OUTER HOUSE, COURT OF SESSION

[2024] CSOH 80

P1082/23

OPINION OF LORD SANDISON

in the Petition of

CAINS TRUSTEES (JERSEY) LIMITED and CAINS FIDUCIARIES (JERSEY) LIMITED as TRUSTEES for the EASTGATE UNIT TRUST

Petitioners

for

Judicial review of decisions of the Highland Council taken on 28 August and 14 September 2023

Petitioners: Burnet KC; Burness Paull LLP
Respondent: J Findlay KC, Colquhoun; Harper Macleod LLP

9 August 2024

Introduction

[1] In this petition for judicial review, the petitioners challenge the validity of decisions of the Highland Council to progress with proposals to redesign Academy Street, Inverness, aimed at greatly restricting vehicular traffic on the street. I previously repelled the respondent's pleas that the petition was incompetent or premature: [2024] CSOH 50.

Background

[2] The petitioners are the trustees for the Eastgate Unit Trust, which owns the Eastgate Shopping Centre, Inverness. The centre is located at the east end of Academy Street there.

The respondent is the Highland Council. On 28 August 2023 its City of Inverness Area Committee resolved that officers should proceed to finalise a particular proposed design for Academy Street and consult on a relative Traffic Regulation Order. That decision was affirmed by a meeting of the full council on 14 September 2023.

[3] The petitioners claim that a non-statutory consultation exercise had been launched in May 2022 on a design proposal which did not indicate that there was any intention severely to restrict the use of Academy Street as a through route for private vehicles. Various consultation events were held. On 14 November 2022 another design proposal was put forward in a report to committee by the respondent's Executive Chief Officer for Infrastructure, Environment & Economy. That proposal involved a restriction of motorised vehicular access to and through Academy Street, and on 24 November 2022 the Area Committee resolved that officers should proceed with development of that design. The decisions of 28 August and 14 September 2023 which are challenged are said to concern a variant of that fresh proposal. The petitioners challenge the validity of the 2023 decisions on the basis that there was a failure to carry out proper consultation, that there was a failure to have regard to material considerations, that an internal report misled the Area Committee and in turn the full council in relation to the 2023 decisions on a material issue, and that the respondent's decisions were predetermined and pursued an improper purpose.

Petitioners' submissions

[4] Senior counsel for the petitioners asked the court to reduce the decisions of the respondent complained of. Academy Street was one of the major shopping streets in Inverness city centre, and a major vehicular route for traffic to access and pass through the city centre. The key question for the court was whether the respondent had acted

unlawfully by deciding when it did and on the basis of the information before it to exclude the option it had previously consulted upon ("Option A"), or any other alternatives, from the consultation process and to proceed with finalising only the current proposal ("Option B") and to consult on a Traffic Regulation Order ("TRO") in relation to that proposal alone. The petitioners maintained that the consultation process was unlawful for the following reasons. The respondent consulted on Option A. Option B was a fundamentally different proposal *inter alia* because it prevented private vehicles from accessing and travelling through the city centre and was likely to change traffic patterns within the city and to have a different economic impact on the city centre. The respondent took the decision to proceed with Option B, which became the current proposal, and to exclude Option A from further consultation, at an early stage of the consultation process and before any traffic or economic impact assessments had been carried out. It did not afford the public meaningful consultation or the opportunity to make sensible representations. It had not carried out an overall comparative assessment of the proposals with an open mind and in a fair manner.

[5] The key facts relied upon by the petitioners were as follows. On 26 August 2021, the respondent's Area Committee resolved to retain a Covid-19 era "Spaces for People" intervention in Academy Street. In May 2022, the respondent launched a public consultation: "Places for Everyone - Academy Street". It did not indicate that there was any intention to prevent the use of Academy Street as a through route for private vehicles. At no time at any of the meetings held during the consultation prior to November 2022 had there been any discussion of restricting access to and excluding cars from Academy Street. The public was not given any information about any proposed restriction of vehicular traffic on Academy Street and its potential effects on local traffic into and through the city centre, or

on the local economy, when the proposals were first put out for consultation in August 2022. Option B was only made known to the public when its import was published in a report to the respondent's Inverness Area Committee ten days before its November 2022 meeting. At that meeting on 24 November 2022, the Area Committee resolved *inter alia* for:

> "officers to proceed with the design development of Option B outlined in Section 8 of the November Committee Report, ensuring the best opportunity to attract external construction funding by promoting an ambitious vision for the city centre".

Option B was an alternative design that had not been part of the consultation exercise. The report to the November committee had said that the introduction of Option B was due to feedback received from the public about the perceived lack of benefits for active travel in the previous option, and as a result of feedback from the administrator of the source of the proposed funding for the proposals, Sustrans, about the limited potential for that option to be eligible for funding. That had been the genesis of the shift from Option A to Option B and thence to the current proposal. It had been specifically noted in the report that the availability of construction funding from the Scottish Government's "Places for Everyone" fund required the design of the street to be compliant with "Cycling by Design" guidelines, and that that involved reducing motorised vehicle volumes to below 2000 vehicles per day from the current typical volumes of 8,500 to 9,500 vehicles per day. The report further noted the results of the consultation exercise to October 2022 (ie on Option A) and stated that 68% of respondents viewed those proposals as positive, mostly positive or neutral, while 32% considered that more radical changes were needed for Academy Street. Both Option B and its iteration in the current proposal prevented private vehicles from the west of the city accessing the east of the city centre via Academy Street, and vice versa. The respondent had not assessed the economic or traffic impact of any proposal on the city centre or the wider area. The economic and traffic assessments and further consultation proposed by it were

restricted to assessing the current proposal only and the details of any TRO in relation to it. It did not know what the likely economic or traffic effects of Option A, Option B or the current proposal were likely to be.

[6] Since November 2022, the respondent had not taken Option A into account as a proposal for Academy Street, or carried out any further assessment of its benefits or disadvantages. It would not consider the benefits or disadvantages of the current proposal against those of Option A. It would not carry out an overall assessment of options, including their economic and traffic impact, as part of its further consultation and final decision. It had made it clear in its response to the petition that the "optioneering process for the proposals has already been completed and consulted on". It averred that "Option A was superseded by Option B, and thereafter by the Current Proposal." The material difference between Option A and Option B was evident from the report to the November committee meeting:

> "Option A looks at improving the public realm, widened footpaths and the provision of alternate cycle routes away from Academy Street. Option B is focused on reducing traffic volumes to enable cyclists to remain on Academy Street."

The local Business Improvement District group had provided the respondent with results from a survey of its members carried out at the end of 2022 and the beginning of 2023 on the proposal that had been by then put forward. The survey showed that there was grave concern from businesses about the respondent's revised proposal and the emergence of Option B as the preferred option without proper consultation.

[7] The report for the Area Committee's meeting on 28 August 2023 had asked it to note the Option B design progress and agree that officers should proceed with its finalisation and with consultation on a TRO, including appropriate equalities and economic impact assessments, or else agree that work on the design should be stopped, the existing Covid-19

era bollards removed, and the carriageway of Academy Street reinstated to its original width. It was noted that the committee meeting on 24 November 2022 had agreed to instruct officers to proceed with the design development of Option B and to continue with public consultation on the development of that option, that potential traffic management measures to implement that decision had subsequently been identified, but that a series of negative responses from parts of the business community had been raised in the media and to the respondent directly, resulting in the design put before the August 2023 meeting, which involved Academy Street not being available as a through-route for private vehicles. It narrated community engagement which had taken place in the June to August 2023 period, and concluded by stating that the design which had been developed to date met the scheme's objectives and had the potential to attract Scottish Government funding, whereas no other design solution identified or suggested could do so, and that accordingly if the committee should decide not to agree to proceed with finalising the proposed design, the alternative would be to stop work and revert to the pre-Covid-19 situation. The Area Committee had accepted the recommendation to proceed with finalisation of the developed design and with consultation on a TRO, and the respondent as a whole had adopted that decision by a majority of 35 to 33, with two abstentions, at its meeting on 14 September 2023. Those councillors who had taken the decisions at the respondent's meetings on 28 August 2023 and 14 September 2023 were not provided with any economic or traffic impact assessments of the alternative proposals but the meeting of 28 August did consider the availability of external funding as a supposedly determining issue in the decisions taken.

[8] Counsel referred to maps showing the routes which traffic might have to take should Academy Street be closed to private vehicles in order to arrive at the Eastgate Shopping

Centre or Raigmore Hospital from various areas in Inverness, which showed significantly increased journey times and distances.

[9] Turning to the law on the duty to consult, a public authority's duty to do so could arise in a variety of ways. In the absence of an express statutory duty, it was frequently generated by the common law duty to act fairly. What amounted to fairness in this context was often illumined by the doctrine of legitimate expectations. In *R (Moseley)* v *Haringey London Borough Council* [2014] UKSC 56, [2014] 1 WLR 3947, Lord Wilson JSC had noted:

> "[23] A public authority's duty to consult those interested before taking a decision can arise in a variety of ways. Most commonly, as here, the duty is generated by statute. Not infrequently, however, it is generated by the duty cast by the common law upon a public authority to act fairly. The search for the demands of fairness in this context is often illumined by the doctrine of legitimate expectation; such was the source, for example, of its duty to consult the residents of a care home for the elderly before deciding whether to close it in *R v Devon County Council, Ex p Baker* [1995] 1 All ER 73. But irrespective of how the duty to consult has been generated, that same common law duty of procedural fairness will inform the manner in which the consultation should be conducted.
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> [24] Fairness is a protean concept, not susceptible of much generalised enlargement. But its requirements in this context must be linked to the purposes of consultation. In *R (Osborn) v Parole Board* [2014] AC 1115, this court addressed the common law duty of procedural fairness in the determination of a person's legal rights. Nevertheless the first two of the purposes of procedural fairness in that somewhat different context, identified by Lord Reed JSC in paras 67 and 68 of his judgment, equally underlie the requirement that a consultation should be fair. First, the requirement 'is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested': para 67. Second, it avoids 'the sense of injustice which the person who is the subject of the decision will otherwise feel': para 68. Such are two valuable practical consequences of fair consultation. But underlying it is also a third purpose, reflective of the democratic principle at the heart of our society. This third purpose is particularly relevant in a case like the present, in which the question was not: 'Yes or no, should we close this particular care home, this particular school etc?' It was: 'Required, as we are, to make a taxation-related scheme for application to all the inhabitants of our borough, should we make one in the terms which we here propose?'
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> [25] In *R v Brent London Borough Council, Ex p Gunning* (1985) 84 LGR 168 Hodgson J quashed Brent's decision to close two schools on the ground that the manner of its prior consultation, particularly with the parents, had been unlawful. He said, at p 189: 'Mr Sedley submits that these basic requirements are essential if the

consultation process is to have a sensible content. First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third . . . that adequate time must be given for consideration and response and, finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals.' Clearly Hodgson J accepted Mr Stephen Sedley QC's submission. It is hard to see how any of his four suggested requirements could be rejected or indeed improved. The Court of Appeal expressly endorsed them, first in *Ex p Baker* [1995] 1 All ER 73, cited above (see pp 91 and 87), and then in *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213, para 108. In *Ex p Coughlan*, which concerned the closure of a home for the disabled, the Court of Appeal, in a judgment delivered by Lord Woolf MR, elaborated, at para 112: 'It has to be remembered that consultation is not litigation: the consulting authority is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice. Its obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this.' The time has come for this court also to endorse the Sedley criteria. They are, as the Court of Appeal said in *R (Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts* (2012) 126 BMLR 134, para 9, 'a prescription for fairness'.

…

[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. For example, in *R (Medway Council) v Secretary of State for Transport, Local Government and the Regions* [2003] JPL 583, the court held that, in consulting about an increase in airport capacity in South East England, the Government had acted unlawfully in consulting upon possible development only at Heathrow, Stansted and the Thames estuary and not also at Gatwick; and see also *R (Montpeliers and Trevors Association) v Westminster City Council* [2006] LGR 304, para 29.

[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. In *Nichol v Gateshead Metropolitan Borough Council* (1988) 87 LGR 435 Gateshead, confronted by a falling birth rate and therefore an inability to sustain a viable sixth form in all its secondary schools, decided to set up sixth form colleges instead. Local parents failed to establish that Gateshead's prior consultation had been unlawful. The Court of Appeal held that Gateshead had made clear what the other options were: see pp 455, 456 and 462. In the *Royal Brompton case* 126 BMLR 134, cited above, the defendant, an advisory body, was minded to advise that only two London hospitals should provide paediatric cardiac surgical services, namely Guys and Great Ormond Street. In the Court of Appeal the

> Royal Brompton Hospital failed to establish that the defendant's exercise in consultation upon its prospective advice was unlawful. In its judgment delivered by Arden LJ, the court, at para 10, cited the *Gateshead* case as authority for the proposition that 'a decision-maker may properly decide to present his preferred options in the consultation document, provided it is clear what the other options are . . .' It held, at para 95, that the defendant had made clear to those consulted that they were at liberty to press the case for the Royal Brompton."

[10] Reference was also made to *McHattie* v *South Ayrshire Council* [2020] CSOH 4, 2020 SLT 399 at [40]. A consultation procedure, if it was to be as full and fair as it ought to be, took considerable time and meanwhile the underlying facts and projections were changing all the time. It was not just a question of an iterative process which could speedily be run through a computer: *R* v *Shropshire Health Authority ex p Duffus* [1990] 1 Med LR 119, per Schiemann J at page 223. Consultation might be phased and carried out in stages and the public authority might take a preliminary or provisional decision, or decision in general principle, or express a preference for a particular option or proposal at the end of each stage. However, any such decision could not restrict discussion during the later stages to that proposal or preclude from discussion anything other than that proposal. The consultee had to be able to give the proposals meaningful consideration and make a meaningful response: *R (on the application of Parents for Legal Action Ltd)* v *Northumberland County Council* [2006] EWHC 1081 (Admin) per Mundy J at [29] - [36]. Renewed consultation was required where there was a fundamental difference between the proposals consulted on and those which the consulting party subsequently wished to adopt: *R (Smith)* v *East Kent Hospital NHS Trust* [2002] EWHC 2640 (Admin) per Silber at [45].

[11] Applying those legal principles to the facts of the present case, the respondent chose to consult the public on its proposals to redesign Academy Street. Having chosen to do so, it was required to consult fairly. As stated in *Moseley*, the requirement for fairness was linked to the purposes of consultation. The respondent was not carrying out a single "iterative"

and "continuing" process which would be completed on the conclusion of the consultation on the TRO. Since November 2023 it had not considered Option A or taken it into account. It accepted that it took the decision in September 2023 to proceed with the current proposal, and that the TRO process could not consider more than one proposal. It would only be considering the benefits and disadvantages of the current proposal in the context of whether or not to adopt a TRO. It was unclear how any modification of that proposal could now take place, or what it might amount to. The respondent decided not to consider Option A any further in November 2022, and to proceed with the current proposal in September 2023, without having carried out any traffic impact assessment or economic impact assessment in relation to either proposal. It was in the process of carrying out a traffic impact assessment and economic impact assessment of the current proposal as part of the TRO process.

[12] At best for it, the respondent had carried out a phased consultation. That was lawful, but there had to be an opportunity to consider matters in the round at the final stage of the consultation. In this case that would involve the public and elected members being able to consider Option A, Option B and the current proposal and their relative benefits and disadvantages at the same time. The respondent should not have prevented further consideration of Option A as an alternative proposal. That was a breach of its common law duty to consult fairly.

[13] The respondent originally consulted on Option A. Option B and the current proposal were not part of the original consultation. Option B and the current proposal were fundamentally different to Option A. Whether something was a fundamental change was "to some extent…one of impression": *Legg* v *Inner London Education Authority* [1972] 1 WLR 1245 per Megarry J at 1257. Option B and the current proposal were likely to have a significant effect on the public's access to and through Inverness city centre, and its patterns

of use of the city centre. Option A did not prevent private vehicles from travelling from one end of Academy Street to the other. Both Option B and the current proposal prevented private vehicles from the west of the city accessing the east of the city centre via Academy Street, and vice versa. Instead, private vehicles wishing to access the east of the city centre from the west of the city would be likely to have two options: (i) a two and a half mile detour via Millburn Roundabout, or (ii) a one and a half mile detour via the Crown residential area. Option A was likely to have materially different economic and traffic impacts to that of Option B and the current proposal. The fundamental difference between the proposals was also evident from the reaction of members of the Area Committee and members of the public to the emergence of Option B in November 2022. Option B was not a refinement of Option A. It was an alternative and Option A should not have been excluded from the consultation. That was unlawful: *Moseley*. At no time prior to 28 August or 14 September 2023 had the public been consulted on Option A and Option B or the current proposal as alternatives. The respondent failed to provide the public with any information on the relative merits of those alternatives, including their impact on businesses and the local economy and traffic. Renewed consultation was required where there was "a fundamental difference between the proposals consulted on and those which the consulting party subsequently wishes to adopt": *Smith*. Whether or not the respondent had concluded that Option A was unlikely to be appropriate, or that the retention of Option A was not required in order for consultees to express meaningful views regarding Option B, in the circumstances it was unfair to exclude Option A from further consideration. The respondent was entitled to take a preliminary decision, or decision in general principle, and express a preference for a particular option. However, any such decision should not have restricted discussion during the later stages to that proposal or preclude from discussion anything

other than that proposal: *Parents for Legal Action*. That is precisely what the respondent did. The respondent was only considering the current proposal. It would not carry out any final overall assessment of the benefits and disadvantages of the current proposal against those of Option A. Any further consultation on an alternative proposal would be limited to modifying the current proposal. It would not involve any broader reconsideration of the proposals. Any opportunity to submit further representations would therefore be extremely limited in scope. There would be no meaningful consultation at the end of the process, and no opportunity for the public to make sensible representations. The petitioners' sense of injustice was entirely understandable and justified.

[14] The law relating to material considerations provided that a decision-maker would err in law if it failed to take into account a material consideration. The tests to be applied in deciding whether or not a consideration was material and so ought to have been taken into account by a decision-maker were set out in *Bolton Metropolitan Borough Council* v *SSE* (1990) 61 P&CR 343 per Glidewell LJ at page 352. The decision-maker ought to take into account a matter which might cause him to reach a different conclusion to that which he would reach if he did not take it into account. The verb "might" meant a real possibility. If a matter was trivial or of small importance in relation to the particular decision, so that it would make no difference to the decision, it was not something that required to be taken into account. There was a distinction between matters that a decision-maker was obliged by statute to take into account and those where the obligation to take into account was to be implied from the nature of the decision and of the matter in question. If the validity of a decision was challenged on the ground that the decision-maker failed to take into account a matter that might have caused him to reach a different decision, it was for the court to decide whether it was a matter which he should have taken into account. If the court

concluded that the matter was fundamental to the decision, or that it was clear that there was a real possibility that the consideration of the matter would have made a difference to the decision, it was entitled to hold that the decision was not validly made. But if the court was uncertain whether the matter would have had that effect or was of such importance in the decision-making process, then it did not have before it the necessary material to conclude that the decision was invalid. Even if the court did conclude that it could hold the decision to be invalid, it was entitled nevertheless, in exceptional circumstances, and in the exercise of its discretion, not to grant any relief.

[15] Applying those principles to the facts of the present case, the economic impact of the current proposal and its impact on businesses was a material consideration which the respondent should have taken into account before deciding to proceed with the current proposal. Despite the report to the November committee meeting having identified the potential for impacts and concerns from affected businesses and other stakeholders as a risk of proceeding with Option B at the time, no economic impact assessment had been carried out. There was a clear requirement for this assessment to be produced as part of a proper and adequate consultation on the proposals for Academy Street, so that the public and members of the Area Committee could properly understand the economic impact. The Area Committee agreed to carry out an economic impact assessment at the November committee meeting. However, this should have taken place in the initial stages of the consultation process, in respect of each design which had been progressed, so as to inform the opinions of the public and the respondent's decision making. Carrying it out as part of a TRO process, which would not consider alternative options, did not cure the unlawfulness of the respondent's decision; on the contrary, the decision to undertake an economic assessment at such a late stage in proceedings was a tacit admission on the part of the respondent that its

failure to do so until that point was a fundamental failure in the consultation process. The assumption that business interests had been given fair and proper consideration throughout the consultation process was wholly inaccurate. The respondent had ignored comments from businesses and failed to properly take account of their concerns, which were a material consideration. There was a very real possibility that the respondent would have reached a different decision if it had taken these matters into account. That failure would not be cured by the economic impact assessment and consultation as part of the TRO process. That process and any further decision would only consider the question of whether to adopt the TRO based on the current proposal. It would not reconsider the question of whether or not to proceed with the current proposal as opposed to alternatives. There was no suggestion that the respondent would properly reconsider the principle of the current proposal as its chosen design.

[16] The legal approach to be taken to challenges based on the content of a planning officer's report was summarised in *Edinburgh Crematorium Limited* v *East Lothian Council* v *Crematoria Management Limited* [2022] CSOH 79 per Lord Richardson at [84]. Such reports were not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they were written for councillors with local knowledge: *Mansell* v *Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314, [2019] PTSR 1452 at [42(2)]. Planning officers required to keep in mind the test imposed by Parliament in terms of sections 25(1) and 37(2) of the Town and Country Planning (Scotland) Act 1997 as to the information and advice provided and the manner in which it was to be provided: *R* v *Selby District Council, ex parte Oxton Farms* [2017] PTSR 1103 at page 1110. The question for the court would always be whether, on a fair reading of the report as a whole, the officer had materially misled the members on a matter bearing upon their decision, and the error had gone

uncorrected before the decision was made. Minor or inconsequential errors might be excused. Unless there was evidence to suggest otherwise, it might reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave: *Mansell* at [42(2)].

[17] Applying those principles to the facts of the present case, the reports to the Area Committee in August 2023 and the full council in September 2023 misled those bodies as to the level of support for the current proposal. According to the report to the August committee meeting, since the consultation website first went live in May 2022, the total traffic to the site to 8 August was: 9032 visitors, 598 respondents, 1422 contributions (of which 894 were made in the form of comments and 528 expressed as agreements), and 633 new subscribers. In terms of contributions sentiment based on the 894 comments: 239 were positive, 132 mostly positive, 157 negative, 66 mostly negative, and 83 neutral. However, in presenting these figures, the August Committee Report had failed to take into account that Option B had not been raised as a potential design option until November 2022; that in March 2023, Option B became the current proposal, with discussions on this with businesses not held until 14 to 16 March 2023; and that detailed plans for the current proposal, and a request for comments on them, were not published until 20 July 2023. Therefore, of the total activity gathered over the consultation period (May 2022 to 8 August 2023), the majority of engagement - 6903 of 9032 visitors, 521 of the 598 respondents and 1253 of the 1422 contributions - related to the period during which Option A was subject to consultation. Only 12% of the total contributions received related to the period during which Option B was under consideration (ie March – August 2023). By taking account of the consultation responses throughout the entire period May 2022 – August 2023, the report to the August committee had conflated comments received for Option A and the current

proposal and materially and erroneously overstated the level of public support for the current proposal.

[18] That was a material issue which committee members and councillors might have considered in reaching the decision. Members were materially misled on a matter bearing upon their decision, which could not be described as minor or inconsequential.

[19] The law on predetermination provided that a decision-maker was entitled to be predisposed to a particular course of action or policy position, but must not predetermine matters. The test was whether there was an appearance of predetermination in the sense of a mind closed to the merits of the decision in question: *Packard, Petitioner* [2011] CSOH 93 at [64], where Lord McEwan had referred with approbation to the observations in *R (Lewis)* v *Redcar and Cleveland Borough Council* [2008] EWCA Civ 746, 2009 1 WLR 83, per Rix LJ:

> "[95] The requirement made of such decision makers is not, it seems to me, to be impartial but to address the planning issues before them fairly and on their merits, even though they may approach them with a predisposition in favour of one side of the argument or the other. It is noticeable that in the present case no complaint is raised by reference to the merits of the planning issues. The complaint, on the contrary, is essentially as to the timing of the decision in the context of some diffuse allegations of political controversy.
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> [96] So the test would be whether there is an appearance of predetermination in the sense of a mind closed to the planning merits of the decision in question. Evidence of political affiliation or of the adoption of policies towards a planning proposal will not for these purposes by itself amount to an appearance of the real possibility of predetermination or what counts as bias for these purposes. Something more is required, something which goes to the appearance of a predetermined, closed mind in the decision-making itself. I think that Collins J put it well in *R (Island Farm Development Ltd) v Bridgend County Borough Council* [2007] LGR 60 when he said, at paras 31—32:
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> > '31. The reality is that councillors must be trusted to abide by the rules which the law lays down, namely that, whatever their views, they must approach their decision-making with an open mind in the sense that they must have regard to all material considerations and be prepared to change their views if persuaded that they should . . . unless there is positive evidence to show that there was indeed a closed mind, I do not think that prior observations or

> apparent favouring of a particular decision will suffice to persuade a court to quash the decision.
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> 32. It may be that, assuming the *Porter v Magill* test is applicable, the fair-minded and informed observer must be taken to appreciate that predisposition is not predetermination and that councillors can be assumed to be aware of their obligations.'"

and per Longmore LJ: "[109] … the test of apparent bias relating to predetermination is an extremely difficult test to satisfy. This case … comes nowhere near satisfying this test … "

[20] In *Bouchti* v *London Borough of Enfield* [2022] EWHC 2809 (Admin), Eyre J had observed:

> "[98] In considering whether there was pre-determination such as to vitiate a decision by elected councillors regard has to be had to their position as elected representatives. As such they are expected and entitled to promote particular views; to seek support for such views; to engage with the public; and to explain to members of the public their stance on matters of public concern. In the light of those aspects of the role of an elected councillor evidence that a particular councillor is pre-disposed to support policies and proposals having certain effects is not sufficient to demonstrate that a particular decision was made with a closed mind such as to vitiate the decision. In short terms councillors will be elected to some extent on the footing that they will approach issues of a particular kind from a certain pre-declared standpoint and their electors will have chosen them because of their support for that standpoint. For a decision made by an elected member to be vitiated by pre-determination regard has to be had to the actual decision and not just to the member's stance as to matters of that kind. It is necessary for the court to find at the least a real risk that the member approached the decision in question not just with a pre-disposition in favour of a particular course but with a determination to approve the actual decision in question and with a mind closed to arguments to the contrary in relation to that decision."

Applying those legal principles to the facts of the case, the respondent appeared to have taken the decision to proceed with Option B, and then the current proposal, on the basis that it considered that no other scheme would be eligible for funding through Sustrans. In doing so it unlawfully predetermined matters. It made its mind up in November 2022 that it was not going to proceed with a design which was unlikely to attract Sustrans funding, and that any consultation on other options (including further consultation on Option A) was

immaterial and unnecessary. In doing so, it predetermined matters, pursued an improper purpose and separately acted unfairly and irrationally. It had closed its mind to the planning merits of the decision in question. The petitioners accepted that the availability of funding was potentially a material consideration. However, it should have been taken into account as part of an overall assessment of the options, including their economic impact. The respondent was entitled to take that into account in explaining a preference for Option B and the current proposal. However, it erred by relying on it to refuse to consider Option A after November 2022. The respondent was entitled to be predisposed to Option B and the current proposal. However, it had not at that point (and still had not) carried out any assessment of the impact of Option B or the current proposal. It had predetermined matters by refusing to consider Option A after November 2022 and by deciding to proceed with the current proposal on the basis of the potential availability of Sustrans funding.

[21] Alternatively, the respondent acted irrationally in placing significant weight on the availability of funding for one option and excluding further consideration of another option when it had not undertaken an economic impact assessment, nor assessed the prospects of Option A attracting or generating finance, with a view to comparing the overall economic effect of alternatives when the proposals were still at a formative stage. Statements made by various councillors at the meetings in August and September 2023 demonstrated that they regarded the availability of funding in and of itself as a key determining issue in their decision.

Respondent's submissions

[22] On behalf of the respondent, senior counsel submitted that, in order to begin the TRO process, a local authority must first have prepared a draft TRO on which to consult. It

was not possible to run the TRO process with more than one proposal at a time (although members of the public might suggest alternative schemes when submitting objections to a proposal). It was fundamental to the statutory and regulatory scheme that a single proposal was published, consulted upon, and then considered by the local authority. The nature of the TRO process served to limit public engagement where a local authority wished to seek views as to what sort of TRO it should consider making in any given case. Accordingly, the respondent had decided to undertake a pre-TRO consultative process in this case, which had been referred to as "optioneering". The intention was to seek public engagement in preparing a draft TRO for submission to more formal public consultation in accordance with the applicable regulations. Optioneering was intended to be an iterative process, whereby an initial proposal would be changed or replaced in the light of ongoing public responses: the eventual outcome could then be fed into a statutory consultation for a proposed TRO. Optioneering, whilst non-statutory, formed an integral part of the respondents' overall TRO process.

[23] Matters relevant to the present dispute had commenced with a report to the August 2021 meeting of the respondent's Inverness Area Committee. That report had raised the question of how the city could be transformed, post-Covid, into a "vibrant", successful place, which involved examining how transport could affect, positively or negatively, the quality, safety and enjoyment of its streets. At a meeting in February 2021, the committee had already agreed that officers should develop design options for permanent street changes in Academy Street. The August committee meeting could not be regarded as having produced any legitimate expectation of consultation on the matter.

[24] By November 2022, officers were recommending to the Area Committee that it should note the feedback from the consultation exercise which had by then taken place

relating to the ambition to improve the environment in Academy Street for all users, agree that officers should proceed with the design development of what was then identified as Option B (which was identified as ensuring the best opportunity to attract external construction funding) and agree that public consultation on the development of Option B should be continued. The differences between Options A and B, and their respective advantages and disadvantages, had been clearly identified. It was noted that there was broad support from the public consultation for reduced road space and increased space for non-motorised users. The choice was how traffic should be allowed to move through the city centre. At the November meeting of the Area Committee, the decision taken was clear that officers should proceed with the design development of Option B, rather than Option A (which was rejected), and should continue public consultation on that option. That that was the decision taken had been made clear to the public. It was too late now to challenge what had happened in November 2022. The question was whether, in carrying out a consultation on Option B, it was necessary to maintain Option A in order to get a meaningful response. It was not; Option A had been considered. Some consultees had indicated the view that it did not go far enough, and it had other drawbacks identified in the report to the November committee meeting. As part of a single ongoing process, consideration had passed to Option B.

[25] By the time of the report to the August 2023 committee meeting, all that was being discussed was the design progress and finalisation, and consultation on the terms of a TRO. The committee had been presented with a summary of public engagement from May 2022 to August 2023. It had been noted that the RIBA design process which was being followed did not require an economic impact assessment at any stage. That notwithstanding, one had subsequently been carried out, and had been publicly available since June 2024. The

potential impact on business had been considered, as had impact on traffic and displacement effects. The report had concluded that a careful balance had been struck between various interests to reach a fair and reasonable compromise that would benefit the city centre as a whole, and that was why the committee had been asked to approve finalisation of the proposed design with any necessary minor amendments as required, and to consult on a TRO. The alternative was to stop work altogether and revert to the pre-Covid-19 state of Academy Street. The Area Committee's decision on 14 September accepted the recommendation made by officers to finalise what had begun life as Option B.

[26] Before any TRO could be adopted by the respondent, it would require to follow a prescribed procedure which involved consulting with statutory consultees, publishing details of the proposal, and considering any objections to it. It would be competent for the petitioners (or anyone else) to object to a proposed TRO on the basis that an alternative scheme (including Option A) would be preferable. Economic and traffic impact assessments would be published along with the proposal itself. Having properly considered any objections made, it would be open to the respondent either to make the TRO as proposed, make it subject to appropriate modifications, re-start the TRO consultation process with a modified proposal, or decline to make the proposed TRO.

[27] There did not appear to be any substantive difference between the parties in relation to the content of the applicable law. The common law imposed a general duty of procedural fairness on public authorities when making decisions which affected the interests of members of the public. There was, however, no general common law duty to consult persons who might be affected by an order before it is adopted: *Moseley*. A duty to consult would exist where a statute (or statutory instrument) provided for it - as in *Moseley* - or where there was a legitimate expectation that one would be carried out, as acknowledged by

Lord Reed JSC in that case at [35]. A public authority might, however, choose to carry out a public consultation where it felt it would be appropriate to do so. The purpose of such a consultation was set by the authority, and could not be enlarged by consultees such as the petitioners. When a public authority carried out a consultation (whether because it was obliged to do so, or because it chose to do so), it had to act fairly. The principles commonly referred to as the Sedley Requirements would apply (*Moseley* at [25]), but the basic requirement was one of fairness. The application of the Sedley Requirements, and the determination of what fairness required in any given case, needed consideration of the overall context in which the consultation was being carried out: *Bouchti* at [68] - [69]. There was no general duty to provide information about options which had been rejected, and a public authority would only be required to provide information about them if the provision of such information was necessary in order for consultees to express meaningful views on the proposal: *Moseley*, per Lord Reed at [40]. Where a challenge was made to a decision on the basis of failures in the consultation process, the question for the court was whether the consultation process was "so unfair it was unlawful": *R (on the application of Greenpeace Ltd)* v *Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin), [2007] Env LR 29 at [62] - [63]. In determining a judicial review, the court was concerned with the legality of the decision-making process and not with the merits of a decision. Matters of judgment were within the exclusive province of the decision-maker. The court would only interfere with a decision if it was *ultra vires*: *Wordie Property Co Ltd* v *Secretary of State for Scotland* 1984 SLT 345. It was for the decision-maker to decide what the determining issues were, the evidence that was material to those determining issues, and the conclusions to be drawn from the evidence. It was for the decision-maker, applying its expertise and judgment, to

resolve the determining issues: *Moray Council* v *Scottish Ministers* [2006] CSIH 41, 2006 SC 691 at [29] - [30].

[28] A material consideration was one which was relevant to the decision-making process. If the court concluded that a matter was left out of account, and that it was fundamental to the decision or that there is a real possibility that consideration of the matter would have made a difference to the decision, it might hold that the decision was not validly made. If the court was uncertain about whether the matter would have had this effect, or was of such importance in the decision-making process, then it did not have the material necessary to conclude that the decision was invalid: *Bolton*.

[29] The petitioners' first ground of challenge rested upon a misconstrual of the purpose of the consultation process begun in May 2022. Whilst it was not denied that the Sedley Requirements applied in principle to the optioneering process, the precise application of those requirements to the process required a proper and informed consideration of the context: *Bouchti* (*supra*). The ultimate issue was the fairness of the consultation process, and what fairness required in any given case was highly contextual: *R* v *Home Secretary, ex parte Doody* [1994] 1 AC 531 at 560D - G, [1993] 3 WLR 154 at 168E - H, per Lord Mustill as follows, especially sub-paragraphs (2) and (3):

> "What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a

> person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

The purpose of optioneering was not to present a single well-formed proposal for the consideration of members of the public; instead, it formed part of an overall process with the ultimate objective of making a TRO, which would then be the subject of further and formal consultation. The result of the optioneering was merely a decision to move to the next stage of the process, rather than to take any substantive action; unless a TRO was eventually made by the respondent, there would be no actual outcome of the optioneering which could be challenged. The current proposal would be consulted upon fully by the respondent, as required in terms of the TRO Regulations. The proposals were still at a formative stage, insofar as changes might yet be made by the respondent in the light of objections which might be made by members of the public, including the petitioners. There would be sufficient information for the petitioners to give intelligent consideration to the current proposal. There would be adequate time for consideration and response. Any objections to the current proposal would be considered fully, again as required by the TRO Regulations.

[30] In any event, the respondent was complying with the Sedley Requirements, and had so complied in so far as relevant at every stage, in particular before taking the decisions it did in August and September 2023. There was a period of nine months between the November 2022 committee meeting and the August 2023 committee meeting. Conscientious consideration had been given to the results of that consultation, and would continue to be so given. What was being consulted upon after November 2022 was the development of

Option B only. Sufficient information was provided to allow for consultees to give intelligent consideration to Option B. The respondent could lawfully have decided to stop all consultation in November 2022. It was not for the petitioners to insist that a voluntary consultation in relation to Option A should continue; the respondent's decision not to continue with that consultation was lawful, and there had been nothing unfair about the consultation which had been carried out between November 2022 and September 2023. The input of the business community on Option B had been considered. There was no need grounded in fairness for Option A to remain on the table in order for comment on Option B to be meaningful.

[31] It was not disputed that the impact of the proposed TRO on businesses was a material consideration which the respondent would require to take into account when making the TRO. However, the appropriate moment for taking that material consideration into account was when the respondent was considering whether to make the proposed TRO or not. Economic impact and traffic impact assessments were being carried out by the respondent and it was intended that they should be available before the TRO proposal was submitted to public consultation, so as to inform the members of the public about the potential impacts of the proposal. Members of the public would be in a position to state objections to the proposed TRO on the basis of disagreement with the assessments, and the respondent would be under a statutory obligation to take those objections into account. The impact assessments would, in addition, be available to the respondents when a final decision was made. The suggestion by the petitioners that full impact assessments should have been carried out before a decision to commence the TRO statutory process was quite impractical, and failed to take account of the purpose of the optioneering which took place between May 2022 and August 2023. It was intended to produce a single proposal which could then

be fully consulted on and assessed in a formal TRO process; in other words, it was designed for the examination and refinement of options. To require full impact assessments at every stage would have introduced delay and expense, and would have undermined the purpose of optioneering. Nor was it obvious that the mere decision to move to the next stage in the TRO process could have an impact on businesses or traffic in Inverness; only the actual imposition of a TRO would have such impacts, and the respondent would have the relevant information available to it before that decision was made. Optioneering was an early stage of an overall process with the goal of producing a sensible and appropriate TRO. Accordingly, the question of whether or not the respondent had had regard to all material considerations was one which could not be answered at this stage. In any event, the respondent had undertaken extensive and adequate engagement with businesses and stakeholders in Inverness, and would continue to do so. The responses of businesses formed part of the reasoning behind the move from Option B to the current proposal, and would be taken into consideration before any TRO was made. So far as the decisions under challenge were concerned, there was no failure to have regard to material considerations that were material and relevant at the time those decisions were made.

[32] As to the suggestion that the Area Committee and the respondent itself had been misled by planning officers, that misconstrued the place of optioneering in the overall TRO process. Its purpose was to produce a single proposal which could then be consulted upon in detail. Matters relevant to the process included the practicability of proposals, the level of funding required (and available), and the respondent's broader desired outcomes for Academy Street. Public support for the proposal would be properly gauged by the responses to the public consultation carried out in terms of the TRO Regulations. The level of support for the proposal would be available for the respondent to consider when deciding

whether or not to make a TRO, and if so in what form. Further, it was not accepted that anything in the reports to the Area Committee had been materially misleading. On the contrary, they had set out the position fairly.

[33] The suggestion that the respondent had predetermined the decision it had to make was based on a mis-characterisation of the respondent's reasons for moving on from Option A in late 2022. That option suffered from a number of difficulties which rendered it less than ideal; these included the need to negotiate with private landowners and the difficulty of installing a segregated cycle lane. In addition, the respondent concluded that it would be unlikely to meet the desired objectives of the scheme. In any event, the availability of funding was a highly material consideration in the case. The respondent could not put in place schemes for which there was no funding available: ultimately, Option A would have had no realistic chance of being put in place even if the respondent considered it an appropriate proposal. The reasons for that had been expressed openly, not concealed at all. The fact that the petitioners might prefer Option A to Option B or the current proposal had little bearing on the practicality of putting it in place.

[34] None of the grounds of challenge was well-founded, and the court should refuse to grant any of the orders sought.

Decision

Fairness of consultation

[35] Although the consultation process in this case was voluntarily instituted by the respondent, there can be no doubt in law that it was subject to a requirement to be procedurally fair: *R (Medway Council)* v *Secretary of State for Transport* [2002] EWHC 2516 (Admin), per Maurice Kay J at [28]; *R (Partingdale Lane Residents Association)* v *Barnet London*

Borough Council [2003] EWHC 947 (Admin), [2003] All ER (D) 29, per Rabinder Singh QC at [45]; *R (Montpeliers and Trevors Association)* v *Westminster City Council* [2005] EWHC 16 (Admin) per Munby J at [21]. What is fair or unfair is most certainly a contextual issue, but, at least so far as the public was concerned, the respondent's "optioneering" exercise, launched in May 2022, was a full and general consultation process intended to canvass the views of residents, businesses and interested parties as to the future use and form of Academy Street, as part of a wider post-Covid review of the role of the central area to which it belongs in the life of the city, its inhabitants and visitors. Although counsel for the respondent was astute - and correct - to point out that the nature and form of the consultation could not be controlled by the petitioners or members of the public more generally, it is equally true that that control does not entirely rest with the respondent; it had to act within the requirements of procedural fairness, the arbiter of which is the court alone - *Medway* at [32]. It follows that the respondent's apparent belief that the purpose of the voluntary consultation exercise was simply to produce a single option for formal consultation as part of the anticipated TRO process cannot in itself govern the question of the fairness of that exercise.

[36] Although fairness may be a protean concept in the sense that it is readily capable of moulding itself to the exigencies of any specific situation, its requirements are not unduly unpredictable. As a minimum, the Sedley principles (in sum, that consultation should take place when proposals are at a formative stage, that sufficient information and reasons should be provided to enable an intelligent consideration and response, that adequate time be afforded for such a response, and that the results of the consultation should be conscientiously evaluated and considered) apply. Beyond that, the reasons why consultation is, as a general proposition, undertaken in the first place, as identified in

Moseley at [24], guide the incidents of fairness from case to case: that it produces better decisions by ensuring that all relevant information is made available and tested before a decision is made; that it avoids fostering a sense of injustice in those affected by the decision; and that it aids the democratic process by assisting in determining not only whether action should be taken but, if so, what that action should be.

[37] Although much depends on how one analyses the facts of a consultation (*Montpeliers* at [23]), on an objective analysis of the events of the consultation exercise in the present case, the following observations may be made. During the initial stage of the exercise, until November 2022, when Option A was being canvassed, there was no indication from the respondent that any active consideration was being given to the possibility of Academy Street being closed to through private traffic. Those participating in the consultation were accordingly not invited or encouraged to comment on such a possibility. On the material shown to me, the move away from Option A to Option B, which was very materially different from Option A and which one might reasonably expect to raise a contrasting pattern of comments, took place in November 2022 on the ground that the source of finance from which it was hoped to draw the funds necessary to implement whatever scheme was settled upon for Academy Street (ie Sustrans) would not be available to support Option A or some variant thereof. From that point until August 2023, the focus was on the development of Option B to the point of viability, and during that period the focus of consultation was on it, with the result that consultees were no longer invited or encouraged to comment on Option A. There was nothing inherently unfair in proceeding with what was, in effect, a phased consultation for that period. The difficulty came in August and September 2023 when the respondent, faced by its officers with a stark choice between the developed Option B and reverting to the pre-Covid situation, chose to move forward with the former as

the sole proposed scheme to be taken through the TRO process and into possible implementation without affording any further opportunity for consultation on the respective merits and disadvantages of Options A and B, or indeed on those of reverting to the pre-Covid situation or maintaining for the meantime the "Spaces for People" measures which had been taken during the pandemic. That choice was, accordingly, made against the background that no effective representations could be made about Option A during the last nine months or so of the overall consultation period, and that the respondent had disabled itself from hearing in any consolidated manner the views of legitimately interested parties on the respective merits and disadvantages of Option A, the developed Option B, the *status quo* and reversion to the pre-Covid situation; cf. *Montpeliers* at [29]. Although it was submitted to me that the opportunity for further comment on Option A, or indeed any other idea, would be open during the statutory TRO consultation process which would now be undertaken in connection with the developed Option B, the authorities are clear that a consultation may well not be regarded as fair if it, in effect, relies on consultees arguing for an option of potential central significance which the process to that point has already excluded from further consideration: *Medway* at [30] and, especially, [32]; *Montpeliers* at [27].

[38] Testing the consultation process as a whole against the Sedley principles and the indicators of unfairness derived from *Moseley*, it may be seen that, at the very least, the sequence of events which transpired in the course of the consultation exercise failed to assist the respondent not only to choose whether or not to take any action, but to select which course of action it might most advantageously take; it was productive of a legitimate sense of injustice on the part of the petitioners and, it may be, others in a similar position to them; and insofar as reliance is placed on the TRO consultation exercise yet to come, is not taking

place at a point where proposals are in any meaningful way at a formative stage. While I entirely absolve the respondent and its officers of any subjective intention to run a substantively unfair consultation exercise, recognising that it may only be with the benefit of hindsight that one can see where and how matters went awry, objectively viewed their actions were calculated to, and did, produce a consultation which was unfair to and beyond the point of unlawfulness. The respondent's decisions of 28 August and 14 September 2023 which are complained of were predicated on that unlawful consultation, and fall to be reduced accordingly.

Material considerations

[39] It is difficult, and ultimately unnecessary in this case, to attempt to disentangle the question of whether material considerations were not taken into account by the respondent in coming to its decisions in August and September 2023 from the question of the overall adequacy of the consultation process. If one of the prime purposes of consultation is to furnish a public authority with the information which it needs to make an appropriate decision, then it might be thought axiomatic that there is at least a real possibility that an inadequate consultation process may have led the authority to proceed without regard to potentially material considerations which, although not quite the way in which the test for the court's intervention was propounded in *Bolton*, approximates to it.

[40] However, the particular criticism in this connection made by the petitioners was that the decisions in August and September 2023 had been taken without the benefit of any economic or traffic impact assessments of the competing options. Dealing with that matter specifically, I consider that it was open to the respondent, without straying into the realm of irrationality, to determine that such assessments were best carried out as part of the TRO

process - as they now have been - rather than at the stage of informing in the first instance the proposal to be taken forward into that process. I would not, accordingly, have been prepared to set aside the decisions complained of on this basis.

Planning officer's report

[41] Approaching the officer's report to the meetings of August and September 2023 with that degree of benevolence in construction which authority demands, I am unable to conclude that its terms were materially misleading, or that they were in fact likely to have misled those participating in the decisions which were made. Although, as must often be the case in reports of various kinds to decision-making bodies, matters could, when viewed in retrospect, have been more pointedly expressed than they were, the figures reported on were not positively mis-stated, and the respondents' members must be taken to have had the necessary background knowledge, at least if they chose to deploy it, to have been able to determine their true significance. Any suggestion to the contrary falls to be regarded as too speculative to amount to a valid ground of complaint. I reject this ground of challenge.

Predetermination

[42] The question which falls to be asked in this connection is whether the circumstances suggest that the respondent's collective mind was closed to the merits of the decision which it was called upon to take in August 2023 and to confirm in the following month: *Lewis*; *Island Farm*. The authorities recognise that that is a high hurdle to overcome. In the present case, I find no positive evidence that the respondent's collective mind was closed. The decision which it had taken in November 2022 may have predisposed the minds of certain members towards a solution which was likely to obtain Sustrans funding, but that was not

an irrational position to adopt, and the suggestion that such a solution would have been preferred by those members whatever its disadvantages or whatever the merits of any other scheme that might have been laid before them is not made out on the material presented to me. I reject this ground of challenge to the decisions of August and September 2023.

Disposal

[43] I shall sustain the petitioners' first plea-in-law, repel their second plea and those of the respondent, and reduce the decisions of the respondent dated 28 August and 14 September 2023 which are complained of.