the opportunities that each trust would be able to provide to staff and pupils, their capacity to deliver school improvement to HPS, their governance and the timescales in which they would be able to provide support.
66. The RD explained that consideration was also given to the concerns that had been expressed historically by stakeholders. These related to a loss of autonomy for HPS, safeguarding, SEND provision, ULT’s behaviour policy and concerns about the level of reported incidents of racism. The RD’s evidence was that having looked at each of these concerns, based on the information available it was not considered that any of them were made out and/or they did not outweigh the merits of ULT’s proposal.
67. The RD’s evidence was that while it was necessary to keep an open mind, ULT was clearly the best sponsor option in terms of its ability to make rapid and sustained improvements at HPS, when judged against the criteria listed in the Sponsor Matching Guidance. This was because (i) ULT had sponsored 50 schools or academies that had been judged inadequate; (ii) in the vast majority of cases ULT had been able to improve these schools to achieve at least an Ofsted “good” rating; (iii) ULT was able to form a local cluster of schools with Paddington Academy and Hurlingham Academy of which HPS would be part, which was in keeping with DfE policy with regard to school support and the benefits of being in a MAT (ie. shared resources, economies of scale and increased CPD); (iv) Paddington Academy has Teaching School status and so would be able to provide a pipeline of candidates to fill teaching vacancies at HPS and high quality CPD to existing staff; and (v) it has access to a number of people considered to be a National Leader of Education (“NLE”), each of whom is an expert in school improvement and has a track record of securing rapid school improvement in challenging circumstances.
68. By contrast, KAA was considered by the RD to be weak from the perspective of delivering school improvement. This was because (i) it has no track record of school improvement beyond its own setting; (ii) it has never sponsored an academy that has been judged inadequate and taken it through an improvement phase; (iii) it is not an approved MAT sponsor; (iii) it does not have a Teaching School; (iv) its Headteacher is not an NLE; and (v) as a SAT it was highly unlikely that KAA would be able to offer the same MAT benefits as ULT offers as a MAT.
69. Further, ULT had committed to ring-fencing the £3 million reserves at HPS to be used solely for the benefit of HPS. The KAA proposal involved RBKC agreeing a loan of £1 million over 3 years, secured against the reserves of HPS, which would have been used to develop KAA into a MAT. The RD considered that the RBKC loan offer was unrealistic and was unlikely to be approved by the ESFA.

70. The RD's evidence was that Harris's proposal was also considered at length, but its merits were not considered sufficient to "top" those of ULT, especially given ULT's superior knowledge and experience of HPS, having been part of the interim support consortium from May 2022.
71. The RD therefore decided in principle on 30 June 2022 that ULT should be the preferred MAT sponsor for HPS. Again, this decision was subject to the RD making a final recommendation to the Minister for approval.

The 1 – 15 July 2022 process

72. On 1 July 2022 the draft agenda for the 21 July 2022 AB meeting at which the HPS transfer would be considered was published.
73. On the same day the RD caused a letter to be sent to HPS parents and carers via the HPS Board, entitled 'Academy Transfer of Holland Park School to United Learning'. The letter read as follows:

"Following detailed consideration, the [RD] for North West London and South Central, Dame Kate Dethridge, has decided that Holland Park School (HPS) should be transferred to another trust.

United Learning (UL) has been identified as the preferred trust to manage the school going forward due to its strong track record of school improvement and working with schools in challenging circumstances.

In coming to this decision on the preferred trust which is being recommended to the AB for discussion, the [RD] considered a shortlist of three trusts, two MATs and one local SAT.

All three trusts were invited to submit a trust information gathering template. You can see a blank version of the template here: [Regional Schools Commissioners' Approach to Sponsor Matching \(publishing.service.gov.uk\)](https://publishing.service.gov.uk) which was considered by the [RD]. Following that, all three trusts met with the [RD] to talk through their proposal in more detail.

The [RD] considered which trust is best placed to provide the significant capacity that is needed to stabilise the school in the short term as well as their previous experience of turning around schools from an Ofsted 'Inadequate' rating to 'Good' or better.

She believes that the best way for HPS to achieve rapid and sustainable improvement is to join a multi-academy trust and that UL were the most appropriate choice of sponsor. Some of the reasons for that view are:

- a. Its strong and significant track record in improving schools
- b. Its readiness to begin the work needed to stabilise the school

- c. The strength of the local cluster that HPS would join with Paddington Academy and Hurlingham Academy
- d. The additional teaching capacity that cluster would offer through the teaching school hub at Paddington Academy
- e. UL's experience of working successfully with schools with different character and history.

The next stage of the process is for the [RD's] Advisory Board (AB) to discuss the transfer of Holland Park School to United Learning ahead of advice being sent to the responsible Schools Minister, Baroness Barran, who will make the final decision. The AB's role is to provide independent advice and challenge on key decisions on academies, including transfers between trusts.

Parents and the wider school community have the opportunity to express views on the preferred sponsor in advance of the Advisory Board meeting on the 21 July, and such views will be shared at that meeting.

There is an opportunity for you to get involved in two ways:

- a) UL will be holding a meeting with the school community where you will have the opportunity to hear more about UL, the transfer process, and the trust's plans to improve HPS as well as ask questions.
- b) You can also respond to the following questions via email:
 - i. What is your relationship to the school?
 - ii. The current proposal is for Holland Park School to be transferred to United Learning. What are your views on that proposal?
 - iii. Are there any further comments/suggestions you would like to make regarding the school's future?

The deadline for responses is 15th July 2022.

We will not provide individual responses to representations received but a summary of representations will be provided to AB members ahead of the AB meeting. Following the AB's consideration, a summary of the discussion and decision will be published in the AB minutes at the following link: [North-west London and south-central England advisory board - GOV.UK \(www.gov.uk\)](http://www.gov.uk). The final decision on the future of HPS will then be made by Baroness Barran".

- 74. On 5 July 2022 Sir Jon Coles, Chief Executive of ULT, sent a letter to stakeholders informing them of the upcoming stakeholder engagement meeting. This took place on 7 July 2022. The DfE was not involved in the organisation of the meeting nor did any DfE official attend.
- 75. On 11 July 2022 HPS's NEU members wrote an open letter to the Secretary of State expressing their concerns that the Board had pre-selected their single preferred candidate

to take over the school, without a genuine, open-minded or accountable consultation; no value had been given to the opinion of the large majority of staff and parents; and the requests of the members to meet with the Board had been ignored. The NEU again requested a pause of the process of MAT selection to allow the consideration of viable alternatives.

76. On 15 July 2022 the RD replied stating as follows:

“You will be aware that United Learning (UL) has been identified as the preferred trust to manage the school going forward due to its strong track record of school improvement and working with schools in challenging circumstances. This was communicated to parents and staff via a letter distributed by the trustees of Holland Park School on 1 July. The identity of the preferred trust is also published on the agenda for the Regional Schools Commissioner Advisory Board meeting schedule for 21 July available here: [North West London South Central Advisory Board draft agenda 21 July 2022 \(publishing.service.gov.uk\)](https://publishing.service.gov.uk).

It is important that the staff, parents and local community now engage with the transfer process. As outlined in my letter of 1 July, there are two main ways that this can be achieved. Firstly, there will be an engagement meeting with United Learning. I would urge you, and all members of staff, to attend this meeting so that you can ask questions and get clarity where there may be misunderstanding. Parents, staff and the local community can also submit representations on my preference. The instructions for how to do this are printed on the agenda for 21 July RSC Advisory Board meeting and are also contained in my letter of 1 July.

I am confident that given time and constructive dialogue, you will be able to find a way forward where you can work in partnership with United Learning and together, bring about the rapid required at HPS. It cannot be in the best interest of your students for their education to continue to be disrupted with local industrial action.

Once again, thank you for taking the time to write to me on this important matter and I wish you and your students the very best”.

77. On the same day the RD wrote to the AB about the upcoming meeting. The letter explained that although some AB members had been contacted directly by parents/members of the public, only representations submitted via the RD inbox could be considered at the AB. The letter continued:

“As you may be aware, there has been a great deal of concern about the future of this school. With this in mind, it is very important that all the papers are read thoroughly and reflected upon so that on the day, we can ensure a robust, in depth and challenging conversation, both in terms of which trust I have stated as my preference and also why I have rejected other options.

I am happy to furnish you with as much additional detail as you may require on the day, to clarify my recommendation, as well as why the other options have been disregarded, if you feel that will assist you. Please be prepared for the fact that we will need to take time over this agenda item. While we all recognise the decision may not result in universal support, it is particularly important that all parties, including the Minister, are reassured that the process that has been followed is robust and objective and in the best interest of the school.

As ever, I want you to ‘stress test’ my reasoning and interrogate my thinking without fear or favour”.

The 21 July 2022 AB meeting

78. Following the closure of the RD inbox, the RD’s office prepared the material for the AB. AB members were sent a paper detailing the background to the proposed HPS transfer with an analysis of the potential sponsor options. It noted that there had been substantial opposition to ULT from parents, teachers (supported by the NEU), the local MP and the local authority. The paper listed ten concerns raised by the NEU about ULT and some further common issues raised by the HPSPC and ULT’s responses to each. They were also sent a summary of the inbox messages and a copy of each individual representation received among other papers such as the Ofsted report.
79. On 21 July 2022 the RD met with the AB. The RD emphasised that a full and open discussion of the situation was necessary and that their views were needed on whether HPS should remain a SAT or be transferred to a MAT, and if so, which should be the sponsor MAT. The meeting notes indicate that the item was discussed from 11.52 am to 1.00 pm. All four AB members agreed that HPS should be transferred to a strong MAT and that the MAT should be ULT. Several AB members also questioned why KAA had even been considered because it was not an approved sponsor nor was it a MAT.

Events leading to the 19 August 2022 Ministerial decision

80. The RD’s evidence was that ordinarily the Minister would not be asked to decide on academy transfers: the final decision is normally taken by the relevant RD. However given the level of stakeholder interest and the contentious nature of the decision, it was considered appropriate to escalate it to the Minister.
81. Accordingly on 17 August 2022 the RD made a detailed submission to the Minister, requesting a decision on whether HPS should transfer to a MAT and if so whether the MAT sponsor should be ULT.
82. The Ministerial Submission provided detailed information about each of the three sponsor options considered and referred the Minister to the 30 June 2022 options paper which was appended to the submission, together with other key documents. The submission also summarised the concerns that had been raised by stakeholders both historically and via the RD inbox. The Minister also received a summary of the representations that had been sent to the RD inbox and a copy of each individual representation.

83. On 18 August 2022 the RD met with the Minister to discuss the submission. Further information was requested by the Minister and this was provided. It took the form of a summary note of the specific school improvement capacity required at HPS, based on information that was provided to the RD by the Chair of the Board.
84. On 19 August 2002, the Minister made the final decision approving the recommendation that HPS should be transferred to a MAT and that the MAT sponsor should be ULT. The Minister's feedback was as follows:

“I support both the recommendations in the submission and accompanying papers, namely that HPS should join a MAT and that the MAT should be United Learning.

I have included a few particular points below, but these should be considered in the context of the wider set of submissions I was given.

1. Joining a MAT:

- a. I think that the sub makes a clear case for HPS to join a MAT based on the need to make rapid and significant improvement, and the lack of capacity in the school to achieve or sustain this. In particular, I am concerned about the fragility of the current staffing structure, the fundamental cultural challenges the school faces on many fronts but particularly in relation to safeguarding, and the need to secure the governance and finance functions and HR. I have noted the additional detail set out below following my request for clarification.

2. Choice of MAT

- a. I believe that the decision is not without risk and that the choice is between a MAT with extensive school turnaround experience and one with strong support from the most vocal group of stakeholders – a visible group of parents, the LA (noting their conflict of interest as a sponsor of KAA) and the MP.

3. United Learning

- a. The advice I have received, endorsed by the Advisory Board, and the detailed reading of the UL proposal in Annex G, and the readout from interviews in Annex H, clearly underlines:
- i. The experience of UL in turning around schools graded as inadequate by Ofsted.
 - ii. Their local presence with two schools nearby including a Teaching School Hub which is the TSH for Holland Park School.
 - iii. The detail of the school improvement approach. I felt that the plan in Annex G showed both a deep understanding of how to improve a school in distress, and a close knowledge of the specific issues that Holland Park faces.
 - iv. Their experience in turning around schools in comparably controversial situations. The proposal had a focus on communication, openness, and collaborative working while

recognising that there is a risk that some stakeholders will not be reassured.

- v. UL have already completed their due diligence. Therefore, there is no risk that they will withdraw, and they will be able to commence support rapidly.
- vi. I was satisfied that some of the concerns and allegations that were raised by stakeholders as part of their representations were addressed factually in the sub and that there is independent evidence from Ofsted inspections in several instances to support UL's refutation of them.
- vii. EIA – noted and pleased that conclusion is a positive one.

4. KAA:

- a. The KAA option is broadly the reverse of the UL one. KAA enjoys the support of a group of parents, the local authority and the MP and this would undoubtedly make their transition to sponsors of the academy an easier one.
- b. However, KAA is a single academy trust that has no experience of turning around an inadequate school. This is shown by the need to bring in external support – although I note that there is not a shared understanding about what that support might consist of.
- c. In weighing up the strength of local connection and the lack of school improvement expertise, the clear advice of those with experience in this area is that KAA does not have the experience to be confident enough that they will turn around HPS. There is even a risk that taking on HPS could undermine the success of KAA itself.
- d. Grenfell legacy: KAA (and those who support this option) have made the case that greater school and community collaboration should be part of the positive legacy from this terrible tragedy. Whilst I recognise the value of school collaboration, especially in the context of the aftermath of the Grenfell fire, I am not convinced that it is necessary for this particular MAT to be formed in order for the schools to be part of local collaboration.

5. Harris Federation:

- a. Harris shared many of the strengths and weaknesses of UL. It has an excellent track record at turning around inadequate schools, a strong central school improvement function and a highly aspirational culture. They also provide a clear school improvement plan and would undoubtedly bring great strengths to HPS.
- b. However, it does not have such a strong local presence, including in relation to the TSH.
- c. Further, there is a risk with HF (as with KAA), that during due diligence, they decide not to proceed with sponsoring the school.
- d. I note that HF was not recommended by the RD as being the appropriate sponsor for HPS.

6. Fairness of the approach:

- a. Beyond the scope of the sub and the advice, there is a sense which was raised on my call with the LA and that MP this morning, that the decision to appoint UL was a 'foregone conclusion from the start'. I genuinely do not believe this is accurate. Colleagues will be aware that I asked specifically for detailed

info on all three options, that the AB should consider these carefully, and the decision was taken to include KAA as a possible sponsor despite the fact that they were not normally eligible as they were not a sponsor MAT, or even a MAT”.

September – November 2022

85. In September 2022, a new Headteacher started at HPS. Additional staffing was put in place. The DfE asked ULT to submit a proposal for ‘ESIF’ funding, in order to provide interim support from the start of the academic year. DfE has committed £86,380 in ESIF funding to secure this support, which would otherwise have been funded by ULT.
86. Sebastian Peattie, a parent, gave evidence describing the new Headteacher and the greater involvement of parents in the school since the announcement that it might be transferred to ULT as “stabilising” forces. He noted that the children had achieved good grades at GCSE and A-level in the summer of 2022. He described the children as largely happy, with fewer incidents of bad behaviour, and noted that the teachers were now back at work with no strikes threatened.
87. Palmira Morrais, another parent, gave evidence that HPS is “once again thriving, happy and safe”. Her evidence was that the only issue in the school had been around governance with governors not acting in the best interests of children and teachers, but with a “Mission” to convert the school from a SAT to a MAT. She said she firmly believed that many of the issues highlighted by Ofsted had now been resolved.
88. Sam Hesketh’s evidence was that many of the structures that parents had been told would benefit HPS under ULT were already in place and functioning well. These included heads of year and department, an increase in SEND teachers and updated policies on issues such as behaviour. The statement said that “[p]arent governors feel strongly that the decline in standards over the past academic year (as noted by Ofsted) is a direct result of the focus being given to the transfer of the school to a [MAT] rather than allowing good governance of the [SAT] to be a priority”.
89. Shane Leonard gave evidence that his daughter has reported a marked increase in the presence of senior leaders and mid-level staff. He referred to a “clear investment in staffing and a lot more presence in the corridors and common areas”. His daughter’s perception was that HPS was very different in September 2022 to how it was in May 2022.
90. The Defendant submitted that the ‘rosy’ picture painted by the Claimants in their evidence was indicative of their persistent failure to accept and engage with the grave operational difficulties of maintaining HPS as a SAT or to appreciate that HPS continues to function as it does only because of the interim support in place, which is due to end on 21 December 2022. To focus on strong exam results alone (which have been achievable only because of the interim support) ignores the full picture at HPS and the consequences of further delay for its most vulnerable pupils, such as those with SEND. The RD’s evidence was that this was not a view that can be adopted by the DfE or anyone who wishes to secure the long-term future of the whole school community.

91. On 23 November 2022, the day before the hearing, the ESFA wrote to the HPS Board indicating that the NtI would be lifted with effect from the date of the letter. This was because the ESFA had closely monitored the trust’s progress against the conditions set out in the notice and was satisfied that all the NtI conditions had been met. The letter emphasises that it was “important that the trust continues to exercise strong financial and governance oversight to maintain the progress...achieved”.

Issue (1): Did the Defendant undertake a consultation which met the minimum legal requirements?

The consultation question

92. There is no general duty to consult at common law. Such a duty arises in four main circumstances: where there is a statutory duty to consult, where there has been a promise to consult, where there has been an established practice of consultation and where, in exceptional circumstances, failure to consult would lead to conspicuous unfairness. The common law will be slow to require a public body to engage in consultation where there has been no promise or past practice of consultation and the courts should not add a burden of consultation which the democratically elected body decided not to impose: *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2015] 3 All ER 261 at [98(2)], [98(3)] and [98(6)].
93. The Claimants accepted that there was no duty to consult on the proposal to transfer HPS to a MAT and the identity of the MAT. However they argued that regardless of whether or not a consultation is required as a matter of law, if a public body undertakes a consultation, it must be carried out properly and fairly, They relied on the words of Lord Woolf, MR, giving the judgment of the Court of Appeal in *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213 at [108], thus:
- “It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken (*R v Brent LBC ex parte Gunning* [1986] 84 LGR 168”.
94. The requirements for a lawful consultation set out in *Gunning*, summarised in the above passage, were endorsed by the Supreme Court as a “prescription for fairness” in *R (Moseley) v Haringey LBC* [2014] UKSC 56; [2014] 1 WLR 3947 at [25].
95. The Defendant argued that *Coughlan* at [108] was being misinterpreted. The *Gunning* requirements did not apply to the steps taken by the Defendant in this case which were not a consultation that attracted the *Coughlan* principle: rather they constituted a different form of stakeholder engagement, in accordance with the Engagement Guidance. The Claimants contended that the process was plainly a consultation.

96. Accordingly the first issue that arose between the parties was whether the Defendant had embarked upon a “consultation” so as to trigger the *Gunning* requirements, in accordance with the principle set out in *Coughlan* at [108].
97. In *R (FDA & ors) v Minister for the Cabinet Office* [2018] EWHC 2746 (Admin) at [99] and [103], Simler J (as she then was) held that (i) “consultation in the *Gunning* sense” is a “term of art”; and (ii) whether or not a public body has engaged in a consultation within the meaning of this legal term of art is a question of fact:
- “...the question whether a public body has embarked on consultation for these purposes is a matter of substance and not form. If, without using the term, a decision-maker embarks on an exercise that is in substance consultation then the [*Coughlan*] principle applies”.
98. In *R (Greenpeace) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin), Sullivan J considered whether a particular paper was a consultation paper or more akin to an “issues paper”. I was referred to a series of other first instance authorities where courts have considered whether a particular process amounted to a consultation: *R (Personal Injury Lawyers) v Secretary of State for Justice* [2013] EWHC 1358 (Admin), *R (Asbestos Victims Support Groups’ Forum UK) v Lord Chancellor* [2020] EWHC 2018 (Admin); [2020] Costs LR 1175 and, most recently, *R (Binder) v Secretary of State for Work and Pensions* [2022] EWHC 105 (Admin).
99. However, in this case, I have concluded that it is not necessary to determine the status of the process embarked upon by the Defendant. This is because, even taking the Claimants’ case at its highest, and assuming that the process followed here was a consultation, I am satisfied for the reasons that follow that it was fair. I am also conscious that permission to appeal the *Binder* decision has recently been granted. It is therefore likely that the question of how courts should identify whether a consultation has been voluntarily embarked upon will be the subject of consideration by the Court of Appeal in the relatively near future.

The second *Gunning* criterion

100. The Claimants argued that the process followed was unfair by reference to the second *Gunning* criterion.
101. This requires that a consultation includes sufficient reasons for the proposal to allow consultees to give intelligent consideration to it and to provide an intelligent response.
102. It requires letting those with a potential interest in the subject matter know “in clear terms what the proposal is and exactly why it is under consideration”, which means “telling them enough (which may be a good deal)” to enable them to provide the intelligent response referred to in *Gunning: Coughlan* at [112].

Unlawful consultations

103. What fairness requires in a consultation exercise is very fact-specific: statutory duties to consult “vary greatly, depending on the particular provision in question, the particular context, and the purpose for which consultation is to be carried out” (*Moseley* at [36]).

104. The *Gunning* requirements “are not...to be approached mechanistically...what fairness requires inevitably depends on the context and the particular circumstances” (*FDA* at [74]).
105. A consultation is unlawful if it is “so unfair as to be unlawful”: see, for example, *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin); [2019] 1 WLR 1649 at [68] and [73]. The fact that a consultation was “not perfect or could have been improved” is not enough to render it unlawful, provided that “in all the circumstances, it provided a fair opportunity for those to whom the consultation was directed adequately to address the issue in question”: *R (Keep the Horton General) v Oxfordshire Clinical Commissioning Group* [2019] EWCA Civ 646 at [66], per Sir Terence Etherton MR.
106. In *R (Help Refugees Ltd) v SSHD* [2018] EWCA Civ 2098; [2018] 4 WLR 168 at [90(v)] the Court of Appeal observed that courts should not lightly find that a consultation process is unfair. Unless there is a specification as to the matters that are to be consulted upon, it is for the public body charged with performing the consultation to determine how it is to be carried out, including the manner and extent of the consultation, subject only to review by the court on conventional judicial review grounds.
107. However, the court should decide for itself whether a consultation was fair; and should consider elements of alleged unfairness in a consultation process both individually and cumulatively: *R (WC) v Somerset County Council* [2021] EWHC 2936 (Admin) at [112] and *R (Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts* [2012] EWCA Civ 472; (2012) 126 BMLR 134.
108. Some authorities refer to a principle that a conclusion by the court that a consultation process has been so unfair as to be unlawful is likely to be based on a factual finding that something has gone “clearly and radically wrong”. However in *R (Bloomsbury College) v Office for Students* [2020] EWCA Civ 1074; [2020] ELR 653 at [69] the Court of Appeal held that the “clearly and radically wrong” phrase (i) is not an additional hurdle to be jumped; the test remains whether the process was so unfair as to be unlawful; and (ii) is directed principally at cases where a consultation exercise is under attack on such a broad front that it is alleged that the whole process is unlawful. For this reason:

“It does not assist much, if at all, in cases where the allegation is that a claimant or class of claimants likely to be particularly affected by the operation of the policy was not given sufficient information which they needed to know in order to make informed and meaningful representations to the decision-maker before a decision was made”.
109. Where a consultation is said to be unlawful because the second *Gunning* principle has not been complied with, relevant considerations include: “(1) the nature and potential impact of the proposal put out for consultation; (2) the importance of the information to the justification for the proposal and for the decision ultimately taken; (3) whether there was a good reason for not disclosing the information; and (4) whether consultees were prejudiced by the non-disclosure” (the *Law Society* case at [73]).

110. Where a claimant makes an informed objection, this can demonstrate that sufficient information was provided for fair consultation: *R (British Homeopathic Association) v NHS Commissioning Board* [2018] EWHC 1359 (Admin) at [57].

Submissions and analysis

111. The Claimants argued that there had been three breaches of the second *Gunning* criterion, which individually or cumulatively rendered the consultation so unfair that it was unlawful.

(1): Failure to refer to alternative trust options

The evidence

112. The 1 July 2022 letter (see [73] above) did not identify which potential sponsor trusts for HPS the RD had considered other than ULT, or explain why the alternatives had been rejected. The letter simply stated that there had been a shortlist of two MATs and one SAT. Information about the alternative options to ULT was not provided at any other time before the period for representations ended.
113. Mr Hunjan’s witness evidence stated that it was difficult, if not impossible, for parents and carers to engage meaningfully with the process because they were only asked for their views on the preferred option (ULT), without knowing what else was being considered. His evidence was that it came as a surprise to learn through the litigation that Harris has been considered as this had not previously been suggested; similarly that ARK had not been reconsidered.
114. I was informed that only a limited number of parents and key NEU officials have seen the material disclosed in the litigation, in accordance with the Claimants’ duties under the CPR. On that basis, the wider parents and staff communities at HPS may well remain ignorant of the alternative trust options considered.
115. The RD’s evidence explained that neither KAA or Harris were named in the 1 July 2022 letter because (i) it is DfE practice only to name the preferred MAT sponsor, to avoid causing reputational damage to the academies not selected; and (ii) by the time the in principle decision had been made, the RD had taken into account a considerable evidence base and had a very strong ‘minded to’ view in favour of ULT. This meant that while it was not a foregone conclusion, it would have taken something extremely significant and previously unknown to the DfE to lead to one of the other options ultimately being chosen ahead of ULT.

The relevant legal principles

116. In *Moseley* at [27]-[28], Lord Wilson, with whom Lord Kerr agreed, held that:

“[27] 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...”

[28] But, even when the subject of the requisite consultation is limited to the preferred option, fairness may nevertheless require passing reference to be made to arguable yet discarded alternative options”.

117. On the facts of *Moseley*, he held that fairness required that brief reference should have been made to the alternative options: [29]. At [31] he referred to the need to consider whether other options would have been reasonably obvious to consultees. Even where they were obvious, it was also necessary to consider, first, whether it would have been reasonably obvious to consultees why the decision-maker was minded to reject those options and secondly, whether the consultation document in any event led the consultees to believe that the other options were irrelevant.
118. Lord Reed, whose approach was endorsed by Baroness Hale and Lord Clarke, also held at [39] that meaningful public participation in this particular decision-making process, in a context with which the general public could not be expected to be familiar, required that the consultees should be provided not only with information about the draft scheme, but also with an outline of the realistic alternatives, and an indication of the main reasons for the authority’s adoption of the draft scheme. At [41], he held that this did not mean that a detailed discussion of the alternatives or of the reasons for their rejection was needed, but “enough must be said about realistic alternatives, and the reasons for the local authority’s preferred choice, to enable the consultees to make an intelligent response in respect of the scheme on which their views are sought”.
119. In *R (Langton) v Secretary of State for the Environment, Food and Rural Affairs* [2018] EWHC 2190 (Admin); [2019] Env LR 9 at [109], Cranston J held that the case before him was “not one of those exceptional cases” like *Moseley* which required reference to discarded alternatives. He accepted the Secretary of State’s submission that the duty to make reference to discarded alternatives only arose in the *Moseley* case because of special circumstances, including the nature of the consultees and the likely impact of the preferred proposal on their vital financial interests, the fact that the consultees could not be expected to identify the discarded alternatives themselves, and the particularly wide terms of the statutory duty of consultation under consideration in that case.
120. In *R (Electronic Collar Manufacturers Association) v Secretary of State* [2019] EWHC 2813 (Admin) (“*ECMA*”) at [149], Morris J distilled the following principles from the authorities:

“(1) There is no hard and fast rule that a consultation document must refer to discarded alternative options.

(2) In considering whether it should so refer, it is necessary to identify the purpose of the particular consultation, which in turn is to be identified from the statutory context of the particular duty.

(3) If the purpose of the particular consultation is general public participation in a wide-ranging consultation, then there might be a duty to make some reference to discarded alternatives. This will particularly be the case where general public cannot be expected to be familiar with the issues.

(4) If the purpose of the consultation is narrower, and to protect particular persons likely to be affected by the proposal, then there may not be a duty even to refer to discarded alternatives. This is more likely to be the case where the consultees can be expected to be aware of the alternatives.

(5) It is relevant to consider whether the failure to refer to discarded alternatives has caused prejudice to consultees, whether those alternatives would have been obvious to consultees and whether it was obvious why the decision-maker had not referred to the alternatives”.

The submissions

121. Mr Wolfe KC for the Claimants submitted that information about the alternative options and why they had been rejected by the RD should have been provided in the process. It was highly relevant in circumstances in which stakeholders were being asked for their views on the merits or otherwise of HPS transferring to a particular MAT. Adopting the words of the *Law Society* case at [73] (see [109] above), it was important information relating to “the justification for the proposal and for the decision ultimately taken”. The fact that some stakeholders may have had knowledge of the alternatives through other means was irrelevant, as it is well established that “it is sufficient to show that the unfairness affects only a group of persons affected by the consultation”: *Royal Brompton* at [14]. Further, even if they had knowledge of the alternative trusts, this did not mean that they knew how the candidates had been evaluated or why the RD had rejected the alternatives.
122. Mr Auburn KC for the Defendant relied on the principle that fairness does not always require the provision of information about alternatives. Here, the RD was entitled to conclude that it was sufficient to name her preferred option and the number of others which had been considered, but no further details about the alternatives. This was because this was not a statutory consultation, its scope and purposes were narrow, the need for a final decision was urgent, stakeholders were already informally aware that ULT, KAA and Harris were the three sponsor options being considered and they had already expressed views during the HPS Board voluntary transfer process. Further, it is DfE practice not to identify unsuccessful sponsor options due to the risk of causing them reputational damage.

Analysis and conclusion

123. The principles relating to whether fairness requires information about alternatives to be provided distilled in *ECMA* at [149(2)]-[149(4)] make clear that it is necessary to consider the purpose of the consultation in question, which is to be identified from the statutory context.
124. Here, there was no statutory duty to consult. The statutory context therefore provides relatively little assistance in determining the purpose of the process.
125. The purpose of this process was not, in my view, seeking “general public participation in a wide-ranging consultation”, to quote *ECMA* at [149(4)]. Rather, it was a focussed process aimed at securing input from a relatively closely defined group of stakeholders on a specific issue. Indeed, given the fact that the RD’s in principle decision had already

been made, after considering a large evidence base, including representations from stakeholders, it was particularly narrow.

126. The RD's evidence in these proceedings was that the purpose of the process was effectively to provide further material to inform the AB meeting and if necessary future discussions with ULT, including identifying gaps and information which the RD might want to address before making her recommendation to the Minister. I accept this evidence: although it was provided after the process in question, it amplifies the approach taken at the time and does not contradict it. It is therefore consistent with the legal principles summarised in *R (United Trade Group) v TfL* [2021] EWCA Civ 1197, [2022] RTR 2 at [125(3)].
127. Applying *ECMA* at [149(4)], this narrow purpose of the process makes it less likely that there was a duty to refer to discarded alternatives.
128. *ECMA* at [149(3)]-[149(4)] makes clear that regard should also be had to the extent to which the alternatives, and the reasons for their rejection, would have been obvious to consultees.
129. Here, KAA had featured as an option during the HPS Board voluntary transfer process and was being discussed in some form by, at least, 1 March 2022: see [26] above. Further, RBKC continued to support it publicly in the period leading up to and throughout the Defendant's process which commenced on 1 July 2022. For example, on 23 June 2022 a group of RBKC councillors, describing themselves as being in close contact with members of the HPS community, sent a letter about the proposal following a meeting of the full RBKC council. This was published by HPSPC on its website. Similarly, as early as 1 July 2022 a detailed report recommending that RBKC support the KAA proposal by agreeing the loan referred to at [69] above was published on the RBKC and HPSPC websites.
130. On that basis, the existence of KAA as an alternative option was something that would have been obvious to the stakeholders in this process.
131. The position in respect of Harris is less clear. It had not been considered in the proposed HPS Board voluntary transfer process. However the fact that it was being considered by the Defendant was also in the public domain: it was mentioned in both of the RBKC documents referred to at paragraph [129] above. The RD also gave evidence that Harris was being discussed between stakeholders on social media as far back as June 2022.
132. On that basis, the RD was also entitled to conclude that the existence of Harris as an alternative option would have been reasonably obvious to stakeholders, albeit perhaps less widely-known than KAA.
133. The 1 July 2022 letter provided a relatively detailed summary of why ULT was the preferred option. It was therefore not unreasonable for the RD to assume that stakeholders could realistically infer that those reasons did not apply to the alternative options, or did not apply as persuasively, and explained why the RD had rejected them.
134. *Moseley* at [36] and *FDA* at [74] (see [103]–[104] above) make clear that fairness is generally to be judged by reference to the “context and the particular circumstances” of

the process. Here, the context and the particular circumstances of the process in this case also included (i) the fact that stakeholders had already expressed their views during the HPS Board voluntary transfer process; and (ii) the urgent need for a final decision.

135. Pulling these threads together, in my view (i) the narrow purpose of the process; (ii) the reasonable expectation that stakeholders already had an awareness of the alternative options; and (iii) the other factors noted at [134] above lead to the conclusion that there was no duty to provide information about the alternative options in this process.
136. Referring to the alternative options would have enabled stakeholders to understand the context for the ULT proposal better, but I do not consider that fairness required it.
137. There was very limited evidence before me justifying the DfE practice of not identifying unsuccessful sponsor options due to the risk of causing them reputational damage. I did not consider that there was enough evidence to justify the finding that this was “a good reason for not disclosing the information” (the *Law Society* case at [73]). Rather, I have reached my conclusion as to the lack of a duty to refer to alternative options from an application of the legal principles distilled in *ECMA* at [149] to the facts of this case.
138. Applying the principle from the *British Homeopathic Association* case cited at [110] above, the fact that representations about KAA were received into the RD inbox also demonstrates that sufficient information was provided about it for a fair consultation.
139. For the reasons explained under Issue (2) (see [182]-[183] below), the fact that Harris was not referred to was also unlikely, looking at the whole process, to have caused prejudice to the stakeholders, a further material factor noted in *ECMA* at [149(5)].

(2): Alleged inclusion of misleading information

140. A consultation will be unfair if the consultation material is “materially misleading”: *Help Refugees* at [90(ii)]. However, “[i]f the presentation of information inaccurately would have no material adverse effect on the process of consultation ... the error is unlikely to amount to unfairness when taken on its own...”: *Royal Brompton* at [12].
141. Mr Wolfe submitted that the 1 July 2022 letter was seriously misleading in that it suggested that the RD had already decided that the HPS would join a MAT, and that the sole decision still to be taken was which the MAT would be. However, it is now clear that both decisions remained under consideration at the time the letter was sent. The letter therefore presented stakeholders with a skewed picture, and they would not have understood that they were being asked for their views on whether HPS could remain a SAT. Had they done so they might, for example, have made representations about the possibility of HPS remaining as a SAT, including if necessary with the recruitment and appointment of new trustees.
142. Mr Auburn contended that it was the responsibility of any stakeholders who were unsure as to the scope of the process to seek clarification. I do not accept this: it is primarily the responsibility of the public body conducting the process to ensure fairness in it, especially in a process such as this with a very compressed timescale.

143. However, I accept his more fundamental submission that the 1 July 2022 letter was sufficiently clear as to the scope of the process. Stakeholders would understand from the express wording of the letter that they were being asked for their views on the proposal for HPS to be transferred to ULT. They could reasonably infer from this that if they opposed transfer to any MAT, they could say so.
144. Representations were received that dealt with both transfer in principle, and ULT as the MAT sponsor. Again, this indicates that sufficient information was provided for the process to be fair applying the *British Homeopathic Association* principle at [110] above.
145. Further, I agree with Mr Auburn that HPS remaining as a SAT was unrealistic given that the HPS Board had said itself on 14 June 2022 that it did not consider it could address the challenges the school faced. On that basis, any unfairness by the failure to be clearer as to the nature of the decisions that were still to be made was unlikely to have caused any prejudice to the stakeholders. This is a further relevant factor in determining fairness: see the *Law Society* case at [73] ([109] above).

(3) Alleged failure to refer to the policy or criteria applied by the decision-maker

146. A public body undertaking a consultation must present information fairly (*Royal Brompton* at [10]). That requirement includes making consultees “aware of the basis on which a proposal put forward for the basis of consultation has been considered and will thereafter be considered...as otherwise the consultee would be unable to give...either “intelligent consideration” to the proposals or to make an “intelligent response” to [them]”.
147. This means that consultees are “entitled to be informed...of what criterion would be adopted by the decision-maker and what factors would be considered decisive or of substantial importance by the decision-maker in making his decision at the end of the consultation process”: *R (Capenhurst) v Leicester City Council* [2004] EWHC 2124 (Admin) at [46].
148. The Claimants alleged that these principles had been breached in two respects.
149. *First*, the Claimants contended that the information provided by the Defendant was misleading in that it failed to refer to the DfE’s internal policy on MAT transfers which was inconsistent with the SCC Guidance.
150. The relevant part of the SCC guidance states that when an academy in a SAT has been assessed to be inadequate it will generally join a strong MAT (see [50] above). This was, Mr Wolfe contended, a statement of fact rather than a prescription or normative statement of policy. The SCC is a public document of which stakeholders were aware, as it was referred to in the 1 July 2022 letter. However the Ministerial Submission stated that it is DfE policy for such a school to transfer to a MAT [my emphasis]. He submitted that these positions were self-evidently not the same, and it was therefore clear that the RD had applied a criterion to the question of whether HPS should transfer to a MAT of which consultees were unaware. Further, that criterion was of critical importance in respect of both the decision as to whether HPS should be transferred to a MAT and which MAT should be the sponsor. Had stakeholders been aware of this, they would have been able

to take issue with the criterion that the Defendant was proposing to apply, not least because it was inconsistent with the published guidance.

151. In my view Mr Auburn was correct to argue that this is an overly fine distinction for the purposes of assessing unfairness in this process. I consider that a stakeholder reading the 1 July 2022 letter would understand from the guidance that the general position was that an inadequate SAT-run academy would be transferred to a strong MAT. That is very close to the proposition that it is DfE policy that such an event will occur. I also accept his submission that it is unlikely that any substantive distinction between the guidance and policy had a material adverse effect on the process: stakeholders would have had a sufficient understanding that there was, per the guidance, a strong presumption in favour of transfer to a MAT, and could make representations on that basis, including against that presumption being followed in this case. Again, the fact that some representations were received opposing transfer in principle suggests that sufficient information was provided for the process to be fair.
152. *Second*, the Claimants alleged that the information provided by the Defendant was misleading in that it failed to refer to the geographical criterion the RD had applied, which was inconsistent with the Sponsor Matching Guidance.
153. The 1 July 2022 referred to the Matching Guidance, which indicates that potential MAT sponsors should be considered if they are either within 1 hour's drive or where there is a potential to grow a new hub. However this was not the criterion used by the RD in this case. Instead she looked at potential MATs within a 3-mile radius. This was due to her assessment that circumstances vary across the country and a different situation arose for this specific school, such that a varied geographical consideration was considered appropriate. Mr Wolfe therefore submitted that the Claimants were deprived of the opportunity to make representations as to why, for example, options should be considered within the wider geographical area contemplated by the Guidance.
154. Mr Auburn countered this by arguing that the issue of geography was identified in the letter, and if stakeholders wished to say anything about it, it was open to them to do so.
155. In my view it would have been preferable if the geographical criterion applied by the RD had been made clear in the process, but its absence was not necessarily unfair.
156. I also accept Mr Auburn's submission that the strong preference emerging from the stakeholders was for a local solution and it is therefore to some degree unrealistic to suggest that they would have argued for a wider geographical search had the information been clearer. It is therefore unlikely that the stakeholders were prejudiced by the non-disclosure: applying the *Law Society* case at [73] (see [109] above).

(4) Overall conclusion on fairness of the process

157. For the reasons set out above I consider it would have been preferable if the RD had given brief information about the alternative MAT options and been clearer about the geographical criterion applied during the process.
158. However, taking all the circumstances into account, I consider that both of these are examples of the process being "not perfect" or areas in which it "could have been

improved”. I am satisfied that the overall process provided “a fair opportunity for those to whom the consultation was directed adequately to address the issue in question” (*Keep the Horton General* at [66], per Sir Terence Etherton MR).

159. It follows that my conclusion on Issue (1) is that the process followed by the Defendant did meet the minimum legal requirements.
160. For these reasons, the claim fails on its merits and the issue of relief does not arise. I will nevertheless address both issues relating to relief in case my decision on the merits is wrong and because they were both fully argued before me.

Issue (2): Can the Defendant show that it is highly likely that the outcome would not have been substantially different for the Claimants in any event?

The legal principles

161. The Senior Courts Act 1981, section 31(2A) provides as follows:

“(2A) The High Court –

- (a) must refuse to grant relief on an application for judicial review, and
- (b) may not make an award under subsection (4) on such an application, if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred”.

162. In *R (Cava Bien Ltd) v Milton Keynes Council* [2021] EWHC 3003 (Admin) at [52], Kate Grange QC (sitting as a Deputy Judge of the High Court) distilled the key principles from the authorities, the following of which are relevant here:

- (i) The burden of proof is on the defendant;
- (ii) The “highly likely” standard of proof sets a high hurdle. Although s. 31(2A) has lowered the threshold for refusal of relief where there has been unlawful conduct by a public authority below the previous strict test set out in authorities such as *Simplex GE (Holdings) Ltd v Secretary of State for the Environment* (1988) 57 P & CR 306, the threshold remains a high one;
- (iii) The “highly likely” test expresses a standard somewhere between the civil standard (the balance of probabilities) and the criminal standard (beyond reasonable doubt);
- (iv) The court is required to undertake an evaluation of the hypothetical or counterfactual world in which the identified unlawful conduct by the public authority is assumed not to have occurred;
- (v) The court must undertake its own objective assessment of the decision-making process and what the result would have been if the decision-maker had not erred in law;

- (vi) The test is not always easy to apply. The court has the unenviable task of (i) assessing objectively the decision and the process leading to it, (ii) identifying and then stripping out the “conduct complained of” (iii) deciding what on that footing the outcome for the applicant is “highly likely” to have been and/or (iv) deciding whether, for the applicant, the “highly likely” outcome is “substantially different” from the actual outcome’;
- (vii) It is important that a court faced with an application for judicial review does not shirk the obligation imposed by section 31(2A); the matter is not simply one of discretion but becomes one of duty provided the statutory criteria are satisfied;
- (viii) The provision is designed to ensure that, even if there has been some flaw in the decision-making process which might render the decision unlawful, where the other circumstances mean that quashing the decision would be a waste of time and public money (because, even when adjustment was made for the error, it is highly likely that the same decision would be reached), the decision must not be quashed and the application should instead be rejected. The provision is designed to ensure that the judicial review process remains flexible and realistic;
- (ix) The provisions ‘require the court to look backwards to the situation at the date of the decision under challenge’ and the ‘conduct complained of’ means the legal errors that have given rise to the claim;
- (x) The court can, with due caution, take account of evidence as to how the decision-making process would have been approached if the identified errors had not occurred. Section 31(2A) is not prescriptive as to material which the Court may consider in determining the “highly likely” issue...a witness statement could be a very important aspect of such evidence, although the court should approach with a degree of scepticism self-interested speculations by an official of the public authority which is found to have acted unlawfully about how things might have worked out if no unlawfulness had occurred:
- (xi) Importantly, the court must not cast itself in the role of the decision-maker. While much will depend on the particular facts of the case before the court, ‘nevertheless the court should still bear in mind that Parliament has not altered the fundamental relationship between the courts and the executive. In particular, courts should still be cautious about straying, even subconsciously, into the forbidden territory of assessing the merits of a public decision under challenge by way of judicial review. If there has been an error of law, for example in the approach the executive has taken to its decision-making process, it will often be difficult or impossible for a court to conclude that it is “highly likely” that the outcome would not have been “substantially different” if the executive had gone about the decision-making process in accordance with the law. Courts should also not lose sight of their fundamental function, which is to maintain the rule of law;
- (xii) It follows that where particular facts relevant to the substantive decision are in dispute, the court must not ‘take on a fact- finding role, which is inappropriate for judicial review proceedings’ where the ‘issue raised...is not an issue of jurisdictional fact’. The court must not be enticed ‘into forbidden territory which belongs to the decision-maker, reaching decisions on the basis of material before

it at the time of the decision under challenge, and not additional evidence after the event when a challenge is brought'. To do otherwise would be to use section 31(2A) in a way which was never intended by Parliament.

163. In assessing whether it is highly likely that the same decision would have been reached regardless of a consultation process being carried out, the factors that may be relevant will include the extent to which the claimant has had the opportunity to make its views known to the decision-maker by other means, the extent to which such views were taken into account by the decision-maker, and whether quashing the decision would create undue administrative inconvenience or have a significant detrimental impact on third parties: see, for example, *R v Secretary of State for Social Services, ex p Association of Metropolitan Authorities* [1986] 1 WLR 1 at 15D and *R v Secretary of State, ex p Walters* (1997) 30 HLR 328 at 380-383.

Submissions on the law and analysis

164. Mr Wolfe submitted that in this case the “outcome for the applicant” was “the consultation process itself” and the Claimants’ participation in that process. That was because the challenge here was to the legality of the consultation, rather than the decision itself. On that basis, it could not be said that the outcome would not have been substantially different: it would have been substantially different as the stakeholders would have been able to make different representations and the Defendant would have had the benefit of their properly informed views. To conclude otherwise amounted to the Defendant saying that she would have approached such a process with a closed mind and/or would not have conscientiously considered the responses.
165. I agree with Mr Auburn that this is an unduly narrow construction of section 31(2A), such that the “outcome” should be interpreted as including reference to the final decision taken. This was the approach taken in *Glatter v NHS Herts Valleys CCG* [2021] EWHC 12 (Admin) at [99]-[101], *R (Police Superintendents’ Association) v HM Treasury* [2021] EWHC 3389 (Admin) at [203] and most recently in *R (Gymraeg) v Neath Port Talbot* [2022] EWHC 2674 (Admin) at [143], where Kerr J held that “outcome” in this context was “...not to be viewed narrowly as confined to the decision under challenge, artificially ignoring the wider ‘outcome’ which includes what actually happens, in the aftermath of the decision challenged”. This approach recognises that the “conduct complained of” and the “outcome” are separate elements within the section. It is also consistent with the wider purpose of section 31(2A) as being to ensure that the judicial review process remains flexible and realistic: see [162(viii)] above.
166. Mr Wolfe placed reliance on the case law indicating that there is a particular risk of the court unlawfully casting itself into the role of the decision-maker in consultation cases. For example, in *R (Silus Investments) v LB Hounslow* [2015] EWHC 358 (Admin), [2015] BLGR 391 at [70], where Lang J held that:

“...it would not be proper to assume that the claimant’s representations would have made no difference to the outcome [because that] would be tantamount to accepting that the Defendant had a closed mind and would not have had regard to their representations. That would defeat the very purpose of a consultation procedure”.

167. Similarly, in *R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214; [2020] PTSR 1446 at [273], the Court of Appeal reiterated that courts should be cautious about straying, even subconsciously, into the forbidden territory of assessing the merits of the decision under challenge. He cited Megarry J's well-known observation that: "[a]s everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; ... [and] of fixed and unalterable determinations that, by discussion, suffered a change": *John v Rees* [1970] Ch. 345, at 420.
168. However, as Mr Auburn highlighted, *Silus Investments* was decided under the previous *Simplex* test, rather than section 31(2A). The warning in *Plan B Earth* is to be balanced with the requirement that judges do not shirk their s.31(2A) duty and necessarily undertake their own objective assessment of the decision-making process, and what its result would have been. Section 31(2A) imposes a duty that applies to all judicial review claims, of which consultation claims are many. It has also been applied in several consultation cases, including *R (Wiggins and Jones) v Neath Port Talbot CBC* [2015] EWHC 2266 (Admin), *Glatter* and the *Police Superintendents' Association* case.

Application of section 31(2A) to this case

169. Mr Wolfe's overall submission was that the Defendant came nowhere close to establishing to the necessary standard of proof that the outcome would not have been substantially different if consultation had been fair. As this case concerns a challenge to the fairness of a process through which a decision maker sought to involve the public and solicited representations, it is *par excellence* the type of decision in respect of which it is "difficult" if not "impossible" for a court safely to conclude that the high threshold is crossed.
170. He submitted that it was not possible to assess what representations not only the Claimants but any other member of the HPS community would have made. These could have included representations on (i) the possibility of HPS remaining as a SAT and not transferring to a MAT; (ii) the apparent tension between the Defendant's unwritten policy and the SCC Guidance; (iii) in order to comply with the Defendant's policy, other existing MATs rather than KAA; (iv) other trusts which had been shortlisted but ultimately rejected by the RD; and (v) the unpublished 3-mile radius geography criterion. However the parent group has diverse views and it is simply not possible for the Defendant to second guess what would have come forward from a properly informed consultation process.
171. Accordingly, he argued that the court cannot make any assumptions about what would have happened, and what impact those representations may have had on the ultimate recommendation of the RD and decision of the Minister. The cases such as *Glatter* where section 31(2A) has been applied involve extreme factual scenarios very different to the one present here.
172. Mr Auburn advanced a series of points in support of the proposition that the section 31(2A) duty is triggered. Bearing in mind the high hurdle imposed by the "highly likely" standard of proof, the need to avoid descending into the merits, and taking into account the other elements of the *Cava Bien* guidance, I accept his submissions. Notwithstanding Mr Wolfe's persuasive arguments, I consider that, on the particular facts of this case, it

is highly likely that the outcome for the Claimants would not have been substantially different if the conduct complained of had not occurred, for the following key reasons.

173. *First*, the Defendant's policy and published guidance strongly supported transfer of HPS, as an inadequate rated academy being run by a SAT, to a MAT.
174. *Second*, the Defendant had gathered an extensive evidence base which considered the potential MAT sponsor options in detail. This process strongly supported ULT as the best MAT sponsor option for HPS, for the reasons given in the 1 July 2022 letter and as set out in the RD's evidence: see, respectively, [73] and [67] above.
175. *Third*, the Claimants had had the opportunity to make their views known to the decision-maker by other means. This is a relevant factor: see *ex p Association of Metropolitan Authorities* and *ex p Walters* at [163] above.
176. Since at least 14 March 2022, when the HPS Board announced ULT as its preferred MAT sponsor, stakeholders had been able to express their views on whether HPS should transfer to a MAT, and on ULT as the potential MAT sponsor, in the context of the voluntary transfer process. They had raised a considerable number of points, including directly with DfE. The engagement process adopted at the voluntary stage went beyond the three minimum steps set out in the Engagement Guidance: see [37] above.
177. Stakeholders were then given the further opportunity to provide their views on both issues during the Defendant's SEP. A large number of such representations were received.
178. The RD gave evidence to the effect that she was and remained of the opinion that "stakeholders had more than usual opportunity to share their views on the proposal for HPS to join a MAT and who that MAT should be". That was, in my view, a fair assessment of the lengthy process that had occurred here before the decision was ultimately taken by the Minister, rather than self-interested speculation.
179. *Fourth*, stakeholders' views informed further information gathering and investigation by the DfE. The stakeholders' specific concerns about ULT were considered by the DfE to be either not substantiated on the available evidence, or not sufficient to outweigh ULT's merits. The concerns about ULT were fully considered by the RD, the AB and the Minister. The fact that stakeholders' views were taken into account by the decision-maker is another relevant factor: see *ex p Association of Metropolitan Authorities* and *ex p Walters* at [163] above.
180. *Fifth*, the points that had been raised in favour of KAA were investigated and taken into consideration in the decision-making process. However, despite the points in its favour, KAA was not considered a realistic or achievable option, not least because it was an 'untested' SAT without a Teaching School or access to NLEs (see further at [68] above). It is therefore highly likely that any further representations about KAA would have made no substantial difference to the ultimate conclusion in respect of KAA as a MAT sponsor for HPS.
181. *Sixth*, by 1 July 2022 it was known that Harris was the third option being considered by the RD, but no representations were received either in favour of or against Harris as a

MAT sponsor. ARK was not considered as a MAT sponsor option beyond the DfE's initial desktop assessment because it would have been unable to meet the transfer timetable transfer until September 2023.

182. The RD's evidence was that if Harris had been identified as a specific option in the SEP, stakeholders would have made "very similar" representations about it to those made in respect of ULT, namely expressing concerns that Harris was not a "local" option. This was, in my view, a reasonable inference rather than unjustified speculation.
183. However even if further representations had been received about Harris or ARK as a MAT sponsor, it is unlikely that they would have outweighed the merits of ULT, especially given the better understanding of the situation at HPS which ULT had gained through its work as part of the consortium, which did not apply to Harris: see [70] above. It is also pertinent that the Minister had noted Harris' lack of local presence, including in relation to the Teaching School Hub: see [84(5)] above.
184. *Seventh*, the questions of whether HPS should transfer to a MAT, and who that MAT sponsor should be, were considered by the HPS Board in the context of the voluntary transfer process.
185. They were then considered by the RD, the AB and the Minister. All of these highly experienced individuals and bodies have taken into account the stakeholders' representations and come to the same view, namely HPS should transfer to a MAT with ULT.
186. *Eighth*, the Claimants have not even at this stage identified any truly "new" points which are so material to the decision that there is a realistic likelihood that they would have led to a different result. The burden of proof on this issue remains on the Defendant, and the Claimants cannot of course speak for all stakeholders, but this is nevertheless a factor that can be taken into account.
187. *Ninth*, while each assessment of the section 31(2A) issue is fact-specific, there are similarities between this case and the *Police Superintendents' Association* case. There, the reasons why the court found the "highly likely" threshold met included that (i) the option in question was the preferred policy option; (ii) the decision-maker was already strongly in favour of it; (iii) the content of the responses from consultees was known; and (iv) "[t]he documentation indicates that HMT officials ... did not consider that any basis had been shown to depart from the preferred prospective policy ...". All of those factors are present here.
188. For all these reasons, if the claim had succeeded on its merits, I would have found that the Defendant had discharged the burden of proving that section 31(2A) required the court to deny the Claimants the relief sought, on the basis that it is highly likely that the outcome would not have been substantially different for the Claimants in any event.
189. It follows that my conclusion on Issue (2) is "Yes".

Issue (3): Should the court exercise its discretion to refuse to grant the Claimants relief?

190. In light of my conclusion on Issue (2), Issue (3) does not arise. However, if I had concluded that section 31(2A) did not apply, I would have been persuaded by the Defendant's argument that the general discretion to limit relief should be exercised to refuse to grant the Claimants relief, for the following reasons.
191. *First*, the court's general discretion with respect to relief is a wide one, exercised based on consideration of, among other things, the needs of good administration, the effect on third parties and the utility of granting the relevant remedy: see, for example, *R v Brent LBC, ex p O'Malley* (1997) 10 Admin LR 265, CA at pages 295–296 and *R v Monopolies and Mergers Commission, ex p Argyll Group* [1986] 1 WLR 763, CA, at pages 774–775.
192. *Second*, the RD provided compelling evidence that any further delay to the transfer process would cause real hardship to HPS and its pupils and disruption to the smooth operation of the school, to the following effect:
- (i) The academy was rated as inadequate by Ofsted and such a classification is usually the result of “complex and serious problems relating to failure of governance and leadership, or of financial mismanagement” which require urgent action, and that remains the case at HPS.
 - (ii) HPS has experienced a particularly turbulent period as evidenced by the serious safeguarding concerns raised by former staff and students, the B3sixty investigation and the Ofsted rating as inadequate. The interim support ends in December 2022.
 - (iii) There has been a high level of trustee turnover at HPS and many of the trustees appointed to support the school over the last year have indicated that they are not in a position to remain for the longer term. The HPS Board do not have the capacity to make the rapid improvements required at HPS.
 - (iv) The senior team and Human Resources service is completely depleted. Only two members of the pre-existing senior team remained for September 2022.
 - (v) The absence of senior staff has revealed significant gaps in practice in SEND, support for management of student behaviour and pastoral care, knowledge of how to plan curricula, manage exams properly and manage finance and IT effectively.
 - (vi) Although the consortium arrangement helped HPS to reach the end of the academic year without critical incident and there is now a strong and experienced Headteacher and additional staffing in place, there is still a significant need for additional support in a range of areas.
 - (vii) There is a risk that the significant school improvement needs at the school will not be addressed with the urgency required.
 - (viii) HPS requires the support of a strong MAT, like ULT, who are able to step in and quickly bring to bear their resources across a range of areas to support the school.
 - (ix) The ESIF funded support is due to end in December 2022.

- (x) Mr Daniels has reported to the RD that the HPS Board is not functioning effectively because of tensions between different members, in particular between the current parent trustees and non-parent trustees. If the transfer is not completed by early January 2023, some of the trustees may resign their positions, meaning that the lack of stable governance and leadership at HPS will be worsened and the hard-won improvements made to date will be lost.

193. *Third*, in all the circumstances these factors outweigh the positive experiences of the current school term reported by some of the First Claimant’s witnesses (see [86]-[89] above). The same applies in relation to the fact that the NtI has been lifted. In any event, the NtI process was limited to certain governance issues, and did not address the breadth of concerns that led to the Ofsted inadequate rating.

194. It follows that my conclusion on Issue (3) is also “Yes”.

Conclusion

195. Accordingly, for the reasons set out herein I grant the Claimants permission to seek judicial review, but dismiss their claim on its merits. Had I allowed any part of the claim, I would have concluded that the duty under the Senior Courts Act 1981, section 31(2A) required me to deny them relief and/or that the court’s general discretion in respect of relief justified that course.