Neutral Citation Number: [2023] EWHC 536 (Admin)

Case No: CO/2097/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/03/2023

Before :

MR JUSTICE LANE

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THE KING
On the application of

Between :

(1) Better Streets for Kensington and Chelsea
(2) Justin Abbott **Claimants**

- and -

The Royal Borough of Kensington and Chelsea **Defendant**

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- -

Ms J Wigley KC, Ms A Walker (instructed by **Leigh Day**) for the **Claimants**
Mr C. Streeten (instructed by **Head of Legal Services**) for the **Defendant**

Hearing dates: 8 December 2022 , 13 January 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 14 March 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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MR JUSTICE LANE

Mr Justice Lane:

A. CYCLE LANES ON KENSINGTON HIGH STREET

1. The claimants challenge the defendant's decision taken at a Council meeting on 17 March 2021 not to re-instate temporary cycle lanes on Kensington High Street. The cycle lanes had been removed by the defendant pursuant to a decision of 2 December 2020. They had been installed seven weeks earlier, pursuant to the defendant's Active Travel Plan, which the defendant approved on 27 July 2020. Funding was originally envisaged to come from the Government's Emergency Active Travel Fund, which was intended to assist local authorities in promoting walking and cycling, and avoiding overcrowding on public transport, during the initial stages of the Covid-19 pandemic in 2020. As well as establishing the Fund, the government issued guidance entitled "Traffic Management Act 2004: Network Management in Response to Covid-19". In the event, the cycle lanes were funded by the defendant.

2. On 19 June 2020, the defendant had indicated that it was exploring a new "temporary" cycling and walking route on Kensington High Street. On 16 July 2020, the defendant's Lead Member for Planning and Transport (Councillor Thalassites) indicated that he was minded to approve the defendant's Active Travel Plan.

3. The Active Travel Plan included some 16 projects. These were a mix of temporary schemes and schemes that the defendant had been planning to introduce, in any event, for which it now had an accelerated delivery programme in order to respond to the easing of lockdown in the summer of 2020.

4. An officer's report on the Active Travel Plan said that there was "simply not time" to consult extensively, prior to the Plan's introduction. Partly for this reason, the report said it was important to stress that the majority of the proposals were designed to be introduced quickly "but also on a temporary basis". If it should "later be considered appropriate to make any temporary schemes permanent, after the current public health crisis has passed, the [defendant] would consult local people before doing so".

5. One of the projects included in Table 1, as set out in the officer's report on the Active Travel Plan, was a light segregation cycle lane on Kensington High Street, for which the timescale given was "August 2024 up to 18 months".

6. On 14 September 2020, the defendant wrote to local residents and businesses to advise them of its intention to install the cycle lanes. The proposals were also published on the defendant's website.

7. During September 2020, the cycle lanes were installed on Kensington High Street and were in place by 14 October 2020.

8. In October 2020, a petition calling for the end of the cycle lanes was launched on Change.org. The petition attracted over three thousand signatures. Objections were also made by local businesses and the emergency services.

9. On 12 November 2020, the defendant reviewed the impact of the cycle lanes, with reference to the available data. The defendant had a meeting with local businesses and

residents' groups, at which the impact of the cycle lanes was discussed. The claimants were not invited to that meeting. Nor did they know about it until later.

10. On 17 November 2020, Councillor Thalassites indicated that he intended to end the temporary cycle lanes scheme on Kensington High Street. The claimants say that this intention was not communicated to them, despite the fact that they had a meeting with Councillor Thalassites on 18 November 2020.

11. On 26 November 2020, Councillor Thalassites sent a letter to residents and businesses headed "Removal of Temporary Bicycle Lanes on Kensington High Street". The letter said that Councillor Thalassites had asked the defendant's officers to begin removing the temporary bicycle lanes on Kensington High Street from 2 December 2020.

12. In a Key Decision ("the December Key Decision") dated 2 December 2020, the defendant decided to remove the cycle lanes on Kensington High Street. The day after the December Key Decision, the claimants sent the defendant a pre-action protocol letter, threatening judicial review of the December Key Decision.

13. On 3 December 2020, the Mayor of London, Mr Sadiq Khan, gave an interview on LBC Radio. The Mayor criticised the defendant's decision to remove the cycle lanes. An article was published in the *Evening Standard* headed "Sadiq Khan set to seize control of High Street Kensington to reinstate cycle lanes being axed by council". An article in the *Daily Mail* was titled "Council insists it will not bring back bollards on Kensington's hated cycle lane despite Mayor Sadiq Khan's threat to take control of the traffic restriction – as Extinction Rebellion threaten SECOND protest to save it".

14. On 23 December 2020, the claimants sent a second pre-action protocol letter to the defendant. In its response of 8 January 2021, the defendant indicated to the claimants that it intended to reconsider the December Key Decision. As a result, the defendant told the claimants that a claim for judicial review would be premature. The defendant, however, stated that it "does not accept that it is under a duty to consult in reaching a fresh decision and will not be carrying out such consultation".

15. On 8 January 2021, the defendant announced on its website that "Following representations from groups and partners in the borough, the Council will be revisiting the decision to remove temporary cycle lanes on Kensington High Street". The decision was to be taken by the defendant's Leadership Team (absent the Lead Member for Planning and Transport), who were to reach a "balanced decision based on a new report with the latest evidence".

16. In the defendant's online announcement, the words "View more information" provided a hyperlink to a web page setting out further details in relation to the cycling scheme. The web page included the text of the defendant's response of 8 January 2021 to the claimants. It also contained a section headed "Frequently Asked Questions". One of those questions was "Is this a consultation?". The answer given was "the Council is not under a duty to consult in reaching a fresh decision and will not be carrying out a formal consultation. However, we have received representations from groups and individuals and the Leadership Team will take all relevant material considerations into account".

17. The defendant's decision to reconsider the question of the cycle lanes on Kensington High Street received publicity. This included an article in the *Evening Standard* dated 9 January 2021: "Council pledges to 'look again' at controversial cycle lane decision"; an article of the same date in *The Independent*: "Council to 'revisit' removal of cycle lane on High Street Kensington"; and an article in *Cycling Weekly*: "London council will revisit decision to pull down £320,000 cycle lane after just seven weeks".

18. On 9 March 2021, the defendant published on its website a Key Decision Report of its officers for the Leadership Team. I shall call this report the "OR".

19. Although the defendant had stated that it did not consider itself to be under a duty to consult, and was not carrying out a formal consultation on the reinstatement of the cycle lanes, the defendant had received 3,134 emails and other correspondence regarding temporary cycle lanes on Kensington High Street.

20. The defendant says that these emails were "all individually examined and coded for analysis". Key themes arising from them were identified and reported in the OR. These included representations from the claimants who, between 21 January and 17 March 2021, wrote some sixteen letters to the defendant, in support of the cycle lanes.

21. Detailed submissions were also received from Transport for London. A letter from Transport for London dated 5 February 2021, was attached at Appendix E to the OR. This noted that Kensington High Street had been identified by Transport for London as a "top priority" corridor in both the Temporary Strategic Cycling Analysis and the long-term Strategic Cycling Analysis. In a three year period to January 2019, fifteen people had been killed or seriously injured on Kensington High Street whilst walking or cycling. There had been a total of 48 casualties overall involving cyclists. One third of all casualties that occur on Kensington High Street were said to be cyclists. Transport for London accordingly argued that there was "an exceptionally strong case for safer cycling facilities on Kensington High Street".

22. The OR set out four options for the defendant's Leadership Team to consider. These were:-

> **"Option 1. Install temporary cycle lanes in full**
>
> This would allow the Council to carry out further monitoring of cycle lanes, but would still not be conclusive while traffic patterns continued to be atypical as a result of the current and any future lockdown restrictions required due to the pandemic. Conditions for cycling would be similar to those during the time that the temporary scheme was in place.
>
> **Option 2. Install parts of temporary cycle lanes**
>
> This would involve providing segregated cycle lanes in the outer sections of the route, where the road is widest. It would not provide a continuous route in either direction but would assist people to cycle to and from the area of the sections of road where traffic tends to be faster.

> **Option 3. Do not install temporary cycle lanes but consider an alternative scheme in the longer term**
>
> Do not install temporary cycle lanes but develop plans to commission research into transport patterns in the post-Covid world in partnership with local residents and local institutions including academic partners. The research could begin in the summer and lead to a feasibility study in the longer term. A non-exhaustive table containing a high-level summary of some suggestions that have been put to the Council and could be considered further is in Appendix A.
>
> **Option 4. Do not install temporary cycle lanes**
>
> This would maintain the current levels of traffic capacity along the High Street for general traffic. Conditions for cycling would remain as they are today."

23. The OR did not make a recommendation as to which of the four options should be adopted by the defendant. Instead, paragraphs 1.5 to 1.9 said:-

> "1.5 In practice, the temporary scheme in Kensington High Street was not implemented until 14 October, when the second wave of the pandemic was just developing. The scheme was abandoned some seven weeks later and was fully removed within nine weeks of being implemented. Plainly and with hindsight, the scheme was not implemented in a timely manner in respect of the waves of the pandemic.
>
> 1.6 The decision faced now is whether to introduce a temporary cycle lane in Kensington High Street as we begin to come out of the third lockdown, over the next few months.
>
> 1.7 The lesson of the past year has been that all plans (including experimental local transport plans of this type) are subject to major contingencies and may need to be urgently adapted. The case for, and against, implementing an experimental cycle lane in Kensington High Street involves balancing considerations of design, safety, transport congestion as well as the Council's overall aim of encouraging walking and cycling. The case also requires the Council to have regard to the full variety of attitude and opinion from residents, businesses, public agencies, visitors and other stakeholders.
>
> 1.8 There has not been a formal consultation on the scheme, neither prior to its original implementation nor since. The attitudes and opinions about the temporary cycle lane are mixed, with very strong views held by some residents and organisations.

> 1.9 This report presents the evidence collated both during the period when the temporary scheme was in place, and since it was removed. Whilst the evidence does not point to a firm conclusion, it is sufficient to enable an assessment of the options presented in section 3, all of which it has helped to inform. All of the options are feasible and there is sufficient evidence rationally to justify them."

24. Paragraphs 6.4 to 6.11 of the OR analysed the volume, nature and weight to be attributed to the representations that the defendant had received. The OR noted that the process did not "guarantee fully that individuals are in fact in the category they have been allocated". The OR acknowledged that a typical consultation process "would have allowed all individuals to 'self-declare' as a resident, visitor or other." Officers therefore had to make a judgment as to the status of a respondent. At paragraph 6.17, it was recorded that Transport for London had commissioned a telephone survey which found that 70% of Kensington and Chelsea residents favoured "measures to make cycle routes in the area safer". 56% of residents "supported protected cycle lanes on Kensington High Street". The OR noted Transport for London's support for the cycle lanes.

25. At paragraph 6.25, the OR said that "Had there been an appetite for [the cycle lanes] to remain, the Council would have required a full consultation to take place before making them a permanent fixture".

26. Section 7 of the OR concerned an analysis of technical data. Although this data had been collected before, during and after the cycle lanes were in operation, the OR conceded that, since the scheme had been in place for only seven weeks, "the technical data we have been able to collect… does not itself provide a basis upon which firm conclusions can be drawn" (paragraph 7.1).

27. Having seen the OR, the first claimant sent the defendant a thirteen page letter dated 16 March 2021, in which the substance of the OR was critiqued. As a result, on 17 March 2021, the defendant produced an Addendum to the OR, in which it appended the first claimant's letter of 16 March and directed the Leadership Team to have regard to its substance.

28. On 17 March 2021, the defendant's Leadership Team considered the question of temporary cycle lanes on Kensington High Street. Following a debate, the Leadership Team resolved "not to install temporary cycle lanes on Kensington High Street, but to develop plans to commission research into post-Covid transport patterns, in partnership with local residents and local institutions including academic and research partners". In other words, the defendant chose Option 3.

B. THE CLAIMANTS' CHALLENGE

29. On 19 May 2021, the claimants sent the defendant a pre-action protocol letter in respect of the decision of 17 March 2021. The claim was issued on 9 June 2021. It raised five grounds of challenge. Permission to bring judicial review was refused on the papers on 6 August 2021.

30. On 6 October 2021, Tim Smith, sitting as a Judge of the High Court, granted the claimants permission on two grounds; namely:-

> "Ground 1- Failure to consult. The claimants argue that prior to reaching the 17 March 2021 decision, the defendant carried out a consultation which failed to comply with the applicable legal principles and/or failed to carry out a consultation in circumstances in which there was a legal duty to do so;
>
> Ground 3 – Irrationality: This can be divided as follows:-
>
> (a) The defendant framed the impugned decision as being whether to install the cycle lanes, whereas the claimants had been assured that the defendant would reconsider the decision taken in 2020 to remove the cycle lanes;
>
> (b) The defendant did not properly inform itself and/or weigh up relevant considerations;
>
> (c) The OR disclosed no rational basis on which the impugned decision could have been reached, bearing in mind the evidence that had been gathered and the limitations of the data as a result of the removal of the cycle lanes."

31. A continuation fee was payable by the claimants to the court, following the grant of permission. The fee was not paid. In April 2022, the claimants became aware that, as a result of non-payment, the claim had been automatically struck out in December 2021. Relief from sanctions was granted by Robert Palmer KC, sitting as a judge of the High Court, at a contested hearing on 19 July 2022.

32. Following a late change of the claimants' leading counsel, the claimants sought permission to amend their grounds, in order to add a ground asserting that the defendant created a legitimate expectation in the claimants, which it failed to honour.

33. Upper Tribunal Judge Cooke, sitting as a Judge of the High Court, refused the amendment application on 23 November 2022. At the commencement of the hearing before me on 8 December 2022, the claimants sought to set aside UTJ Cooke's order. Having heard submissions from Ms Wigley KC and Mr Streeten, I delivered an *ex tempore* judgment, refusing the set aside application.

C. DECIDING THE CLAIM

Ground 1

34. The claimants contend that a common law duty to consult before reaching the impugned decision arose either because there was an established practice of consultation or because failing to do so would cause conspicuous unfairness. In any event, the claimants argue that the defendant carried out, and relied on, a consultation of sorts, with the result that the consultation was required to be fair and legally adequate.

35. The defendant's position is, in essence, that the defendant was under no duty to consult. Even if that was not so, however, the approach of the defendant was not so unfair as to amount to an abuse of power. There was no prejudice to the claimants. They made no fewer than 16 written representations to the defendant, including the detailed 13-page critique of the substance of the OR in the letter of 16 March. These representations were all taken into account by the defendant.

Consultation: legal principles

36. In R (Plantagenet Alliance Ltd) v The Secretary of State for Justice and others [2014] EWHC 1662 Admin, the Divisional Court, at paragraph 98 of its judgment, summarised the general principles concerning the duty to consult, as derived from the authorities. The Divisional Court noted, first, that there is no general duty to consult at common law and that the government of the country would grind to a halt if every decision-maker were required in every case to consult everyone who might be affected by his decision.

37. I would add here that, in the case of a democratically-elected public authority, such as the defendant, the courts will be particularly cautious about inferring that a duty to consult has arisen. As Laws LJ held in R (Bhatt Murphy) and others v the Independent Assessor [2008] EWCA Civ 755 at paragraph 41, "Public authorities typically, and central government *par excellence*, enjoy wide discretions which it is their duty to exercise in the public interest… Often they must balance different, indeed opposing interests across a wide spectrum. Generally, they must be the masters of procedure as well as substance…".

38. As held in Plantagenet Alliance, a duty to consult may arise where there has been an established practice of consultation or where, in exceptional cases, a failure to consult would lead to conspicuous unfairness. Here again Bhatt Murphy is relevant. At paragraph 49, Laws LJ held that where there has been no assurance either of consultation or as to the continuation of the policy in question, "there will generally be nothing in the case save a decision by the authority in question to effect a change in its approach to one or more of its functions. And generally, there can be no objection to that, for it involves no abuse of power".

39. Even where, in a rare case, a common law duty to consult arises, the public authority will have considerable leeway to decide the nature of the consultation exercise. At paragraph 62 of his judgment in R (Greenpeace Ltd) v Secretary of State for Trade and Industry [2007] Env. L.R. 29, Sullivan J said:-

> "A consultation exercise which is flawed in one, or even in a number of respects, is not necessarily so procedurally unfair as to be unlawful. With the benefit of hindsight it will almost invariably be possible to suggest ways in which a consultation exercise might have been improved upon. This is most emphatically not the test. It must also be recognised that a decision-maker will usually have a broad discretion as to how a consultation exercise should be carried out."

40. At paragraph 63, Sullivan J concluded that a finding that a consultation exercise was unlawful by reason of unfairness "will be based upon a finding by the court, not

merely that something went wrong, but that something went 'clearly and radically' wrong".

41. In deciding whether a consultation exercise has gone "clearly and radically wrong", the court will have regard to what are referred to as the "Gunning" or "Sedley" criteria. In R v Brent London Borough Council *ex parte* Gunning (1985) 84 LGR 168, Hodgson J adopted the submissions of Mr Sedley QC (as he then was) concerning the basic requirements for a consultation process to have a sensible content. First, that consultation must be at a time when proposals are still at a formative stage. Second, the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third, adequate time must be given for consideration and response. Finally, the product of the consultation must be conscientiously taken into account in finalising any statutory proposals.

42. The Gunning/Sedley criteria were approved in the judgment of Lord Wilson (with whom Lord Kerr agreed). In R (Moseley) v London Borough of Harringey [2014] UKSC 56, at paragraph 25. The criteria had earlier been approved by the Court of Appeal in R v North and East Devon Health Authority, *ex parte* Coughlan [2021] QB 213 at paragraph 108.

43. Recently, in R (Article 39) v Secretary of State for Education [2021] PTSR 696, Baker LJ, citing *ex parte* Coughlan, held at paragraph 78 of the judgments, that if as a matter of fact, a public authority consults, albeit informally and over a limited period, then, whether or not consultation is a legal requirement, "if it is embarked on it must be carried out properly and fairly".

44. In R (L) and another v Warwickshire County Council and another [2015] EWHC 203 (Admin), Mostyn J held, at paragraph 17 of his judgment, that an action founded on an alleged breach of a promise to consult must demonstrate "not just... a broken promise but there must also be shown to be unfairness amounting to an abuse of power for the public authority not to be held to it". As regards an action founded on an alleged established practice of consultation, the practice "must be clear, unequivocal and unconditional and, again, there must also be shown to be unfairness amounting to an abuse of power". As regards the exceptional case where a failure to consult would lead to conspicuous unfairness, "the unfairness must be of a very high level". Mostyn J added that "where the decision not to consult has been made by democratically elected representative, the court should be very slow to intervene, for obvious constitutional reasons."

45. In R (Heathrow Hub Ltd and another) v Secretary of State for Transport [2020] EWCA Civ 213, the Court of Appeal held that, whilst a promise of consultation need not be express, there must be a practice "which is impliedly tantamount to such a promise. That practice must still give rise to a representation which is clear, unambiguous and devoid of any relevant qualification": paragraph 69.

46. Newey LJ, giving the judgment of the Court of Appeal in R (MP) v Secretary of State for Health and Social Care [2020] EWCA Civ 1634, held, at paragraph 35, that where "a public body chooses to consult on a set of proposals, it has to conduct the consultation in respect of *those proposals* properly." (original emphasis). So far as concerns the exceptional case in which fairness demands that a consultation be undertaken, Newey LJ emphasised the requirement of conspicuousness in

approaching the test of unfairness. He also held, at paragraph 36, that "the fact that a proposal might be expected to excite interest and comment" did not provide a reliable answer to whether the proposal needed to be the subject of consultation, in order to avoid conspicuous unfairness. Without more, a proposal of that character did not "imply that there is a duty to consult on it".

47. In R (Binder and others) v Secretary of State for Work and Pensions [2022] EWHC 105 (Admin), Griffiths J held that the question of whether a consultation was, in fact, held, such as to attract the Gunning/Sedley criteria, was one of substance rather than form, based on what was said and done at the time: paragraph 60. In holding that, in the case before him, such a consultation had been voluntarily embarked upon and that a particular survey was at the heart of that consultation, Griffiths J had regard to a press release issued by the defendant, in which it was said that the defendant's strategy would build "on insights from the lived experience of disabled people" and that the defendant wished to ensure that there was "enough time to get this right and undertake a full and appropriate programme of stakeholder engagements. People's views and insights would be crucial". In the case before him, Griffiths J found that the Gunning/Sedley criteria had not been complied with.

Ground 1: discussion

48. In the present case, there was manifestly no statutory duty to consult. Ms Wigley KC submits that an established practice arose, in that before installing the cycle lanes, the defendant consulted with local stakeholders. The claimants point to an equality impact assessment, which describes informal consultation involving local residents and business groups, with members, residents and business groups being invited to view the designs and share their thoughts at a meeting held on the evening 13 July 2020. Following discussion, the designs were amended and shared with residents' groups and others. The OR describes the process following the installation decision as involving "amended designs to reflect the feedback received".

49. I agree with Mr Streeten, for the defendant, that on the facts of the present case, the claimants have come nowhere near showing that there has been a promise to consult, of the kind required by the case law. By the same token, it is manifest that an established practice of consultation has not arisen.

50. The officer's report of July 2020, mentioned in paragraph 5 above, emphasised that there had simply not been time to undertake anything other than what might be described, at best, as a rudimentary and necessarily incomplete consultation exercise. The report did not contain any commitment to consult, except if it "should … later be considered appropriate to make any temporary schemes permanent, after the current public health crisis has passed" (paragraph 7.4). There is nothing to suggest that the defendant was thereby intimating that decisions to uninstall temporary cycle lanes would be the subject of consultation. On the contrary, the fact that the defendant said what it did about consultation if a temporary scheme was to be made permanent, but said nothing about consultation concerning the removal of temporary schemes, speaks for itself.

51. The claimants' attempt to invoke the authority of Binder is misconceived. As can be seen from paragraph 47 above, it is quite clear that the facts of that case were quite different from those of the present. Indeed, the statement of the defendant in Binder

that "we want to ensure we have enough time to get this right and undertake a full and appropriate programme of stakeholder engagement. People views and insights will be crucial…" stands in stark contrast to the present defendant's statement that it "does not accept that it is under a duty to consult in reaching a fresh decision and will not be carrying out such consultation". As I have mentioned, under the question "Is this a consultation?", the defendant reiterated that it "is not under a duty to consult… and will not be carrying out a formal consultation". The fact that the defendant had received representations from groups and individuals and that the Leadership Team would take all relevant material considerations into account, before reaching its decision on removal, means exactly what it says. There is a world of difference between what is required by way of a consultation exercise, on the one hand, and, on the other, merely taking account of such representations as may be made to the decision-maker.

52. I agree with Mr Streeten that there is no basis whatsoever for the claimants to invoke the principle of "conspicuous unfairness" in order for a duty of consultation to be placed upon the defendant in respect of the impugned decision. The case law could hardly be clearer about the exceptional nature of this principle. The defendant is a democratically elected public body and I therefore bear in mind paragraph 41 of the judgment of Laws LJ in Bhatt Murphy and paragraph 17 of the judgment of Mostyn J in L.

53. I particularly note the point made by Newey LJ in MP that the controversial nature of the proposal in question - which the removal of the cycle lanes undoubtedly was - is not a touchstone for deciding whether conspicuous unfairness has arisen as a result of a failure to consult. Indeed, the more controversial the proposal, the more likely it is that the subject matter lies in the political realm, where the courts are rightly cautious to intervene.

54. Ms Wigley questioned Mr Streeten's reliance upon the proposition that the test of conspicuous unfairness involves asking whether what has happened (or failed to happen) amounts to an abuse of power. It is, however, evident from the case law that such a question is relevant in this regard: see paragraphs 38 and 44 above.

55. At paragraph 83 of her judgment in R (Hough) v Secretary of State for the Home Department [2022] EWHC 1635 (Admin), Lieven J noted the use of the expression in paragraph 42 of the judgment of Laws LJ in Bhatt Murphy. Although Lieven J then articulated the test, at paragraph 85, in terms of the unfairness being required to "amount to an abuse of process", rather than power, I consider little turns on that difference. The essential point being made in the cases is that in order for the fairness principle to impose a duty of consultation on a public authority, there must be something fundamentally wrong with what the authority has done. It must be something which would put the authority firmly beyond the range of behaviour that is expected of it as a public body and thus threaten the rule of law, if left uncorrected.

56. What the defendant did in the present case cannot possibly be said to reach that level. In so finding, I have considered the submission of the claimants that they were deprived of an existing benefit in the form of the cycle lanes. The implication appears to be that this meant they had a right to be consulted. The fact is, however, that in most if not all cases of the kind with which we are concerned, particular elements of the public will have a greater interest in the subject matter, compared with the rest of

the public. The claimants have failed to show that they stand in any special situation, which has not been respected by the defendant. On the contrary, as I shall go on to explain, not only did the claimants have a full opportunity to make representations concerning the removal of the cycle lanes, their views were annexed to the OR and so drawn to the specific attention of those making the impugned decision.

57. I have also had regard to the submission that, since the defendant itself had identified problems regarding the absence of consultation before the cycle lanes were installed, this meant consultation was essential when the question arose as to whether the cycle lanes should be removed. This proposition simply does not follow. On the contrary, if anything there is a symmetry in taking the same approach to removing temporary features as to installing them, bearing in mind that there would be consultation before a decision is taken to install cycle lanes on a permanent basis.

58. The claimant argues that the failure to consult was a contravention of the defendant's Local Code of Corporate Governance. This Code is, however, couched in understandably wide terms. The claimants have pointed to nothing in it which supports their contention that conspicuous unfairness has arisen as a result of the defendant's actions.

59. In any event, even if - contrary to what I have found - a duty to consult arose as a result of some promise or by operation of the principle of conspicuous unfairness, I find that the Gunning/Sedley criteria were met.

60. The claimants argue that any consultation did not occur at a time when the defendant's proposals were still at a formative stage. In particular, they say that between 8 January and 9 March 2021 they had no concrete or detailed proposals to which to respond. They were effectively faced with a "yes/no" response to the issue of the cycle lanes, rather than an option to comment on the continuation of temporary cycle lanes in pursuance of an evidence-gathering process. The defendant's proposals were published six working days before the decision. By that stage, most of the representations must, the claimants say, have been received and considered, since they were published in the same report.

61. I reject this submission. It is perfectly plain from the OR that all four of the stated options were before the Leadership Team on 17 March 2021. Any one of those four options could have been taken. The fact that the temporary cycle lanes had been removed is, in this respect, immaterial. The decision to revisit the question of the cycle lanes was published on the defendant's website on 8 January 2021. The defendant announced its intention to ensure "a fair and frank discussion and balanced decision based on a new report with the latest evidence".

62. The fact that the OR appeared six working days before the decision was taken is, I consider, immaterial. It did not undermine the relevance of the submissions which had been provided, up to that time. Nor did the timing of the OR serve to show that the Leadership Team's decision had already been made.

63. The claimants argue that those wishing to make representations were not afforded the opportunity to give intelligent consideration or an intelligent response to the defendant's proposals. The announcement on 8 January, however, made it clear that what was being considered was the re-instatement of temporary cycle lanes on

Kensington High Street. That was in the context of the removal of the existing temporary lanes. The defendant's website - in particular the section regarding frequently-asked questions - provided full details of what was being considered and why. This involved the use of "drop down boxes". The website included details of the scheme which had been in place from October to December 2020, with plans. From 9 March 2021, the defendant also published on its website the OR which set out the four options being presented to the Leadership Team.

64. The claimants complain that Options 1 and 2 in the OR did not set out how long the temporary cycle lanes would be in place. The claimants say that this was highly relevant information. Had it been made clear that the proposal would extend for a period of 12-18 months, it would have been evident that there would inevitably be a period in which the defendant could have monitored the cycle lanes whilst no lockdown restrictions were in place. The claimants submit that, as drafted, Option 1 (and by implication Option 2) would lead to the illogical conclusion that temporary cycle lanes could never be installed whilst there was uncertainty about future restrictions or, possibly, changes in travel patterns.

65. These submissions, however, take us back to what Sullivan J said in Greenpeace. With the benefit of hindsight, it will invariably be possible to suggest ways in which a consultation exercise might have been improved upon. The claimants' criticisms do not show that any consultation exercise went clearly and radically wrong.

66. The claimants say there was inadequate time in which to make a response. The defendant did not give the public a deadline for representations. On 5 February 2021, the second claimant was informed in an e-mail from the defendant that the latter had imposed a "soft deadline" of "the weekend"; namely, 6/7 February 2021. The claimant says that automated replies to emails sent to the defendant after 5 February 2021 stated "Please note that from 12 February, we cannot guarantee that further emails received after that date will be analysed or included". The OR did not set out at what point the defendant stopped taking responses into account. Consultees were given six days in order to consider the OR and supporting documents, comprising nearly 150 pages.

67. As the defendant points out, however, the defendant announced its reconsideration on 8 January 2021. The decision in question was taken more than two months later, on 17 March 2021. That was, in my view, plainly adequate time for consideration and responses. Indeed, this is demonstrated by the detailed comments received from a broad range of organisations and individuals, summarised in the OR. In particular, the claimants were able, in the week following publication of the OR, to provide a detailed response, which was then annexed to the OR, for consideration by the Leadership Team.

68. The final criterion is that the product of the consultation must conscientiously be taken into account. There is, in my view, no doubt that the communications received by the defendant were carefully reviewed by officers, with key themes being drawn out and summarised in the OR, along with the identification of significant organisations. The communications from the claimants were specifically mentioned, with key correspondence appended to the reports. There is nothing before me which casts doubt on the fact that the Leadership Team had regard to these when reaching its decision.

69. Taking matters overall, I reject the submission of the claimants that, if and insofar as this was a "consultation", it was not merely a consultation with some flaws but was clearly and radically wrong. It was nothing of the kind.

70. Finally, Mr Streeten raises the issue of prejudice or, rather, its absence. He points out that the claimants have not identified any prejudice which they allege arises from the conduct of the defendant. They do not identify a single point that they would have wished to make to the defendant, but were prevented from doing as a result of the defendant's approach. In this regard, Mr Streeten relied upon the judgment of Ouseley J in R (Mid Counties Co-operative Ltd v Wyre Forest District Council) [2009] EWHC 964 (Admin) for the proposition that there can be no technical breach of natural justice: paragraphs 114 to 116. I agree.

71. Ground 1 accordingly fails.

Ground 2

72. The claimants contend that the impugned decision is vitiated by irrationality. They point to what they say is the re-framing of the decision whereby, in January 2021, the defendant wrote to say that it was reconsidering the removal decision and putting the scheme cycle lane scheme back in (this language being repeated in press articles); whereas, by contrast, on 9 March 2021 the decision described in the OR was whether to introduce a temporary cycle lane in Kensington High Street. Thus, the proposals were not framed around "re-instating" but, rather, "installing" and "introducing".

73. A reconsideration of whether it was correct to remove the temporary cycle lanes would, the claimants say, have taken as its starting point that there was already a reason for the lanes to be there, and would then have considered whether there was evidence to support their removal. The relevant statutory guidance makes clear that the purpose of introducing temporary schemes was to provide an opportunity to "monitor and evaluate... with a view to making [the cycle lanes] permanent, and embedding a long-term shift to active travel as we move from restart to recovery".

74. In deciding whether the removal decision was correct, the claimants contend that the question for the defendant should have been: "Has sufficient information been collected to evaluate whether to make the scheme permanent?" By contrast, the question posed by the defendant was: "Is there evidence to support installing a temporary cycle lane?". The defendant said Option 1 would allow the defendant to carry out further monitoring of the cycle lanes "but would still not be conclusive while traffic patterns continue to be atypical as a result of the current and any future lockdown restrictions required due to the pandemic". At the time the defendant committed, in the face of a threatened judicial review, to reconsider the removal decision, the claimants say the defendant did not suggest that potential future lockdown restrictions would be a barrier to evaluating temporary cycle lanes. Taken to its conclusion, the effect of Option 1 was that the defendant would be reluctant to install any temporary cycle lanes whilst there was uncertainty about transport patterns (for any reason).

75. Furthermore, the claimants point out that only ten lines of the OR referenced safety. Paragraph 7.64 of the OR acknowledged that data on air quality was available from October to December 2020 but that this was "not long enough to be able to draw firm

conclusions". A similar point arose from paragraph 12.1 of the OR. This meant, according to the claimants, that it was "clear and unequivocal" that the removal of the cycle lanes had been premature. The answer to the question the defendant should have asked was plain; namely, that more time was needed to enable data and evidence to be collected before the efficacy of the cycle lanes could be evaluated. As a result, the claimants submit that to decide anything other than to re-instate the cycle lanes was irrational.

76. The proposal in Option 3 to "develop plans to commission research into transport patterns in the post-Covid world" was not, according to the claimants, a rational substitute for monitoring and evaluating a temporary cycle lane that was *in situ*.

77. The defendant's overarching response to the rationality challenge is to contend that there is no legitimate basis for interfering with a judgment reached by a democratically-elected decision-maker, with the benefit of expert advice from specialist officers within the technical area of highways management. There were, the defendant says, powerfully expressed and conflicting views regarding the introduction of the temporary cycle lanes on Kensington High Street and it was for this reason that the decision was escalated to the defendant's Leadership Team for consideration. It is pointed out that views differed widely, as evidenced by the objections received from the London Ambulance Service and the London Fire Brigade on grounds of safety, and, by contrast, the supportive response from Transport for London.

78. It also has to be borne in mind, the defendant stresses, that although it might now seem easy to forget, the taking of the impugned decision in March 2021 arose during the Covid-19 pandemic. In reaching its decision, the defendant had to strike a balance with reference to considerations of design, safety, transport congestion and the overall aim of encouraging walking and cycling, at a time when there were still considerable uncertainties about the future.

79. The striking of that balance was, the defendant says, for it alone. The defendant seeks to draw support from Dolan v Secretary of State for Health and Social Care [2020] EWCA Civ 1605, which concerned a challenge to regulations made under the affirmative resolution procedure, restricting activities during the pandemic. At paragraph 90 of the judgments, the Lord Chief Justice held that the various balances which fell to be struck were "quintessentially a matter of political judgment" for the democratically accountable authority in question.

80. The defendant submits that, as in Dolan, the present decision was in a technical area, reached on the basis of advice from expert officers, requiring predictive judgments about future behaviours.

81. Given that the defendant decided to adopt Option 3 in the OR, it is particularly difficult, according to the defendant, to see how that decision can be said to be irrational, involving as it does the process of gathering evidence so that a long-term solution to the problems on Kensington High Street can be developed. The defendant contrasts this with the submission of the claimants that the only rational decision the defendant could have taken was to install the temporary cycle lanes, without conducting any further research on the issue.

82. The defendant stresses that its officers had expressly advised the Leadership Team that although the evidence did not point to a firm conclusion in favour of any one course, it was, nevertheless, sufficient to enable an assessment of each of the Options set out in the OR. There was sufficient evidence rationally to justify each of them.

83. Accordingly, the claimants face what the defendant submits is an impossible task, in contending that the decision was irrational.

Ground 2: discussion

84. I shall deal first with an issue regarding evidence. The claimants seek to rely upon a report published in October 2022 by the Centre for London. This finds that there is a "strong current and potential demand for East-West (and vice versa) cycle-based travel across the borough" and that there is not "a convenient alternative East-West cycling route on quiet roads". The report stops far short of any detailed designs, recommendations for temporary or experimental schemes or providing the bases for "plans for an alternative, permanent scheme".

85. This report post-dates the challenged decision by over 18 months. I do not consider it casts any relevant light on the present ground of challenge to that decision. Insofar as the claimants seek to rely upon it in support of Ms Wigley's submission, in oral argument, that Option 3 was merely in the nature of a sop or face-saving exercise, I agree with Mr Streeten that it is not relevant to the ground of challenge based on irrationality. The claimants have not sought to challenge the decision on the basis that it was taken in bad faith.

86. Despite the vigour with which Ms Wigley advanced ground 2, I find that the claimants have not demonstrated any irrationality on the part of the defendant. At heart, the fact that this is a "merits" challenge becomes evident at the point at which the claimants make it plain that, in their view, the only rational decision the defendant could have taken in March 2021 was to install the temporary cycle lanes, which had been earlier removed. There are huge and, I find, insurmountable difficulties in making good this contention, on the basis of irrationality. That is particularly so, given that we are, here, dealing with a democratically-elected body.

87. The claimants point to what they say is a significant paucity of data of matters relevant to the taking of the decision. The sufficiency of information to reach a decision is, however, a matter of judgment for the elected decision-maker: Secretary of State for Education and Science v Tameside MBC [1977] AC 1014. In this regard it is noteworthy that the claimants were refused permission in respect of their ground which alleged the defendant had failed to have regard to material considerations.

88. The claimants highlight the fact that paragraph 7.47 of the OR acknowledges that there was only one full week when the cycle lanes were in place, without there being major roadworks. That, and the effect of national lockdown, made it "very hard to draw firm conclusions about the effect of the cycle lanes on congestion". It is, however, impossible to draw from this the inference that the expert officers providing input to the OR were unable to provide any lawful advice, other than that the cycle lanes should be re-introduced, as opposed to (in particular) commissioning further studies on the matter.

89. On the subject of air quality/environment, the claimants point to paragraph 7.62 of the OR, which acknowledges the difficulties in analysing the environmental impact brought about by the defendant's decision to remove the cycle lanes. The same point applies as I have made in the preceding paragraph. Furthermore, it is for local authority members to reach judgments on the facts presented to them in the light of their local knowledge. I agree with the defendant that, for this purpose, such knowledge includes environmental impacts in respect of streets within the defendant's area.

90. Cycling safety was addressed at paragraphs 6.40, 6.41, 6.50 and 7.60 of the OR. The OR acknowledged the limitations as to available data but nevertheless advised members that the temporary cycle lanes "had made [cyclists] feel safer and encouraged them to cycle, or cycle more"; and that this was consistent with the cycle count data. There is nothing legally problematic with this.

91. Turning to the use of the cycle lanes, the defendant addressed this topic at paragraphs 6.38 to 6.39 and 7.2 to 7.16 of the OR. The report expressly recognised that an increase in cycle usage occurred when the temporary cycle lanes were in place. I accept this was taken into account by the Leadership Team in reaching its decision. Furthermore, the defendant undertook a full equalities impact assessment. I note that permission to bring a challenge in respect of the PSED was refused.

92. The OR recorded both support and objection from local businesses. The claimants contend that it was irrational to take into account the objections of some local businesses without considering any information as to their size, location and nature. It is said that this alleged failure was compounded by failing to acknowledge the support of larger retailers such as Waitrose, Decathlon and Peter Jones. The position of those three businesses was, however, expressly recorded in 6.21 of the OR.

93. Overall, I find there is simply nothing in this aspect of the challenge.

94. I turn to the issue of the framing of the decision by the defendant. As was pointed out by Laws LJ in paragraph 41 of Bhatt Murphy, how a decision is framed is essentially a matter for the public authority in question. No one reading the OR could be in any doubt as to the context in which the Leadership Team was being asked to reach a decision on the four options. The background, which would have been known to the Leadership Team, included the threatened judicial review of the decision to remove the cycle lanes. It also included the defendant's announcement that it would consider the issue afresh "with an open mind and in the light of the most up to date information": paragraphs 5.5 to 5.11. Reading the OR fairly and as a whole, as I am enjoined to do by Mansell v Tonbridge and Malling DC [2019] PTSR 1452, the fact that the Leadership Team was in reality revisiting the decision that had been taken to remove the cycle lanes was plainly well understood.

95. I agree with the defendant it is notable that the claimants' letter of 16 March 2021 specifically deals with the framing of the decision. The letter does not come close to suggesting this framing decision was irrational. Whilst the claimants are not legally fixed with that view, their contemporaneous stance is, nevertheless, significant and, I find, represents reality.

96. In so finding, I accept that, as Ms Wigley says, there are two paragraphs on the third page of the letter of 16 March under the heading "Framing of the question". These are followed by paragraphs under the heading "Framing of the options". None of these paragraphs, however, contend that the defendant was acting unlawfully by describing the decision faced as being "whether to introduce a temporary cycle lane in Kensington High Street". The letter specifically acknowledges that "your decision is also specifically to re-visit the unlawful decision to remove the scheme that was in place before you took it out after just seven weeks".

97. Overall, I agree with Mr Streeten that it is paradoxical for the claimants, on the one hand, to say that the defendant did not have sufficient information to reach a decision and, on the other, to contend that the defendant's decision to conduct further research before determining what, if any, cycle lane provision there should be on Kensington High Street, was irrational.

98. Ground 2 accordingly fails.

D. DECISION

99. The application for judicial review is dismissed.