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

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 19th December 2008

B e f o r e :

SIR MICHAEL HARRISON

Between:

THE QUEEN ON THE APPLICATION OF

(1) DEBBIE DOMB

(2) DULCE SOBRAL

(3) MOSES BUSHIWA

Claimants

v

LONDON BOROUGH OF HAMMERSMITH AND FULHAM

Defendant

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(Official Shorthand Writers to the Court)

Mr David Wolfe (instructed by Public Law Project) appeared on behalf of the **Claimants**

Mr Julian Milford (instructed by the London Borough of Hammersmith and Fulham)
appeared on behalf of the **Defendant**

J U D G M E N T

(As Approved by the Court)

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1. SIR MICHAEL HARRISON: Background

In these judicial review proceedings, the claimants challenge the decision of the defendant, the London Borough of Hammersmith and Fulham ("the Council"), made on 16th June 2008 to introduce charges for the home care services it provides to the claimants and to other home care service users within the borough.

2. On 14th October 2008, Mr Robert Jay QC, sitting as a Deputy High Court Judge, ordered that the claim should be dealt with as a rolled up permission and substantive hearing on an expedited basis because the Council proposes to introduce the new charging system for home care services as from 1st January 2009. I am satisfied that the claimants have an arguable case. I therefore grant permission and proceed to consider the substantive case.
3. The first claimant, Deborah Domb, is aged 50. She is a wheelchair user who needs help in many aspects of her daily life. The second claimant, Dulce Sobral, is aged 48. She suffers from a number of medical conditions leaving her constantly exhausted and in severe pain so that she needs assistance with many of the physical tasks of daily living. The third claimant, Moses Bushiwa, is aged 25. He lives alone and is completely blind so that he needs assistance with a wide range of daily activities.
4. The claim really falls into two parts. The first part of the claim involves two main issues - firstly, whether the Council's Executive, the Cabinet, failed to take into account that the introduction of the charges breached an alleged legitimate expectation arising from the Council's manifesto and, secondly, whether the Cabinet had power in any event to make the decision to introduce the charges. The second part of the claim relates to the alleged failure of the Council to comply with its disability, race and gender equality duties. Those two different parts of the claim are capable of being dealt with separately. I start therefore by dealing with the first part of the claim.

First part of the claim - legitimate expectation

a) facts

5. The first issue under the first part of the claim is the alleged failure to take into account that the introduction of the charges would breach an alleged legitimate expectation arising from the Council's manifesto that there would not be charging for home care services. In dealing with that issue, it is necessary to refer first of all to the relevant facts.
6. There is no dispute that the Council has power under section 17 of the Health and Social Services and Social Security Adjudications Act 1983 to make charges for the non-residential home care services it provides. Indeed, I was told that 97 per cent of councils charge for such services.
7. In the case of Hammersmith and Fulham, the Council exercised the power to charge from 2000 to 2006, but that policy was discontinued by the then Labour Administration as from 1st March 2006. The Conservatives approved of the discontinuance of the

charging scheme and, in their manifesto for the 2006 local elections, they stated "A Conservative Council will not reintroduce Home Care Charging".

8. The Conservatives won the local election and the new Council held its inaugural meeting on 24th May 2006. It was described as the Annual Council Meeting. The manifesto was one of the items included on the agenda. Under that heading, the agenda stated:

"To receive and note the Conservative Administration's Manifesto for the Council for 2006-2010".

The Mayor's notes for the meeting, which had been drafted by the committee clerk, stated under the dialogue column:

"I call on the Leader of the Council to move the adoption of the Conservative Administration's Manifesto for the period 2006-2010."

The notes stated under the directions column:

"The Leader is usually given unrestricted time to speak to this item - all other speeches are limited to 5 minutes."

9. The Minutes of the meeting relating to the manifesto item record that the Leader of the Council, Councillor Greenhalgh, outlined the Conservative Administration's manifesto for the Council and that the Leader of the Opposition, Councillor Cowan, made a speech in reply "before the item was duly noted". The minutes then record that it was resolved "That the new Conservative Administration's manifesto for the Council for 2006-2010 be duly noted and adopted".
10. During the next two years the Council experienced increasing pressure on its adult social services budget. Ultimately, officers could only identify two ways of bridging the gap in funding - by increasing the threshold eligibility criteria for social care services or by introducing charges for care services. There followed a 12 week consultation period between February and May 2008 during which time a Predictive Equality Impact Assessment was undertaken. The second part of the claim in this case relates to that aspect of the matter.
11. On 16th June 2008 there was a meeting of the Cabinet at which the issue of home care charging was on the agenda. The officer's report for that meeting recommended that the Council charged service users for home care in line with the Department of Health's Fairer Charging Guidance with an implementation date of 1st January 2009. The Cabinet resolved to adopt that recommendation with a charge of £10 per hour increasing in the light of assessed need for services, if need or costs increase, up to £12.40 per hour. That is the decision that is challenged in these proceedings.
12. It is clear from the witness statements filed on behalf of the Council that the Leader of the Council, Councillor Greenhalgh, and the Cabinet Member for Community and Children's Services, Councillor Lillis, were acutely aware that by introducing charges

for home care services they were departing from their manifesto pledge. That fact was put to them by opposition councillors during the meeting on 16th June 2008.

b) Submissions

13. Mr Wolfe's argument on behalf of the claimants on this aspect of the case was, to put it shortly, that the Minutes of the Council meeting on 24th May 2006 show that the Council adopted the manifesto thereby giving rise to a legitimate expectation that the Council would not reintroduce home care charging, but on 16th June 2008 when the cabinet resolved to introduce home care charging it failed to have regard to the fact that it was in breach of a promise which had given rise to a legitimate expectation that it would be honoured.
14. Placing reliance on the words "noted and adopted" (my underlining) in relation to the manifesto in the Minutes of the Council's meeting on 24th May 2006, Mr Wolfe drew a distinction between a mere manifesto promise and the adoption of a manifesto promise. He relied on a remark made by Sedley LJ in the case of R v Secretary of State for Education and Employment, ex parte Begbie [2000] 1 WLR 1115. In that case Peter Gibson LJ stated at page 1126D that when a party elected into office fails to keep its election promises, the consequences should be political and not legal. Laws LJ remarked at page 1131C that the more the decision challenged lies in what may be inelegantly called the macro-political field, the less intrusive will be the court's supervision. Sedley LJ, in what is agreed to be an obiter remark in the last paragraph of his judgment, stated at page 1134C:

"A pre-election promise may of course be expressly adopted by a new administration once in office, but then it acquires a new character with, no doubt, consequences analogous to those of any other representation made by a public authority."
15. Mr Wolfe submitted that the statement in the manifesto that a Conservative Council will not reintroduce home care charging was a clear and unambiguous statement which had been adopted by the Council. He accepted that the Council could charge its mind but he submitted that, if it did so, it had to take into consideration that it was in breach of a promise which had given rise to a legitimate expectation. He relied on the dictum of Schiemann LJ in R (on the application of Bibi) v Newham London Borough Council [2002] 1 WLR 237 at paragraph 39, where he stated:

"But, on any view, if an authority, without even considering the fact that it is in breach of a promise which has given rise to a legitimate expectation that it will be honoured, makes a decision to adopt a course of action at variance with that promise then the authority is abusing its powers."
16. Mr Wolfe submitted that, although the Cabinet were aware at the meeting on 16th June 2008 that they were going against the manifesto statement about not charging, they treated it as a mere manifesto promise and failed to accord it the greater legal significance of an adopted Council decision. He drew attention to paragraph 1.2(d) of

the Council's Procedure Rules, which form part of the Council's Constitution, where one of the matters to be considered at the Annual Meeting is "approving or adopting" the policy framework of the authority. He submitted that the Council had adopted the manifesto as part of the policy framework. He also placed importance on the fact that, at the Council meeting on 28th June 2006, the Minutes of the Annual Council Meeting held on 24th May 2006 were confirmed as an accurate record.

17. Mr Kerr QC, who appeared on behalf of the Council, submitted that, to establish a breach of legitimate expectation, the claimants must show that they had a reasonable expectation based on a clear and unequivocal promise which was made by a body with power to give effect to the promise and that the Council failed to take the promise into account when resiling from it so as to constitute an abuse of power and that, in most cases, detrimental reliance had been placed on the promise. It was contended that none of those conditions were fulfilled.
18. Mr Kerr submitted that the fact that the manifesto was "noted and adopted" at the inaugural meeting on 24th May 2006 could not reasonably have been understood as converting it into anything of greater significance than a manifesto. It had been prepared by a political party not in office without the benefit of detailed reports and advice from officers and no further work had been undertaken on it during the 14 days before the Annual Meeting. Reliance was placed on what was described as the evident ambiguity of the nature of the decision taken on 24th May 2006 by reference to the facts that the Agenda only included the matter to be noted, not adopted, there was no vote on the matter, and the previous sentence in the Minutes stated that the item was duly noted. It was submitted that the inclusion of the item on the agenda was clearly ceremonial in that it was the first opportunity following the election for the Leaders of both the Conservatives and the new Opposition to restate in Council the political aspirations on which they had been elected without a meaningful debate or a vote being taken. Mr Kerr contrasted that with the preceding items on the Agenda relating to the Constitution and three business special motions, all of which were put to the vote. He suggested that the words "and adopted" had crept in inadvertently from the Mayor's notes and that they did not convert the manifesto into anything more than that.
19. Both parties drew attention to the words used in the Minutes of previous Annual Meetings. In 1986, 1990, 1994 and 1998, the Minutes had referred to the manifesto as being endorsed or adopted as policy or as an overall framework for Council policy, a vote being taken on each occasion, whereas after the Local Government Act 2000, with the introduction of the Cabinet or Executive system, the Minutes for 2002 record the manifesto as having been merely "noted", albeit after a vote. Mr Kerr relied on the difference in the resolutions relating to the manifesto between the old and the new regime whilst Mr Wolfe relied on the difference in the wording of the resolutions between 2002 and 2006. Mr Wolfe also submitted that there is no provision for such a thing as a ceremonial decision, that neither the Agenda nor the Mayor's notes determine the position and that what matters is the Minutes which used the word "adopt", there being no evidence to support the assertion of an error by the minute taker.

c) Conclusions

20. My conclusions on this matter have also taken into account the second issue in this part of the claim, namely the vires issue, because there is a potential interconnection between the two issues but, for the sake of clarity, I propose to deal with the first issue separately before proceeding to consider the second issue in this part of the claim.
21. The claimant's argument really hinges on the obiter dictum of Sedley LJ in the Begbie case which I have quoted earlier, namely that if a pre-election promise is expressly adopted by a new administration it acquires a new character with consequences analogous to any other representation made by a public authority. Before seeking to apply that principle, it is necessary, in my view, to bear in mind the context and the circumstances in which the matter arises. In the circumstances of this case, and having regard to the various matters that I have mentioned when summarising the parties' submissions, I do not consider that the words "noted and adopted" in the Minutes of the Annual Meeting on 24th May 2006 could reasonably be understood as cloaking the manifesto with the greater legal consequences for which the claimants contend. Whilst I would accept that there is no such legal creature as a ceremonial decision, it is a matter of determining the nature of the decision recorded in the Minutes. It is significant that, unlike the occasions when the manifesto was considered prior to the introduction of the Local Government Act 2000, it was not stated to be adopted as policy or as an overall framework for Council policy. The fact that no vote was taken is also relevant. There was much more in the manifesto than simply the non-reintroduction of home care charging. It is unlikely that the Opposition would have agreed to the matters to which they were opposed being adopted as policy without a vote being taken.
22. I do not therefore consider that the resolution recorded in the Minutes relating to the manifesto gave rise to the legal consequences contended for by the claimants. Insofar as it gave rise to an expectation that home care charging would not be reintroduced, that was something of which the councillors were acutely aware when they resolved to introduce charging on 16th June 2008. It is clear from the witness statements of Councillor Greenhalgh and Councillor Lillis that they were well aware that they were departing from their manifesto pledge and that it was something that they took into account.
23. Quite apart, therefore, from the issue of vires, I would not accept the claimant's case that the Cabinet failed to take into account that they were breaching a legitimate expectation that home care charging would not be reintroduced. In my view, no such legitimate expectation arose on the facts of this case.

First part of claim - the issue of vires

a) facts

24. I now turn to deal with the vires point which is the second issue under the first part of the claim. The parties' submissions involve consideration of the Council's Constitution and consideration of the relevant statutory provisions under the Local Government Act 2000 ("the 2000 Act") and under the Local Authorities (Functions and Responsibilities) (England) Regulations 2000 ("the Regulations"). It is therefore necessary first of all to

refer to the relevant provisions of the Constitution and of the statutory legislation before turning to the parties' submissions.

i) Council's Constitution

25. Dealing first with the Council's Constitution, the Summary and Explanation states in paragraph 9 that the Executive has to make decisions which are in line with the Council's overall policies and budget. Article 4 of the Constitution deals with the full Council and states as follows:

"The full Council is responsible for setting the Budget and Policy Framework within which the Council must operate under an Executive form of governance (Leader and Cabinet).

4.01 Definitions

(a) **Policy Framework.** The policy framework means the following plans and strategies which are currently required by law to be considered and approved by the full Council:-

- Best Value Performance Plan;
- Children's Services Plan;
- Community Strategy;
- Crime and Disorder Reduction Strategy;
- Early Years Development Plan;
- Education Development Plan;
- Local Development Framework.

The Secretary of State has the power to relax the requirements in relation to plans and strategies. Accordingly, the plans and strategies set out above shall only form part of the Budget and Policy Framework and be approved by the full Council to the extent required by law.

26. Paragraph 4.02 of Article 4 of the Constitution deals with the functions of the full Council and states that only the full Council will exercise, *inter alia*, the function of approving or adopting the policy framework.
27. Article 6 provides for Scrutiny Committees to be appointed in accordance with the political proportion of the Council as a whole to review or scrutinise decisions in connection with the discharge of any of the Council's functions.
28. Article 7 deals with the role of the Executive and provides as follows:

"The Executive (commonly referred to as 'the Cabinet' in Hammersmith

& Fulham) will carry out all of the local authority's functions which are not the responsibility of any other part of the local authority, whether by law or under this Constitution."

29. Paragraph 3 of the Council's Procedure Rules, which form part of the Constitution and which by virtue of paragraph 13 of the Constitution the full Council must follow, provides that the Executive can only take decisions that are in line with the policy framework except in cases of urgency.

ii) statutory provision

30. Turning to the statutory provisions, section 13 of the 2000 Act deals with functions which are the responsibility of the Executive. It provides, so far as relevant, as follows:

"(1) This section has effect for the purposes of determining the functions of a local authority which are the responsibility of an executive of the authority under executive arrangements.

(2) Subject to any provision made by this Act or by any enactment which is passed or made after the day on which this Act is passed, any function of a local authority which is not specified in regulations under subsection (3) is to be the responsibility of an executive of the authority under executive arrangements.

(3) The Secretary of State may by regulations make provision for any function of a local authority specified in the regulations—

(a) to be a function which is not to be the responsibility of an executive of the authority under executive arrangements,

(b) to be a function which may be the responsibility of such an executive under such arrangements, or

(c) to be a function which—

(i) to the extent provided by the regulations is to be the responsibility of such an executive under such arrangements, and

(ii) to the extent provided by the regulations is not to be the responsibility of such an executive under such arrangements.

...

(6) The Secretary of State may by regulations specify cases or circumstances in which any function of a local authority which, by virtue of the preceding provisions of this section, would otherwise be the responsibility of an executive of the authority to any extent is not to be the responsibility of such an executive to that or any particular extent.

...

(10) Accordingly any function which is the responsibility of an executive of a local authority under executive arrangements—

(a) may not be discharged by the authority..."

31. Regulation 2 of the Regulations made pursuant to the 2000 Act deals with functions which are not to be the responsibility of an authority's executive. They are specified in Schedule 1 of the Regulations. Regulation 3 deals with functions which may be the responsibility of an authority's executive. They are specified in Schedule 2 of the Regulations. Regulation 4 deals with functions which are not to be the sole responsibility of an authority's executive. Regulation 4 provides, so far as relevant, as follows:

"(1) In connection with the discharge of the function -

(a) of formulating or preparing a plan or strategy of a description specified in column (1) of Schedule 3 to these Regulations;

[(b) of formulating a plan or strategy for the control of the authority's borrowing or capital expenditure; or]

(c) of formulating or preparing any other plan or strategy whose adoption or approval is, by virtue of regulation 5(1), a matter for determination by the authority,

the actions designated by paragraph (3) ('the paragraph (3) actions') shall not be the responsibility of an executive of the authority.

(2) Except to the extent of the paragraph (3) actions, any such function as is mentioned in paragraph (1) shall be the responsibility of such an executive.

(3) The actions designated by this paragraph are -

...

d) the adoption (with or without modification) of the plan or strategy."

32. Regulation 5 deals with the discharge of executive functions by authorities. Regulation 5(1) states:

"Subject to paragraph (2), a function of any of the descriptions specified in column (1) of Schedule 4 to these Regulations (which, but for this paragraph, might be the responsibility of an executive of the authority), shall not be the responsibility of such an executive in the circumstances specified in column (2) in relation to that function."

33. Paragraph 1 of column (1) of Schedule 4, under the heading "Function", states:

"The adoption or approval of a plan or strategy (whether statutory or non-statutory), other than a plan or strategy of a description referred to in regulation 4(1)(b) or Schedule 3."

34. Column (2) of Schedule 4, under the heading "Circumstances", states:

The authority determines that the decision whether the plan or strategy should be adopted or approved should be taken by them."

(b) submissions

35. Mr Wolfe's argument was that the Executive had no power to decide on 16th June 2008 to introduce home care charging because the adoption of the manifesto by the Council on 24th May 2006 was part of the Council's policy framework and thus became the sole responsibility of the Council pursuant to Article 4 of the Constitution. He also reached the same conclusion by reference to Regulation 4(1)(c) and Regulation 5(1) and Schedule 4, paragraph 1 of the Regulations.

36. Mr Wolfe's argument based on the Constitution was that the definition of the policy framework in article 4.01(a) of the Constitution was not exhaustive. He relied in particular on the last sub-paragraph which stated that the plans and strategies set out in Article 4.01(a) shall only form part of the policy framework. As the adoption of the manifesto was part of the Council's policy framework and as, under Article 4.02 of the Constitution, only the full Council can adopt the policy framework, it was submitted that the Executive had no power to act as it did.

37. The position under the Regulations is somewhat convoluted but, as there is a measure of common ground, I can deal with it without going into all the intricacies. It was common ground that home care services are not specified in regulations made under section 13(3) of the 2000 Act and that, without more, they would by virtue of section 13(2) be the function of the Executive alone and could not, by virtue of section 13(10), be discharged by the Council. Mr Wolfe, however, relied on section 13(6) as providing a route whereby regulations can take away from the Executive responsibility for a function which would otherwise be a responsibility of the Executive. Under the Regulations, there are a number of functions that are specified as not being the responsibility of the Executive. Home care does not come within any of the functions specified in Regulation 2 and Schedule 1, Regulation 3 and Schedule 2 or Regulation 4(1)(a) and Schedule 3. Mr Wolfe, however, relied on Regulation 4(1)(c), read together with Regulation 4(3)(d), which applies to the adoption of any other plan or strategy whose adoption is, by virtue of Regulation 5(1), a matter for determination by the authority. Regulation 5(1) provides that a function specified in column (1) of Schedule 4 shall not be the responsibility of the Executive in the circumstances specified in column (2) of that Schedule. The circumstances specified in column (2) are that the authority determines that the decision whether the plan or strategy should be adopted or approved should be taken by them. Mr Wolfe submitted that, on 25th May 2006, it was implicit that the Council had determined that the decision whether the policies in the

manifesto should be adopted as a plan or strategy should be taken by the full Council and that the Executive therefore had no power to reach the decision that it did on 16th June 2008.

38. Mr Kerr, on the other hand, submitted that Article 4.01 of the Constitution was exhaustive. I was told that there used to be eleven plans and strategies which were required by law to be approved by the full Council, but the Secretary of State has since relaxed that to the present seven plans and strategies specified in Article 4.01. Mr Kerr suggested that the reference in the last sub-paragraph of Article 4.01 to the plans and strategies only being part of the policy framework was a reference to them only being part of a policy framework to the extent required by law. In other words, if the Secretary of State further relaxed the requirement by deleting some of the present seven plans or strategies, they would then fall out of the policy framework. It was therefore submitted that, as the definition of the policy framework in Article 4 of the Constitution was exhaustive and as home care services did not come within it, it was the responsibility of the Executive and, by virtue of section 13(10)(a) of the 2000 Act, could not be discharged by the Council. For that reason also, he submitted that the adoption of the manifesto could not be the foundation of a legitimate expectation because the fulfilment of the promise was ultra vires the Council.
39. So far as the position under the statutory provisions is concerned, Mr Kerr's argument was that there had not been a determination by the Council that the decision whether the plan or strategy should be adopted should be taken by the Council as required by column (2) of Schedule 4 of the Regulations. The Minute of the decision of 25th May 2006 did not describe the manifesto as a plan or strategy or even as a policy or policy framework as had been the position before the new executive arrangements were introduced in 2000. There was, he said, no discussion about which body should take the decision whether the plans and strategies in the manifesto should be adopted, and there was no determination of the sort set out in column (2) of Schedule 4. Mr Kerr suggested that it would be surprising if the Council had intended on 25th May 2006 to take away from the Executive all the matters in the manifesto that would otherwise be the responsibility of the Executive without even a vote on the matter, especially in circumstances where two items earlier on the Agenda the Council had approved the Constitution which only reserved the policy framework and the budget to the Council. Finally, Mr Kerr told me that the manifesto has not been treated by the Council since 24th May 2006 as being part of the policy framework so that, if it had in fact become part of the policy framework, all the decisions taken by the Executive in the last two years on matters contained in the manifesto which were not precisely consistent with it would have been ultra vires.

(c) conclusions

40. In my view, on the proper construction of Article 4 of the Constitution, the description of the policy framework is exhaustive. The first sentence of that definition states that the policy framework "means" the plans and strategies specified in that paragraph. Those are the plans and strategies which are currently required by law to be approved by the full Council. It does not say that the policy framework simply includes those plans and strategies. In my judgment, it is clear that the policy framework consists of

those plans and strategies referred to in paragraph 4.01(a) of the Constitution and that the definition is exhaustive. The reference in the last sub-paragraph to those plans and strategies only forming part of the policy framework is a reference to them only forming part of the policy framework to the extent required by law, in the light of the previous sentence which refers to the Secretary of State's power to relax the legal requirement for those plans and strategies to be approved by the full Council. My conclusion is that the manifesto is not a plan or strategy which comes within the definition of the policy framework in Article 4 of the Constitution. It is not therefore a matter which is required by the Constitution to be approved by the full Council. By virtue of Article 7 of the Constitution, it is a matter for the Executive.

41. Under the relevant statutory provisions, that would also be the position under section 13(10)(a) of the 2000 Act unless the claimants' argument under Regulation 4(1)(c) and 4(3)(d), coupled with Regulation 5(1) and Schedule 4, is correct. That in turn boils down to whether the Council made a determination within the meaning of column 2 of Schedule 4. Whilst I can understand the claimants' position that, if the Council says it adopts a plan it is implicit that the plan is for it to adopt, the position is not as straightforward as that. A determination by a Council that it will take a decision which would otherwise be for the Executive is an important step which one would expect to be the subject of a resolution before the decision that would otherwise be for the Executive is taken. In this case, there was no discussion about it, no vote was taken on it, no resolution was passed in relation to it and the manifesto was not referred to as a "plan" or "strategy". In short, there was no determination of the kind referred to in column (2) of Schedule 4 and I do not consider that it would be appropriate in the circumstances to conclude that it was implicit. That is all the more so in the light of the fact that, at the same meeting, the Council had approved the Constitution only minutes earlier, which provides that the only plans and strategies which are for the full Council are those in the policy framework, the definition of which, as I have said, is exhaustive.
42. I therefore conclude that the manifesto does not become the responsibility of the full Council either under the Constitution or under the relevant statutory provisions. It is the responsibility of the Executive which has been dealing with it lawfully since 24th May 2006. It is a further reason why the relevant resolution of the Council on 24th May 2006 could not give rise to a legitimate expectation.
43. For all of the above reasons, I do not accept the claimants' contentions in respect of either of the two issues arising under the first part of this claim.

Second part of the claim - general equality duties

44. The second part of the claim relates to the alleged failure of the Council to comply with its disability, race and gender equality duties. I start by dealing with the basic statutory provisions.
 - a) statutory provisions
45. The basic statutory duties are contained in section 71(1) of the Race Relations Act 1976, section 76A(1) of the Sex Discrimination Act 1976 and section 49A(1) of the

Disability Discrimination Act 1995. Put shortly, those provisions impose a duty on a public authority to have "due regard" to the need to eliminate unlawful discrimination and to the need to promote equality of opportunity in relation to the relevant equality duty. The former has been described as the negative duty and the latter the positive duty. The relevant regulations made under those Acts require, respectively, a race, gender and disability scheme to be published by the local authority showing, inter alia, its proposals for assessing the impact of its policies and proposals, or the likely impact of its policies and proposals, on equality in respect of the relevant equality duty. In each case, there is a statutory Code of Practice which sets out further details in relation to the requirements relating to the relevant equality duty.

b) the facts

46. The facts of this part of the case are somewhat complex because all three of the general equality duties mentioned above are involved, although it is the disability equality duty which is the most relevant because home care is provided to disabled people who would therefore be affected by a home care charging policy.
47. I have already mentioned previously that there was a shortfall in the adult social services budget and that, ultimately, it was concluded that the claim in funding could only be bridged by increasing the threshold eligibility criteria or by introducing charges for care services. The Council therefore decided on 17th January 2008 to consult on the possibility of re-introducing a home care charging scheme. That consultation took place over a 12 week period between February and May 2008. The consultation included a questionnaire and 30 consultation events. A Charging Reference Group acted as a reference point for the consultation. That group consisted of Hammersmith and Fulham Action on Disability (a local voluntary organisation which provides services and campaigns for people with disabilities), the Hammersmith and Fulham Disability Forum (an action group of service users and residents), the Hammersmith and Fulham Better Government Consultative Forum for older and disabled people, and Hammersmith and Fulham Mencap (a voluntary organisation for people with learning disabilities). Views were sought from a large number of present and prospective service users. The Council offered to consult the Hammersmith and Fulham Coalition Against Cuts, with whom the claimants are associated, but that body did not wish to be consulted because it disagreed with charging in principle. Each of the three claimants were sent consultation questionnaires and the third claimant attended the consultation meeting with the Disability Forum where he made his views known.
48. The consultation process was designed to be part of the Predictive Equalities Impact Assessment ("the PEIA"). Assessment meetings were held on 12th May 2008, attended, amongst others, by Ms Jane Wilmot, who is chair of the Disability Forum and co-vice chair of the Action on Disability Group and who has made a witness statement in this case.
49. On 14th May 2008, Ms Angela Jenkinson, who is the Council's Head of Directorate Development and who managed the whole process on behalf of the Council, sent out the first draft of the PEIA. It was the first of a number of versions of the PEIA, all of which were marked "Draft-Confidential" until the final one on 9th July 2008. Ms

Wilmot was consulted on the drafts and some of the amendments resulted from her suggestions. In her witness statement, she says that she did not consult with organisations which she represented because the drafts were marked confidential, but I was told by the Council that the confidential notation was only intended to prevent general circulation.

50. The Cabinet approved the charging policy on 16th June 2008, that is to say before the final PEIA. The Council says that the draft PEIA as at 16th June 2008 was the substantive PEIA and that the subsequent versions only included minor changes.
51. The Council has a policy that the PEIA is not put before Cabinet members, but report writers are recommended to include in the main report any equality issues or linkages. It is strongly advised that the PEIA is completed and signed off well before the main report proceeds to Cabinet members.
52. In this case, the main report to Cabinet, which was written by Ms Jenkinson, was completed on 6th June 2008 so that it was available in good time for the meeting on 16th June 2008. The claimants' case is based in the main on the alleged deficiencies in the PEIA which existed as at 16th June 2008 and on alleged deficiencies in the main report to Cabinet relating to general equality duties. It is necessary therefore to refer to the parts of those documents which were relied on by the parties.
53. Dealing first with the PEIA in its form as at 16th June 2008, section 3 of that document was headed "Could the proposal have a positive impact on a) race, b) disability, c) gender...?" Under that heading was a paragraph which stated:

"The key positive impact for disadvantaged groups would be the continued ability of the Council to meet the population's growing adult social care needs up to and including 2010/2011 at the current threshold for services."

54. Section 4 of the PEIA was headed "Could the proposal have a negative impact on a) race b) disability c) gender...?" Under that heading came the following paragraphs:

"A decision to introduce a home care charging policy would have a negative impact on those current and prospective service users who would be eligible to pay and on informal carers who support service users who would be eligible to pay. In particular, a home care charging policy would have a negative impact on those service users whose income only just exceeds the charging threshold as set down in the Fairer Charging Guidance.

The Council has a legal obligation to provide services to meet assessed need regardless of service users' ability to pay. Despite this, some people might be reluctant to request or accept home care services even where services are to meet an assessed need above the eligibility threshold because they feel they are unable to afford home care charges even where they have been assessed as eligible for charging.

These potentially adverse impacts would not be related to age, gender, disability or impairment, ethnic origin, sexuality or belief system. These impacts would mirror the known profile of home care service users. Therefore there would be no group for whom a home care charging policy as proposed would have a disproportionately adverse impact.

The largest single service user groups that questionnaire respondents thought would be most affected were people who were frail and over 65 (51% responses) and people with a physical disability (50% responses). A considerable number of questionnaire respondents thought home care charging would affect everyone equally (44% responses). This was consistent with consultation event outcomes. There was no correlation between race, disability, gender, age or belief system groups and the consultation questionnaire outcomes. Home care charging would not have a differential impact on sexual orientation.

a) Race

- The Council monitors the take up of home care by ethnic group.
- As of Council data produced May 2nd 2008, some ethnic backgrounds are highly represented within home care service users. In particular, 9.41% of the local population is Black or Black British whereas 16.35% of home care users are Black or Black British. Similarly, 4.04% of the local population is Asian or Asian British whereas 5.55% of home care users are Asian or Asian British. The 2004 Housing Needs Survey sets out the distribution of average annual gross household income (including non housing benefits) and indicates a significantly lower mean and median average gross annual income for people of Asian and black ethnic backgrounds than white.
- Mitigating actions would need to take this into account.

b) Disability

- As of Council data produced May 2nd 2008, 561 home care service users were on the Council's Disability Register.
- Of these 561, 64% (358) have a physical disability, 15% (86) have a mental health need, 22% (80) have a visual impairment, 5% (27) have a learning disability and 2% (10) have a hearing impairment. (Some people may be registered under more than one category.)
- Consequently, people with a physical disability are the largest group on the Disability Register who would be affected by an introduction of home care charging.
- People with a physical disability are the second largest group of home care service users. As such, this group would be affected were home care

charging introduced, but not disproportionately.

- People with mental health needs were highlighted through the consultation events as being a group of people who would be particularly adversely affected were home charging introduced. Mental health service commissioners and providers have raised concerns regarding the difficulty in engaging people with mental health needs and in supporting them to accept home care. Mental health service users have raised concerns regarding the stress incurred by introducing a home care charging scheme.

...

c) Gender

As of Council data produced May 2nd 2008, more women than men receive home care. This is probably related to the longer average life expectancy of women compared to men. As such, women would be more affected were home care charging introduced, but not disproportionately so."

55. Finally, so far as the PEIA is concerned, section 5 was headed "Can any negative impact of the decision be justified?" Under that heading were the following paragraphs:

"The intended positive impact of a decision to charge for home care services would be the continued ability of the Council to meet the population's growing adult social care needs up to and including 2010/2011 at the current threshold for services. Therefore, a home care charging policy would ensure that the most vulnerable people continued to have access to and benefit from the services that they need.

Furthermore, a number of specific actions to mitigate against the impact of a decision to charge for home care services have been identified through the home care charging consultation process and through conducting the equalities impact assessment.

Identified actions as outlined below will be included within the home care charging implementation plan."

56. There then followed details of five identified actions which related to income maximisation, financial assessments, training and development, home care quality and information and communication.
57. The main report to Cabinet, having stated that a PEIA had been completed, dealt at some length in section 4 with the consultation exercise. Under that heading, paragraph 4.74 dealt with service user groups affected and stated:

"4.7.4.1 The largest single service user groups that questionnaire respondents thought would be most affected were people who were frail

and over 65 (51% responses) and people with a physical disability (50% responses). A considerable number of questionnaire respondents thought home care charging would affect everyone equally (44% responses). This was consistent with consultation event outcomes.

4.7.4.2 It is likely that few younger mental health service users would be affected were home care charging introduced. However, the nature of that impact was of great concern to younger service users with mental health needs as well as commissioners and providers. Concerns were expressed during consultation events that difficulties in engaging home care services with younger people with mental health needs would be exacerbated if there were a charge and that younger people with mental health needs would be especially vulnerable to exploitation were they to go direct to the market for home care.

4.7.4.3. Similarly, relatively few people with learning disabilities would be affected were home care charging introduced, but the nature of the impact was of concern to service users, commissioners and providers. Concerns were expressed during consultation events that the administrative burden of home care charging would be keenly felt by people with learning disabilities and, again, that this user group would be vulnerable to exploitation."

58. Paragraph 4.7.5 dealt with mitigation actions and paragraph 4.7.6 dealt with quality of home care provision under which paragraph 4.7.6.3 stated:

"Actions to explore these concerns further were identified through the equalities impact assessment."

59. Section 5 of the report dealt with the "Disability Equality Duty" as follows:

"5.1 The Fairer Charging Guidance is limited in its application only to those in receipt of home care. Therefore only disabled people would be affected by a home care charging policy as only disabled people (in the broadest sense) are in receipt of home care.

5.2 Within adult social care the alternative to charging which would have a similar financial impact would be to raise the eligibility threshold and so provide services to fewer service users. The consultation specifically addressed this to enable members to balance the impact of either change on disabled people. Questionnaire responses on this issue were 45% in agreement with the approach of pursuing a home care charging policy as opposed to raising the threshold for social care service. 30% disagreed with this approach. The remainder expressed no view.

5.3 Paragraph 2.35 of the Statutory Code of Practice requires the Council to determine whether or not the consultation was relevant to disabled people. Members were advised that the home care charging consultation

was extremely relevant to disabled people. Paragraph 2.36 of the Statutory Code of Practice requires the Council to determine how proportionately affected disabled people would be by such a policy. Members are advised that this policy affects only people who are disabled in the broadest sense and therefore members must give full consideration as to how a home care charging policy would affect disabled people.

5.4 The Fairer Charging Guidance ensures that service users are charged only an amount they can afford to pay and in many cases this will result in no charge. The assessment of a person's ability to pay is completely distinct from the assessment of need for services so disabled people should not receive fewer services as a result of this proposed policy. However, it is likely to be the case that a number of service users will choose to purchase their care from private providers especially where only domestic support is required as their costs may be less than the Council's charge.

5.5 An equalities impact assessment was undertaken by the charging reference group. The reference group consisted of representatives from the Disability Forum, Hammersmith and Fulham Action on Disability, Better Government and Mencap as well as officers of the Council. Key actions agreed by the group included..."

and the same five key actions were then set out as were included in the PEIA.

60. Section 8 of the report contained comments from the Head of Legal Services which, amongst other things, stated that the Council must be mindful of its duty under section 49A of the Disability Discrimination Act 1995 which was then set out and which included the positive duty under section 49A(1)(c) to have due regard to the need to promote equal opportunity between disabled persons and other persons.

c) case law

61. Before coming to the parties' submissions, I should first deal with the relevant case law referred to by the parties.
62. In R (on the application of Elias) v Secretary of State for Defence [2005] EWHC 1435, a race equality case, Elias J stated that it was necessary in principle for the decision maker to pay attention to both the negative and the positive duties in section 71(1) of the Race Relations Act 1976. In the Court of Appeal [2006] 1 WLR 3213, Arden LJ stated that the purpose of section 71 to require bodies to give advance consideration to issues of race discrimination before making any policy decision was an important and integral part of the mechanisms for ensuring the fulfilment of aims of anti-discrimination legislation.
63. In R (on the application of Baker) v Secretary of State for Communities and Local Government [2008] LGR 239, a planning case involving Irish travellers and consideration of section 71(1) of the Race Relations Act 1976, Dyson LJ stated, in

summarising a submission in paragraph 30 that had not been disputed, that the promotion of equality of opportunity was concerned with issues of substantive equality and required a more penetrating consideration than merely asking whether there has been a breach of the principle of non-discrimination. At paragraph 31, he stressed that the duty under section 71(1) was not a duty to achieve a result, it was a duty to have due regard to the need to achieve the goals mentioned in that subsection. He stated that "due regard" is the regard that is appropriate in all the circumstances. It is a matter of substance, not form. Finally, in paragraph 37 he stated that the question in every case is whether the decision-maker has in substance had due regard to the relevant statutory need.

64. In R (E) v Governing Body of JFS [2008] ELR 445, a schools admission case involving the Race Relations Act 1976, Munby J stated at paragraph 206 that the object of section 71 is to ensure that the potential racial impact of a decision is always taken into account by public authorities as a mandatory consideration. In paragraph 213, Munby J stated that proper compliance with the two goals of section 71 will almost inevitably involve the taking of active steps.
65. Finally, in R (on the application of Kaur) v London Borough of Ealing [2008] EWHC 2062, Moses LJ, sitting in the Administrative Court, stated at paragraph 25 that the process of assessment should be recorded, that it was not satisfied by ticking boxes and that it must be undertaken as a matter of substance and with rigour.

d) submissions

66. I now come the parties' submissions on this part of the case.
67. Mr Wolfe's first submission was that the PEIA was not taken into account by the Cabinet because its members were not given copies of it. Thereafter, Mr Wolfe made a number of detailed submissions relating to the alleged inadequacies of both the PEIA and the main report to Cabinet. I only propose to deal with the main points that he raised.
68. One of the submissions that he made was that neither the PEIA nor the report to Cabinet dealt with the positive duty under the relevant Acts to promote equality of opportunity. He submitted that the PEIA was perverse in concluding that there would be a positive impact from charging arising from the consequential ability to maintain the current eligibility threshold for services because, he said, it was based on the false premise that those were the only two choices. He pointed out that, when the Council's budget decision was made, the adult services care budget was one of the items described as being at risk. The result of restricting the choice to charging or cutting services meant that the absolute impact of the proposal to charge had not been considered.
69. Mr Wolfe next submitted that key elements of the PEIA were not included in the report to Cabinet. Firstly, he referred to the sub-paragraph under the "Disability" heading in the PEIA which dealt with people with mental health needs and which referred to them as being a group "particularly adversely affected", whereas paragraph 4.7.4.2 of the

report to Cabinet stated that few younger mental health service users would be affected by home care charging although the nature of the impact was of great concern to them. He submitted that the latter paragraph gave a different impression to the equivalent paragraph in the PEIA.

70. Secondly, Mr Wolfe referred to the paragraph under the heading "Race" in the PEIA and made the point that there was nothing about that in the main report to Cabinet. The reason for that given by Ms Jenkinson, namely that the effect was negated by the information in the Housing Needs Survey that the income of people of Asian and black ethnic background was lower and that they were therefore less likely to be charged, had, said Mr Wolfe, already been taken into account in that paragraph.
71. Thirdly, Mr Wolfe referred to the paragraph under the heading "Gender" stating that more women than men received home care, probably because their life expectancy is longer and, as such, they would be more affected, but not disproportionately so. His first point was that there was nothing about that in the report to Cabinet, and his second point was that the words "not disproportionately so" meant that the difference was not very great and was therefore intended to have a different meaning from the word "disproportionately" which had been used in an earlier paragraph of this section of the PEIA.
72. In short, the thrust of Mr Wolfe's submissions was that the PEIA was deficient in several respects but that, in any event, its key conclusions never made their way into the main report to Cabinet. He therefore submitted that the assessment had not been carried out as a matter of substance and rigour and that the Council had failed to comply with its disability, race and gender equality duties.
73. Mr Kerr, on the other hand, submitted that the question was whether the Council had in substance had due regard to its equality duties, which was a matter of fact and degree having regard to the entirety of the exercise. He contended that the PEIA was in substance complete by 16th June 2008 and that the subsequent changes to it were minor and constituted fine tuning. The fact that it could be improved did not mean that it was inadequate.
74. Dealing with the PEIA, Mr Kerr submitted that there was nothing irrational in identifying, as a positive impact of charging, the fact that the threshold for care services would not have to be raised. There was a significant shortfall in the social services budget and the only options available to the Council were to introduce charging or to raise the threshold for services. The fact that adult social care had been described as one of the areas "at risk" in the budget report in January 2008 was normal prudent accounting practice. No alternative to the two choices had emerged in the ensuing five months, nor had any been suggested by the claimants. Mr Kerr submitted that the Council had had due regard in the PEIA to the positive aspects of the equality duties by identifying the positive impact of charging in comparison to the only realistic alternative and by identifying mitigating actions and ways in which services to users might be improved as part of the proposals. So far as race and gender are concerned, Mr Kerr said that both groups had been considered in the PEIA, the conclusion being that neither group would suffer a disproportionately adverse impact.

75. Turning to the main report to Cabinet, Mr Kerr submitted that the key points from the PEIA had been included in the report. It was not accepted that there was a significant difference between the paragraph in the PEIA relating to people with mental health needs and paragraph 4.7.4.2 of the main report. The latter, it was said, simply gave more information about the particular categories of mental health service users who would be adversely affected by charging, and the omission of the words "particularly adversely" made no difference in substance because the reason why service users in that category were dealt with in the report was because they had been identified as particularly adversely affected. Mr Kerr also referred me to some figures contained in the final version of the PEIA as showing that the numbers of mental health service users would be small.
76. So far as race and gender are concerned, Mr Kerr submitted that those groups had been correctly omitted from the main report as there was no disproportionately adverse impact in respect of them, as was explained by Ms Jenkinson in her witness statement. She explained in relation to the issue of race that she knew from the Housing Needs Survey that people from Asian and black ethnic backgrounds had significantly lower income than white people and were therefore less likely to be in receipt of chargeable income. The statement that "mitigating actions would need to take this into account" was, said Ms Jenkinson, intended to ensure that the implementation group take that into account in its information and communication plan.
77. So far as gender is concerned, Ms Jenkinson explained in her witness statement, as indeed is clear from the PEIA, that female users, although greater in number than male users (because women tend to live longer), would not be disproportionately affected by charging and so were omitted from the main report. Mr Kerr submitted that those were Wednesbury reasonable conclusions. He further contended that any comparison of a number of women affected compared with men or with the local population did not affect the fact that it was for the Council to identify the pool for comparison purposes and that it was correct to identify the cohort of service users in the borough who would be affected by the decision to introduce charging. In those circumstances, it was contended that the Council had been correct to conclude that neither the race or gender groups would be disproportionately adversely affected.
78. Overall, Mr Kerr submitted that the report to Cabinet described the negative impacts on disabled people and it included reference to the Council's positive duty to promote equality of opportunity as well as the ways in which equality of opportunity would be promoted by mitigating the adverse effects of the policy and improving services.

e) conclusions

79. In considering those submissions, I start by reminding myself that the issue I have to decide in this part of the claim is whether the Council had "due regard" to the need to eliminate unlawful discrimination (the negative duty) and the need to promote equality of opportunity (the positive duty) in relation to the relevant equality duties in this case which relate to disability, race and gender.

80. In approaching that task, it is important, in my view, to have regard to the totality of the exercise undertaken by the Council and its officers including the consultation exercise, the PEIA and the report to Cabinet. It is also important when carrying out that exercise not to become too blinkered by construing the PEIA and the report to Cabinet as if they were statutes. It is necessary to stand back and look at the exercise as a whole.
81. I start by observing that the consultation exercise, including the questionnaire and the involvement of local user groups, cannot reasonably be criticised.
82. What can, however, be criticised is the failure of the Council to complete the PEIA in time for the Cabinet meeting on 16th June 2008. One of the key principles set out in the Council's PEIA policy is the strong advice that the PEIA should be completed and signed off well before the report proceeds to Cabinet. Whilst it may well be said that the substantive PEIA had been completed by 16th June 2008 and that the subsequent changes were relatively minor, if it had been completed by 16th June 2008 some at least of the criticisms made by the claimants would have been avoided.
83. Another aspect which has given rise to criticism in this case is the failure of the Council to put the PEIA before the Cabinet. Whilst there is not a duty on the Council to do so, if it does not do so it must then make sure that the key aspects of the PEIA are included in the report to Cabinet. Whilst I can understand the wish of Council members not to be inundated with reports and papers and to rely on officers to summarise and highlight matters for their consideration, if the PEIA had been attached to the report to Cabinet in this case it would have avoided many of the criticisms made by the claimants. I make it clear, however, that the failure to put the PEIA before the Cabinet is not in itself a ground on which this claim can succeed.
84. The next general aspect which has to be borne in mind is that, when considering whether the key aspects of the PEIA have been included in the report to Cabinet, it is necessary to compare the version of the PEIA that was current as at 16th June 2008 with the report to Cabinet, not the version of the PEIA that was completed on 9th July 2008. Ms Jenkinson in her witness statement did the latter. Whilst the differences may not be great, it is necessary to be alert to them.
85. With those prefatory remarks, I turn to consider the main points raised by the claimants.
86. I start by dealing with the points raised about the positive duty to promote equality of opportunity. It seems to me to be self-apparent from the structure of the PEIA that section 3 of that document was intended to relate to that aspect whilst section 4 was intended to relate to the negative duty. The document therefore dealt with the positive duty. The only point is whether it was perverse, as is alleged by the claimants, to state in that part of the document that it was a positive impact of the charging policy that adult social care needs can continue to be met at the current level as a result of avoiding the alternative of raising the threshold eligibility criteria. Whilst I can understand the claimants' reaction to this being called a positive impact, it is a fact that, if there is charging, there would be no need to raise the eligibility threshold. Whether that alternative is considered to be better and therefore a positive consequence may be a matter of opinion but I find it difficult to conclude that the statement is perverse in the

Wednesbury sense. I am not persuaded that the description of the adult care service in the budget as at January 2008 as being an area at risk affects the position. It seems to me perfectly reasonable to consider this aspect within the confines of the adult care service budget and to conclude as at June 2008 that there were only two alternatives to achieve the required savings - charging or raising the eligibility threshold. That does not seem to me to be a false premise. Although it means that the absolute impact of charging is not assessed, it is a realistic exercise in the light of the alternatives available.

87. It is right to say that the positive duty is not dealt with in terms in the report to Cabinet in the same way as it is in the PEIA. The statutory terms of the positive duty arising out of the Disability Discrimination Act 1995 are set out in section 8 of the report containing the comments of the head of legal services and it is, of course, the disabled in the broadest sense who are in receipt of home care. The positive impact identified in the PEIA is not repeated in terms in the report to Cabinet although paragraph 5.2 of the report refers to the alternative to charging being to raise the eligibility threshold and so provide services to fewer service users.
88. My overall conclusion on this aspect is that it cannot be said that the positive duty was not taken into account by the Council in the overall exercise but that it could have been given greater prominence in the report to Cabinet.
89. I turn next to the alleged difference between the PEIA and the report to Cabinet relating to people with mental health needs. Whilst I can understand why it is thought that paragraph 4.7.4.2 of the report gives a different impression to the equivalent paragraph in the PEIA with the omission of the words "particularly adversely" affected, I do not consider it appropriate to attach too much weight to the omission of those words, especially as the significant concerns relating to those service users were spelt out in paragraph 4.7.4.2 of the report. Furthermore, it appears from information in the subsequent final version of the PEIA that it was right to say in paragraph 4.7.4.2 of the report that few of those service users would be affected. I should just add here that paragraph 4.7.4.3 of the report dealing with people with learning disabilities was not included in the PEIA as at 16th June 2008, which could be said to be a deficiency, although it was included in the final version of the PEIA. The relevant point, however, is that it was included in the report to Cabinet.
90. I turn then finally to points raised in respect of the race and gender paragraphs of the PEIA which were not included in the report to Cabinet.
91. I have to say that it is not easy to understand the meaning of the words "mitigating actions would need to take this into account" at the end of the paragraph dealing with Race. On the face of it, those words would suggest that there was a negative impact which required mitigating, in which case one would expect it to be dealt with in the report to Cabinet. However, reference to the preceding sentence relating to the Housing Needs Survey shows that people of Asian and black ethnic backgrounds have a significantly lower income than white people. The result of that, as Ms Jenkinson explains in her witness statement, is that they are less likely to be charged. I could understand how that supports the conclusion that this group would not suffer a

disproportionate adverse impact. Mr Kerr described the effect on the group as being mitigated by exemption from charging. Ms Jenkinson says in her witness statement that the words were intended to ensure that the implementation group takes into account that those people were less likely to be charged due to their low income when preparing its information and communication plan. In the final result, those words are not as clear as they ought to be but, having regard to the matters I have mentioned, I am not persuaded that they have a meaning which would require the effect on this group to be dealt with in the report to Cabinet.

92. So far as the gender group is concerned, I do not accept that the words "not disproportionately so" were intended to have a different meaning from the word "disproportionately" earlier in the negative impact section. I see no reason for that conclusion - quite the opposite. Furthermore, I accept Mr Kerr's submission that it was for the Council to identify the pool of people for comparison purposes and that it has not been shown that the pool identified was Wednesbury unreasonable. I therefore conclude that there was no need for the paragraph relating to the gender group to be included in the report to Cabinet because women were not disproportionately affected. It follows from what I have said that, in my view, the key aspects of the PEIA were included in the report to Cabinet.
93. Having therefore considered the various points raised on behalf of the claimants in relation to this part of the claim, my conclusion is that, although there are some aspects of the Council's consideration of this matter which can justifiably be criticised, when the exercise is considered as a whole it cannot properly be said that the Council did not have "due regard" to its general equality duties. In my view, the Council did in substance, not just in form, have due regard to the need to eliminate unlawful discrimination and to promote equality of opportunity in relation to the relevant equality duties in this case.

Overall conclusion

94. My overall conclusion therefore is that, for the reasons I have given, both parts of this claim must fail and that the application for judicial review must be dismissed.
95. Are there any consequential matters?
96. MR MILFORD: Yes, my Lord. We would ask for costs: the claimant to pay the defendant's costs, costs not to be enforced without the leave of the court.
97. SIR MICHAEL HARRISON: Say that again.
98. MR MILFORD: The claimant to pay defendant's costs, my Lord, such costs not to be enforced without the leave of court.
99. SIR MICHAEL HARRISON: Yes. Can you --
100. MR WOLFE: My Lord, I will make -- it is a slightly technical observation on that first of all, in terms of the wording of it, that, even if my Lord was to make an order in those terms, you do not need the second part of the phrase, "not to be enforced without leave

of the court", because that is implicit within the statutory scheme. My Lord will only need, if minded to make such an order, to make an order that the claimant pay the defendant's costs, full stop, but that is a very technical point.

101. SIR MICHAEL HARRISON: Is that so? I mean, I only want to make such order as is right.
102. MR WOLFE: That is a wording point. I have other bigger points.
103. SIR MICHAEL HARRISON: Well, let us just deal with -- when you say you have other bigger points -- on costs?
104. MR WOLFE: On costs.
105. SIR MICHAEL HARRISON: I see. Very well. Yes. Just sit down for a moment and we will come back to that. Yes?
106. MR WOLFE: My Lord, in relation to the substantive question of costs, we do resist the making of an order in those broad terms for two reasons. Firstly, my Lord has been, in my submission, rightly critical of a number of aspects of the Council's approach both in relation to the PEIA and in relation to the report that flowed from it, in a number of ways I do not need to remind the court of. So, my Lord, this is not a simple case where everything has gone the defendant's way by any means. Secondly, independently of that, on a question, if you like, of the ambit of the costs order, my Lord rightly identified that Ms Jenkinson's witness statement, which was the main evidence from the Council in terms of sheer volume of work and so on, and no doubt took a substantial amount of work to put it together, actually focused on the wrong comparison and to that extent did not assist the court in the exercise, the wrong comparison being the comparison between the July version of the report -- sorry, the July version of the PEIA and the Cabinet report. So, my Lord, we say there should not be by any means a full order for costs, given my Lord's rightful criticisms, and the order should not extend by any means to Ms Jenkinson's witness statement on any view.
107. So, my Lord, I would suggest in relation -- the second of those is dealt with easily by saying "not including Ms Jenkinson's witness statement costs. The former of that, in my submission, is dealt with by the court ordering that at most the claimant pay a proportion, and I would suggest, if I just want to break it down for a second, clearly the claimant has lost on the first issue but on the second issue, my Lord, that has, although the claimant has lost, in many ways gone both ways. So I would submit an order of no more than 50 per cent of the defendant's costs in the overall position, less Ms Jenkinson.
108. SIR MICHAEL HARRISON: I see. Thank you very much. Anything you want to say on that, Mr Milford?
109. MR MILFORD: My Lord, I have been told by those behind me that we are actually happy not to seek costs, as it happens. So my instructions have been altered and Mr Wolfe's elegant submissions need not be considered.

110. MR WOLFE: Wasting my breath.
111. SIR MICHAEL HARRISON: Then I will make no order as to costs.
112. MR WOLFE: My Lord, I need a sort of administrative order, which is that the claimant's publicly funded costs be subject to detailed assessment.
113. SIR MICHAEL HARRISON: Yes. That order you may have.
114. MR WOLFE: I am grateful. My Lord, I do, in a sense, independently and going on from that seek permission to appeal against my Lord's judgment and decision. Given the extempore nature of it, I would focus on only two issues: one in relation to the first part, the manifesto point, and one in relation to PEIA. On the first part, my Lord's approach, as I appreciated it, in relation to the proper meaning and effect of words of the decision of May 2006, was to seek to identify the intention of the motion; in other words my Lord's approach was to look, for example, at the agenda and the surrounding documentation to seek to identify an intention. In my submission that is a wrong approach and it is an approach which, if correct, would cause much wider implications in terms of the administration of public law because what it would do is it would entitle public authorities to come along and say, well, we know that our decision document says X but actually, if you look at the surrounding materials, our intention was Y and my submission, my Lord, is if that were correct the Administrative Court would very rapidly ground to a halt under a huge flurry of surrounding evidence going to contradict the plain meaning of a document on its terms. So, my Lord, that is clearly an issue which arises on the facts of the case but also my Lord's approach, if right, as I say, would have a much wider impact. So in my submission that touches on both of the limbs of potential challenge to the Court of Appeal, namely real prospects of success on the particular issue but also the wider importance of the point in play identified by my Lord's approach.
115. In relation, my Lord, to the second limb of the claimant's challenge, the PEIA and the report, my Lord's approach most particularly in relation to --
116. SIR MICHAEL HARRISON: Could I just mention in relation to that thing, you were right that I did include the words "were intended to" and I do not think I should have referred to them and I am content that they be deleted from the judgment. The relevant sentence should be, as I am just looking at it, I do not consider that the words "noted and adopted in the minutes could reasonably be understood as". I follow your point and I think I should not have included those words "were intended to".
117. MR WOLFE: My Lord, that is a helpful clarification but I am not sure it necessarily detracts from the overall force of the point, which is that my Lord's approach was nonetheless to look at those surrounding materials in order to understand not necessarily the intention of but the meaning of, and my point is essentially the same, which is what one does not do is to look at the surrounding materials because, if one was to do that, every time the Administrative Court was faced with a council resolution on any subject, in any sphere, the invitation, if you like, the risk would be, that the parties would put in the agenda, the minutes, the notes, the witness statements from

councillors and so on, in effect all going to go behind the plain meaning of the document in play and so in my submission, my Lord, that is a point which arises on this case, real prospect of success on appeal, but is also of much wider public importance and touches therefore on the second limb of the Court of Appeal.

118. My Lord, in relation to the second issue, the PEIA and so on, my Lord's approach most particularly in relation to the positive duty was to look at the totality of what the Council had done and when, looking to see whether the Council had given effect to the positive duty, and I use that as a illustration, to look, if you like, in composite at the report and the PEIA, and my Lord drew those together and in my submission that would have been an appropriate approach if the councillors had had the PEIA before them. But it was not appropriate and, in fact, it trespassed into the territory that Mr Kerr invited the court into, which is to say these things do not need to be before councillors as long as they are somewhere in the mind of the Council and, again, my Lord, there is a point of much wider public importance there which goes to the necessary state of mind of the decision-maker as opposed to the authority and in my submission my Lord was arguably wrong to focus on the state of mind of the wider authority and not to look at the particular state of mind of the decision maker and it is that latter point which counts. Again, that touches on real prospects of success on appeal on this case but also a much wider point of principle as to how one approaches, in a sense, not just predicted impact equality assessments or equality impact assessments but council decisions more generally, because it would enable, for example, in a planning context, it to be argued that because the planning officer had considered these things in some report in the background, somehow the councillors who took the planning decision should be taken to have appreciated the same things, which of course is an argument that would get nowhere in a planning case because it would be said, well, if those things were not before councillors, they were not taken into account in the planning decision.
119. So, my Lord, on both of those these, if you like, I say real prospect of success and point of wider public importance and I do invite my Lord to grant permission for an appeal to the Court of Appeal on that basis.
120. SIR MICHAEL HARRISON: I see. Thank you very much. What do you have to say about that?
121. MR MILFORD: Well, my Lord, on the two points that my learned friend made, first of all on the question of legitimate expectation we say it is plainly right, and you were plainly right, to take into account the circumstances and the context of which such an expectation would arise. On the second issue, the PEIA, we would simply say, briefly, one has to look at substance not form and the totality of what has been done; that follows the guidance set down by Dyson LJ in the Court of Appeal in Baker and that is what my Lord has done. So we would say that there are not grounds for granting permission to appeal in this case.
122. SIR MICHAEL HARRISON: Thank you very much.

123. MR WOLFE: My Lord, Mr Milford does not descend from the notion that my Lord took into account the wider circumstances in making a decision as to what the minutes meant and that, if you like, is the vice that I identified, obviously with the greatest of respect to my Lordship. It is the vice of taking into account the wider circumstances and the surrounding materials in construing a document which should stand on its own terms and, my Lord, in relation to the second point, the taking into account substance and in form, obviously those injunctions from Dyson LJ are absolutely right but what that does not mean is that you take into account things that were known by other people but not known by the decision maker or considerations that were looked at by other people but not looked at by the decision maker and one here has to have, and to some extent my Lord had, but not in this respect, clarity about who the decision maker was here and what was going on in the rest of the Council.
124. SIR MICHAEL HARRISON: I see. Thank you very much.
125. I am afraid I am not prepared to grant permission to appeal, so you will have to go to the Court of Appeal for it.
126. MR WOLFE: My Lord, could I just, as a consequential question to that, which is, this being the last day of the legal term, my Lord will appreciate the difficulties that arise from that, there are two practical questions. Firstly, could we have a transcript of my Lord's judgment on an expedited basis. That is an order I think my Lord needs to make to affect the way the transcript writing company responds --
127. SIR MICHAEL HARRISON: Well, could I just say straightaway on that the answer to that is yes, because I understand your position, although you have to make allowance for the fact that it is Christmas as well for them.
128. MR WOLFE: Absolutely. Consequential on that, and I do not want to put them under any undue pressure, would be an extension of the normal time in which to lodge the materials in the Court of Appeal, an extension which took us -- if I asked it to be extended to 21 days, that would take us to the end of the first week after the new year break.
129. SIR MICHAEL HARRISON: Yes. Do you have anything to say about that?
130. MR MILFORD: My Lord, I do not think I can resist giving my learned friend a little more time, given the Christmas break.
131. MR WOLFE: Can I just say, there is an interaction plainly between the two, which is, although we can commence an appeal technically which the 21 days without the transcript, it would be of the greatest assistance and provide clarity in the production of that if we had the transcript. So if it were possible, and I do not want to put too much pressure on the transcript writer, for us to have the transcript so that we could take it into account before -- I think the date is 9th or 10th January, which is the Friday --
132. SIR MICHAEL HARRISON: 21 days goes to where?

133. MR WOLFE: I think it takes us to the Friday, 9th January. (pause) The other way to do it, my instructing solicitor suggests, is that we should have seven days from the point at which we received the transcript. That would be the cleanest, if you like, and if my Lord was minded to do it that way that would probably have the most productive effect.
134. SIR MICHAEL HARRISON: No, I think it is better to deal with it by way of an extension of the right to apply for permission to appeal. What I think I will do is to extend it to 28 days, rather than 21, because I am also thinking that I have to correct the transcript, it has to reach me and I am just thinking of whether I am going to be available to deal with that. So I think I will extend the time for applying for permission to appeal to 28 days from today's date, order that there be expedition of the transcript and hope that will wend its way to me in sufficient time for it to be corrected before that date. If there is any difficulty you can always apply for an extension.
135. MR WOLFE: I am grateful.
136. SIR MICHAEL HARRISON: Right. Nothing else?
137. MR MILFORD: Not from us, thank you.
138. SIR MICHAEL HARRISON: Thank you very much.