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

CLAIM NO: CO/4957/2011

BETWEEN:

THE QUEEN (on the application of)
(1) MARGARET BAILEY
(2) NIPUNI DEZOYSA
(3) STEVE LESTER

Claimants

-and-

BRENT LONDON BOROUGH COUNCIL

Defendant

DETAILED GROUNDS OF RESISTANCE

A. Introduction

1. This is a claim for judicial review of the decision taken by the Executive of the London Borough of Brent Council ("the Council") on 11 April 2011 to adopt proposals for a transformed library service ("the Decision"). The Decision was taken against the background of unprecedented and severe public sector funding cuts, which required the Council to make total reductions in spending of £41.7 million in 2011/12 and up to £108 million over a four year period. The scale of these cuts meant that the Council needed to make significant savings across all service areas.

2. The Decision taken on 11 April had two parts: (1) to improve significantly the service provided at six high quality library buildings, which included extended opening hours, enhancement of available stock, better facilities for students and young people, improved on-line and digital services, more access to computers, and an improved home visit and outreach service; and (2) to close six library buildings at Barham Park, Cricklewood, Kensal Rise, Neasden, Preston and Tokyngton. The six library buildings provide services

to less than 25% of active library users within the Council's area, and less than 5% of Brent's population. The remaining library buildings are reasonably spread out across the Borough.

3. The Decision was assessed as resulting in gross savings for the Council of approximately £1 million per annum. Net savings would be £800,000, as there would be additional costs associated with improvements to the library service at the six retained libraries: £50,000 per annum for improved Information Technology; £66,000 per annum for improvements in self-service; and £65,000 per annum for Sunday opening in retained libraries that do not currently open on Sundays.

4. The Decision was taken in the exercise of the Council's statutory duty under s.7(1) of the Public Libraries and Museums Act 1964 ("the 1964 Act") to "provide a comprehensive and efficient library service". The Council concluded that the transformed library service was the best means of discharging that duty.

5. The background to the development of the Libraries Transformation Project, and the Decision taken by members, is set out in the w/s of Susan Harper and is not repeated here.

6. In summary, however, it is noted that a detailed and extensive public consultation took place on the Council's preferred option to transform the library service, which was to enhance services at six of its libraries, and close six others; and to give proper consideration to proposals from voluntary organisations for running library services in vacant buildings, which presented a robust business case, was subject to agreement of building owners and was at no cost to the Council.

7. So as to assist members of the Council's Executive to make its decision, officers prepared a very detailed report and made recommendations, based on careful analysis of consultation responses, the various alternative proposals, the needs of the service, and the production of an Equalities Impact Assessment of the preferred option. Members carefully considered this material, and accepted the officers' recommendations.

8. The Claimants' Statement of Facts and Grounds runs to some 172 paragraphs and 68 pages, and yet they do <u>not</u> allege that the Decision was *irrational:* that no reasonable library authority directing itself properly could have reached a conclusion to approve the Library Transformation Project. Nor do the Claimants contend that the enhanced provision

at six libraries and the closure of six existing libraries would not satisfy the Council's statutory duty to provide 'a comprehensive and efficient library service' under section 7 of the 1964 Act. There is no doubt that it can.

9. Rather, the Claimants' position is that the way in which the Council reached its decision was unlawful on a number of grounds. Each ground of challenge is resisted:

(1) First, it is denied that the Council misdirected itself in law as to the means by which it could fulfil its statutory duty under s.7 of the 1964 Act. It is said that the Council misdirected itself in that it proceeded on the basis that it *could not* operate libraries collaboratively with community groups or others in fulfilment of its statutory duty. This is not correct. The Council was fully aware that it was *possible* for it to discharge its section 7 duty by ensuring that library services were provided by community groups. The Council invited alternative suggestions about how the library service should be run, and Council specifically invited voluntary organisations to submit proposals for the use of any premises that would be vacated if the Libraries Transformation Proposals were adopted.

Further, it is denied that the Council had decided in advance that in no circumstances would it contribute to community supported library arrangements in fulfilment of its section 7 duty. The Council had not closed its mind to this possibility, or predetermined the outcome. Officers of the Council carefully evaluated the proposals received, and concluded that they were not viable. The Council approved that recommendation and made its Decision to that effect.

(2) Secondly, it is denied that the Council breached section 7 of the 1964 Act in making the Decision because the Council (a) failed to assess the need for library services in its area rationally or at all; and (b) failed to take into account what they term mandatory considerations, namely duties owed to children under the Children Act 1989 and the Children Act 2004.

With respect to (a), the suggestion that the Council "failed to assess the need for library services in its area" at all is demonstrably false: see w/s Harper, Section G. Nor can it sensibly be argued that the Council did not "rationally" assess the need for library services in its area. The Council's assessment of need drew on a number of sources, including the Museums Libraries and Archives report, "What People want from Libraries", the Red

Quadrant report, the DCMS report arising out of the inquiry into Wirral Libraries, the results of recent CIPFA Public Library User Surveys, library management system data including information on all active borrowers, demographic data, analysis of the consultation responses and the equality impact assessment. The key points in the user needs assessment were then summarised at **[2/E/538].**

With respect to (b), the Council was fully aware of its general duties towards children and the young. The wishes of children within the borough were taken into account in formulating the proposal; and the impact of the Decision on such children was considered in detail, particularly in the equality impact assessment. The Council's Director of Children & Families was fully aware of the Libraries Transformation Proposals and did not express any concerns about any impact on children.

(3) Thirdly, it is denied that the Council failed to comply with the public sector equality duty, now contained in s.149 of the Equality Act 2010. Consideration of the equality implications of the Libraries Transformation Proposals was given genuine consideration at the formative stage, i.e. before the Decision was taken, and in total compliance with the principles enunciated by the Divisional Court in *R (Brown) v. Secretary of State for Work and Pensions* [2009] PTSR 1506. Members carefully considered the detailed analysis of the impact of the proposals on different equality groups, and steps that it was proposed to take to mitigate any adverse impact; and

(4) Fourthly, it is denied that the consultation process was unlawful in that the Council (a) failed to consult the public on other options or on the question of which libraries should be closed; and (b) failed to give those making alternative proposals any "real idea" of the case to be met. The consultation process was fair and lawful.

> (a) It is a trite observation that a public authority is entitled to consult upon a particular proposal. There is no general principle that a decision maker must consult on all the possible ways in which a specific objective might arguably be capable of being achieved: see, for a recent example, *R (Vale of Glamorgan Council) v the Lord Chancellor* [2011] EWHC 1532 (Admin) at [24]. Any consultee was free to make a submission that alternative means should be considered to achieve the Council's objectives, including that other libraries should be closed; and many consultees did so. Extensive information was provided to the

public throughout the consultation period to enable them to give an informed response to the proposal.

(b) The Council considered proposals for the alternative use of buildings that would be vacated in the event that the Council adopted the proposal to close six libraries. The public had been consistently informed that the Council would expect any such proposals to be based on a "robust business case" and at "no cost" to the Council. Officers drew up a set of criteria to test whether the proposals met those principles, and to ensure that any equality concerns would be met. It simply cannot be said that proposers "had no real idea of the case to be met". The criteria used were obvious criteria by which the adequacy of proposals would be addressed: see *R (Robin Murray & Co.) v. Lord Chancellor* [2011] EWHC 1528 (Admin) at [41].

10. In the circumstances, the Council submits that permission should be refused, or alternatively, that the claim should be dismissed.

B. The Statutory Framework

11. There are two key statutory duties with which this claim is concerned.

i) The 1964 Act

12. The first is that contained in section 7 of the 1964 Act. Section 7(1) states that:-

> "It shall be the *duty of every library authority to provide a comprehensive and efficient library service* for all persons desiring to make use thereof…provided that although a library authority shall have power to make facilities for the borrowing of books and other materials available to any persons it shall not by virtue of this subsection be under a duty to make such facilities available to persons other than those whose residence or place of work is within the library area of the authority or who are undergoing full-time education within that area."
>
> (emphasis added)

The Council is a library authority for the purposes of the 1964 Act.

13. Section 7(2) provides that in fulfilling the duty under s.7(1), a library authority shall have regard "to the desirability" of various factors, including that of (a) securing, by the keeping of adequate stocks, by arrangements with other library authorities, and by any other appropriate means, that facilities are available for the borrowing of, or reference to books and various other items sufficient to meet the general requirements and any special requirements of adults and children; (b) encouraging both adults and children to make full use of the library service; and (c) securing co-operation between persons carrying out library functions within the library area.

14. Section 7 is a "target duty", i.e. it is couched in wide and general terms which necessarily confer discretion as to the way in which the result is to be achieved: see, by analogy, *R (G) v London Borough of Barnet* [2004] 2 AC 208. The reference in section 7(2) to having regard to the "desirability" of various matters confers a similar broad discretion.

15. Section 8(1) of the 1964 Act places a restriction on charging for library facilities made available by the authority. The Secretary of State has the power to make regulations authorising charges to be made for certain items; but in general, he cannot authorise any charges to be made for lending any written material to any person. Section 9 empowers – but does not require - a library authority to make contributions "towards the expenses of another library authority or of any other person providing library facilities for members of the public".

16. By section 1 of the 1964 Act, it is the duty of the Secretary of State to superintend, and promote the improvement of, the public library service provided by local authorities in England and Wales; and to secure the proper discharge by local authorities of their functions under the 1964 Act. Section 10 of the 1964 Act sets out the Secretary of State's default powers under the Act. These include the power to hold an investigation into allegations that any library authority has failed to carry out its duties under the Act; giving an order to remove any default in carrying out an authority's duties, and ultimately to make an order transferring the functions of the library authority to the Secretary of State.

ii) The Equality Act 2010

17. The second key statutory provision is section 149 of the Equality Act 2010, which now contains the duty commonly known as "the public sector equality duty" ("the PSED"). Section 149 came into force on 6 April 2011, and was the operative statutory provision when the Council took the Decision five days later, on 11 April 2011.

18. The primary obligation is contained in s. 149(1), which states that:-

> "A public authority must, in the exercise of its functions, have due regard to the need to –
>
> (a) Eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
>
> (b) Advance equality of opportunity between persons who do not share a relevant protected characteristic and persons who do not share it;
>
> (c) Foster good relations between persons who share a relevant protected characteristic and those who do not share it."

19. Section 149(3) sets out what is meant by "having due regard to the need to advance equality of opportunity"; and section 149(5) stipulates the same for the "need to foster good relations between persons who share a protected characteristic and persons who do not share it". Section 149(4) states that the steps involved in meeting the needs of a disabled person include steps to take account of disabled persons' disabilities.

20. Under s.149(7) of the 2010 Act, the relevant protected characteristics are age, disability; gender assignment; pregnancy and maternity; race; religion or belief; sex; sexual orientation.

C. Response to Grounds of Claim

Ground 1: No Misdirection in Law

21. The Claimants contend that the Council misdirected itself in law by considering that libraries could only be either provided and funded solely by the Council in fulfilment of its duty under section 7 of the 1964 Act, or could be a private and community library provided and funded separately, and in addition to, the Council's own library provision. Further, that the Council "closed its mind to the possibility" throughout the Libraries Transformation Project that libraries could be provided by voluntary groups or private

individuals as a means of discharging the Council's statutory duty under section 7 of the 1964 Act.

22. These allegations are simply incorrect. The Council had never contended that section 7 required it to provide all library facilities in its area itself; and had never ruled out the possibility that, in theory, voluntary groups could provide library services that could contribute towards the Council's statutory duty, whether subsidised by the Council or otherwise. However, on the facts of this case, and following a careful consideration of the proposals submitted by such voluntary groups, officers of the Council formed the view that none of the proposals put forward were viable and should be proceeded with.

23. In the judgment of the officers, the Council could provide a 'comprehensive and efficient library service', by an enhanced service at six libraries. Accordingly, they did not consider that it was necessary for the Council to work with community groups to fulfil the section 7 duty. Nor, in the circumstances as presented to the Council, did officers conclude that this was desirable as a means of discharging the section 7 duty. The Executive of the Council agreed.

24. Contrary to the Claimants' assertions, the Council's position was as follows:-

(1) The Council's preferred policy option was that set out in the Libraries Transformation Project, namely to close six libraries, improve the remaining six libraries, and to invite voluntary organisations who wished to, to present a "robust business case" for running library services in the vacated buildings, subject to the agreement of building owners and at no cost to the Council.

(2) The Council consulted on this preferred policy option. The purpose of the consultation was stated to include a desire "to find out what people think of the proposals" and "the extent to which communities can become involved in managing and running local libraries". Consultees were asked whether they preferred a different course of action, and to identify any suggestions for taking that forward.

(3) Proposals for running a library service in a building that would be vacated by the Council under its preferred option were evaluated against obvious criteria that examined

whether a "robust business case" "at no cost to the Council" had been presented. None of them did present such a proposal.

(4) Officers considered whether any of the proposals would meet the Council's objectives, and its financial and legal obligations – namely, its statutory duty under s.7 of the 1964 Act, and its duty to balance the budget. Officers did not consider that any of the proposals presented by voluntary groups satisfied this test. None of them were recommended to members as satisfying the Council's objectives and/or of enabling it to meet its statutory obligations, including the s.7 duty.

(5) In the view of officers "none of the proposals represent viable business cases": see w/s Harper, at [111]-[115]. The Executive agreed.

(6) There was no basis, therefore, for the Council to adopt a different position from its preferred option: it could, and should, meet its section 7 obligations by enhanced service provision at the six libraries, and closing six others. Alternative proposals for use of the vacant buildings were rejected.

25. The Council's conclusion – adopting the very brief summary of detailed analysis prepared by officers– is found at paragraph 12.1 of the Report. It states that the Libraries Transformation proposals will fulfil the Council's duties, i.e. will provide a comprehensive and effective library service. It then goes on to state that:-

"Any organisations, groups or individuals who delivered a private or community library, whether or not they used buildings currently or previously used by the Council as libraries, would be doing so in addition to the Council's provision and not as a contribution to the Council's discharge of its statutory duties."

The Claimants take issue with this sentence, contending that this demonstrates a clear misdirection of law. That contention is misconceived. This was not a general statement of legal principle (such principles are found in Section 6 of the Report). Rather, this was the recommendation made to members by officers *on the facts of the present case.* The enhanced six libraries *would* satisfy the Council's section 7 duty. There was nothing erroneous about what they had said.

26. The Claimants acknowledge at paragraph 103 of the Statement of Facts and Grounds that it would be open to a local authority to decide, after a lawful consultation, that the appropriate means to discharging its section 7 duty would be to provide all services directly and so additional services in partnership with others would not be needed. This is precisely what the Council did.

27. The Claimants allege that there was predetermination of this issue, and that library closures were an inevitable fact. This is disputed. Members legitimately favoured a preferred policy option, and it was that option that had been put out to consultation. As part of this option, their expectation was that community group proposals would be at 'no cost'. But members had not ruled out the consideration of any alternative proposals that may have come forward during the consultation period. Indeed, community groups clearly assumed that the Council had not closed its mind to this matter, or they would not (each of them) have put forward proposals that required a subsidy from the Council. On the facts, and only when it made the Decision on 11 April 2011, did the Council decide to adopt the recommendations of officers and approve the proposal that had been put out to consultation.

28. The Claimants also contend that the Council "failed to give any consideration" to two further matters, namely (i) whether to establish a joint library board with one or more authorities; or (ii) to increase charges for the use of library premises for the holding of meetings or educational or cultural events under s.20 of the 1964 Act. This is simply incorrect.

    (1) Consideration was given to joint working with other local authorities, most particularly through the London Libraries Change Programme. This has the potential for efficiency savings through a joint stock support team for 15 boroughs, shared procurement of stock etc. The Council is also investigating shared services with neighbouring boroughs. While the London Borough of Camden had confirmed that it does not wish to take this idea any further at this time, discussions are ongoing with other authorities. However, this is a difficult political process, as different authorities have different ambitions and aspirations for their library services; and the progress of discussions has been slow. Agreement is unlikely in the short to medium term. Such arrangements will not be able to contribute to the necessary efficiency savings at the present time.

(2) The consultation questionnaire specifically asked consultees whether they would be prepared to pay a reasonable charge to use certain services in library buildings, such as children's events and activities, events and activities for adults etc. It was considered that (i) not all premises have the space or facilities to hold such events; and (ii) only around half of consultees said they might be prepared to pay for adult events/activities, and only around one third said they might be prepared to pay for children's events and activities: **[2/E/574].** It was the professional opinion of the officers concerned that increasing charges would not generate anything like the level of revenue savings that needed to be made in the library service budget; and any profit would be marginal. Charging could have the effect of excluding community groups from the premises through costs.

Ground 2: No breach of section 7 of the 1964 Act

29. The Council has properly discharged the duty under s.7 of the 1964 Act. The Council accepts that there is an implied duty under section 7 of the 1964 Act to consider the needs of those in its area before determining whether proposals amount to a "comprehensive and efficient" library service. The Council was of course under a duty to ask itself the right questions, and to take *reasonable steps* to acquaint itself with the relevant information to enable it to answer the question correctly: see *Secretary for Education v Tameside MBC* [1977] AC 1014 at 1065. However, it is for the decision maker, subject only to review on *Wednesbury* grounds, to decide upon the manner and intensity of enquiry to be undertaken into any relevant factor: see, for example, *R (Khatun) v London Borough of Newham* [2005] QB 37 at [35].

30. The Claimants contend that the Council has "failed to assess need". This contention is unsustainable. Equally unsustainable is the contention that the Council "did not rationally assess" the need for services.

31. The process by which the Council carried out this assessment is set out in the w/s Harper, at Section G. The Council's assessment of need drew on a number of relevant sources, including:-

(1) Library management system data, including detailed data about existing library usage across the borough over a number of years, such as data about the number of visits to each library, the number of "issues" and the cost per issue

(2) Recent surveys about library use, conducted as part of the national model for surveying users of public libraries. The most recent Adult Public Library User Survey ("PLUS") was carried out in 2009; and the Children's PLUS in 2010.

(3) Strategic trends in the development of library services, as set out in national policy documents about the future of libraries provision (e.g. the Museums Libraries and Archives report, "What People want from Libraries"),

(4) Research carried out by Red Quadrant consultants about what people in Brent wanted from their library service; and

(5) Information obtained through the consultation process, which specifically sought to obtain information about what people "want and need from their library service for the future"

(6) Demographic data about the Brent population as a whole (including non library users) obtained from the latest census figures and Mayhew reports; and

(7) The equality impact assessment.

32. The key points in the user needs assessment were then summarised at **[2/E/538].**

33. The Council did not act irrationally in relying on the information contained in these documents as part of its assessment of need:-

(1) Red Quadrant consultants were specifically tasked to "consult with staff and users to identify user needs". That was precisely what they did;

(2) The consultation sought people's views on what they want and need from the library service. The analysis of consultation responses noted that they were not representative of library users as a whole, and that unsurprisingly, there was a high response rate from those

who use one or more of the libraries threatened with closure. However, the suggestion that the Council acted irrationally in having regard to consultation responses in considering how to discharge its statutory duty is startling.

(3) As set out in response to Ground 3, the equalities impact assessment was not flawed in the way the Claimants suggest or otherwise.

(4) The public consultation exercise was not flawed, as consultees were invited to give their thoughts on the Council's proposal, and to give their views on any alternative way in which the Council should proceed. Many consultees responded by making submissions that different libraries should be closed: see, for example, the submission from the Save Preston Library campaign.

(5) The consultation was directed at those who lived in Brent, as well as those who worked and made use of facilities in the area. The steps taken to publicise the consultation exercise were more than sufficient to bring the matter to the attention of those who worked and studied in Brent: w/s Harper, at [51]-[55]; see also 2/E/566 at para 4.3]

(6) The library usage data was the best available. Electronic turnstiles are installed in all Brent libraries, and are used to record automatically the number of individuals who enter library premises, regardless of the purpose of their visit. Library management system data contains data about the number of issues made.

34. The only specific criticisms of the assessment of need have no foundation:-

(1) Section 7 deals with the needs of persons whose residence or place of work is within the library area of the authority, or who are undergoing full-time education within that area. This duty relates to the current needs of those individuals, not those that may arise in the future (if needs change significantly in the future, it may be incumbent on the library authority to look again at this matter).

(2) The Claimants are reduced to alleging that there was no "meaningful" analysis of the proportion of people who are likely to migrate, factors that may prevent them

from doing so, and the effect on them if that is the case. However, it is clear that accessibility to alternative library provision was key to the Council's analysis. It is set out in the User Needs Assessment. It is examined in detail in the Equality Impact Assessment – which includes consideration of those active borrowers who are likely to find access difficult, any barriers to access, and mitigating measures to assist in overcoming access difficulties: see w/s Harper, at Sections G-H.

(3) The Claimants also contend that the Council relied upon home computer use to mitigate the impact of closure, yet did not consider the number or proportion of library users who did not have access to a home computer or broadband. This allegation is simply incorrect. The equality impact assessment relies on recent surveys of internet use within the Brent area, which concluded that 90% of the Brent population now have access to the internet from home: see w/s Harper at [93].

35. Accordingly, the Council submits that it has not breached section 7 of the 1964 Act. It gathered "up to date, accurate and comprehensive information" about the needs of those to whom the section 7 duty was owed.

36. Further, the Council has not failed to have regard to "mandatory relevant considerations" under section 17 of the Children Act 1989 or section 10 of the Children Act 2004.

(1) First, the Council rejects the contention that the general target duty in s.17(1) of the Children Act 1989 amounts to a statutory mandatory relevant consideration that must specifically be taken into account whenever the Council takes any decision which may impact upon the welfare of a child, or children, who may fall within the statutory definition of a "child in need".

(2) Secondly, the duty imposed by s.10 of the Children Act 2004 (referred to by the Claimants at [124]) is a duty to "make arrangements" to promote co-operation between the Council and its relevant partners; and these arrangements are made "with a view to improving the well-being of children in the authority's area". The Council has these arrangements in place. The duty does not impose an obligation on the Council to seek the views of each of the persons with whom it has these arrangements whenever any decision that may affect the well-being of children in its area is being considered.

(3) Thirdly, in any event, the views of a number of relevant partners with respect to the proposal were sought as part of the consultation: in particular, schools, nurseries and children's centres: see w/s Harper at [59]-[68]

(4) Fourthly, and in any event, the needs and wishes of children within the borough were clearly taken into account in formulating the proposal; and the impact of the proposal on children was considered in detail, particularly in the equality impact assessment. Mitigating steps for the very small proportion of children who would not be able to migrate to alternatives libraries were set out in Appendix 4 to the Report. Contrary to the Claimants' contention at [126], the Officers' Report *did* contain reference to the Children Act – the 'Issues Analysis' of the Equalities Impact Assessment (which forms part of the Officers' Report) expressly stated that 'When considering the implementation of these proposals and the delivery of the new core offer to children and families, every local authority that provides services to children needs to consider Section 11 of the Children Act 2004', and that provision was explicitly set out for Members' attention.

(5) Fifthly, the Claimants' contention that (i) the views of the Director of Children & Families on a proposal that could impact on children are a statutory mandatory consideration; and (ii) they must therefore be set out in the Report to members cannot be derived from the Children Act provisions that they refer to. However, as a matter of fact, the Council's Director of Children & Families was fully aware of the Libraries Transformation Proposals through the Council's ordinary internal processes for consultation. The Director did not express any concerns about any impact on children and so even if this should have specifically been drawn to the attention of Council members, it would have made "no difference": see w/s Harper, at [65]-[68].

Ground 3: No Breach of the Public Sector Equality Duty

(a) Preliminary Points

37. The statutory duty under s.149 of the 2010 Act is set out above. It is a duty "to have due regard" to three statutory "needs" set out in s.149(1) – to eliminate discrimination, advance equality of opportunity and foster good relations – in the exercise of its functions. It is not a duty actually to secure those things: see, for example, *R (Baker) v Secretary of*

State for Communities and Local Government [2009] PTSR 809. In exercising the duty, it is for the decision maker to assess what weight should be given to the duty in the decision-making process: see *R (Equality and Human Rights Commission) v Secretary of State for Justice* [2010] EWHC 147.

38. The duty is to have "due regard" to the matters set out above. The context of a decision will always be important in assessing what regard is "due" in any given set of circumstances: *Baker* at [31]. The Claimants seek to compare the present case with the case of *R (Hajrula) v London Councils* [2011] EWHC 448 (Admin), where the Court held that the due regard was "very high" in a case involving cuts in funding to large numbers of voluntary groups, many of which were serving some of the most vulnerable persons in the London area (many of whom fell within the protected groups). The Decision, and the decision under challenge in *Hajrula*, are totally different, both qualitatively and quantitatively. The Decision is not targeted specifically at cutting the funding of organisations that provide services to vulnerable groups; and the number of library users who will not easily be able to migrate to alternative libraries is a very small proportion of users as a whole (see the analysis in the EIA, at **[2/E/606].** In any event, it is abundantly clear that the 'regard' had by the Council to the equality duty was, in fact, very great.

(b) Council complied with the "Brown" principles

39. In ***R(Brown)*** [2009] PTSR 1506, the Divisional Court set down guidance to be followed in the application of the predecessor provisions to s.149 of the 2010 Act. It is common ground that these principles apply equally to the interpretation of the current legislation. This guidance was endorsed by the Court of Appeal in the case of *R (Domb) v London Borough of Hammersmith and Fulham* [2009] LGR 843. The Council has clearly complied with these principles:-

(1) *First, those in the public authority who have to take decisions that do or might affect protected groups must be made aware of their duty to have "due regard" to the identified goals.* Members were fully aware of their duties under s.149, and were given clear advice about their statutory duties in section 6 of the Report **[2/E/516, para 6.5-6.17)**

(2) *Secondly, the due regard duty must be fulfilled "before and at the time that a particular policy that will or might affect" protected groups "is being considered by the*

public authority in question". Attempts to justify a decision as being consistent with the exercise of the duty when it was not in fact considered before the decision was made will not be sufficient to discharge the duty. The requirement is that public bodies give advance consideration to the statutory equality issues before making any decision that might affect them: see, for example, R (Elias) v Secretary of State for Defence [2006] 1 WLR 3213. The Council carefully considered the three statutory "needs" in advance of taking the Decision. Contrary to the Claimants' assertion, these matters were considered at a formative stage, as the Council had not decided in advance of the meeting on 11 April 2011 to adopt the Libraries Transformation Proposals as the means of discharging its statutory duties under s.7 of the 1964 Act: see w/s Harper at [118]-[120].

(3) *Thirdly, the duty must be exercised "in substance, with rigour and with an open mind".* While an equality impact assessment is not a requirement of the lawful discharge of the duty, the detailed 70-page assessment and analysis carried out in the present case demonstrates that this requirement was met. It addresses the effect of a decision to close the six libraries on those who use the libraries, and those who live in the vicinity of those libraries. Four particular "themes" are identified across protected groups as potentially having an adverse impact on the statutory matters to be considered. Consideration is given to whether they in fact have that effect; and if so, what mitigating measures can be taken to ameliorate it.

(4) *Fourthly, the duty imposed on public authorities is a non-delegable duty.* Members were advised of this fact, and were aware that they had to consider the various factors themselves.

(5) *Fifthly, the duty is a continuing one.* Again, members were aware of this requirement.

(6) *Sixthly, it is good practice for those exercising public functions in public authorities to keep an adequate record showing that they had actually considered their equality duties*. The equality impact assessment and the Report itself demonstrates that members gave such consideration.

(c) Particular complaints

40. The Claimants have set out an extensive list of questions that they say the Council should have asked itself when considering its duties under s.149. However, the duty is not to

address matters that the Claimants would like addressed; rather, the duty is to comply with the statutory requirements, as interpreted by the courts.

41. The suggestion that there was no "genuine consideration" of the equality implications before a decision was taken as to how the Council would discharge its functions under s.7 of the 1964 Act is untenable. The Council did not take a decision on this matter until the meeting of the Executive held on 11 April 2011.

42. The Claimants' submission that there is no evidence of any regard being given to the equalities issues when considering which libraries ought to be closed reveals a fundamental misunderstanding of the Decision. The Claimants contend that the Council assumed that the libraries to be closed would necessarily be those with the fewest users. This was not the case. Kilburn library had fewer visits per year than Neasden library, and a similar "cost per visit" figure. Nevertheless, recommendation of officers was that the Council should close Neasden and retain Kilburn because there was a disproportionate number of people with disabilities, the elderly and the very young around Kilburn, who would have the most difficulty in travelling to an alternative library. This is set out clearly in the Report at paragraph 7.6 to Appendix 1 (Claimants' Bundle at 552): see w/s Harper at [98]**.** This shows just how carefully equalities considerations were taken into account by the Council.

43. Further, neither the statutory provisions themselves nor the court's interpretation of those provisions in *Brown* require, as the Claimants seem to contend, that public authorities must conduct an equality impact assessment, or even to consider the equalities implications, for every possible alternative means of exercising the function in question.

44. Finally, the Claimants fall far short of demonstrating that the Council acted irrationally in identifying the information it relied upon to discharge its statutory duty. The Council relied upon the data set out in paragraph 31 above. It was fully entitled to rely on this data for the reasons set out above.

(1) Steps were taken to elicit the views of BME library users, through the PLUS, publicity of the consultation proposals, specific consultation with BME forum, and through discussion in area forums, public meetings, open days.

(2) Detailed consideration was given to the ability of existing users to migrate to alternative libraries. The Council did consider the equalities impact of different abilities to migrate, considering the issues that may be faced by the disabled, the elderly, the young etc. Those protected characteristics that could impact on access to alternative libraries were all considered.

(3) Section 7 of the 1964 Act deals with the needs of persons whose residence or place of work "is" within the library area of the authority, or who are undergoing full-time education within that area. This duty relates to the current needs of those individuals, not those that may arise in the future. The Council was not under any obligation to identify projected demographic changes that might occur in the future.

Ground 4: Fair Consultation Process

45. In relation to the final ground of claim, it is submitted that the consultation process was fair and lawful.

46. The content of the duty of consultation is now well-established, and seems to be common ground in this case. Firstly, consultation must be undertaken at a time when proposals are still at a formative stage. Secondly, sufficient reasons must be provided for particular proposals so as to permit those consulted to give intelligent consideration and make an intelligent response. Thirdly, adequate time must be given to allow responses to be made. Finally, the responses to consultation must be conscientiously taken into account when the ultimate decision is taken: see *R v Brent London Borough Council, ex-parte Gunning* (1985) 84 LGR 168; *R v North East Devon Health Authority ex p Coughlan* [2001] QB 213 at [108].

47. As Simon Brown LJ (as he then was) pointed out in *R v Devon County Council, ex-parte Baker* [1995] 1 All ER 73, 88: "The precise demands of consultation … vary according to the circumstances … Underlying what is required must be the concept of fairness …"

48. The question is not whether the consultation exercise might have been improved upon. As Sullivan J (as he then was) put the matter in *R (Greenpeace) v Secretary of State for Trade & Industry* [2007] EWHC 311 (Admin) at [63]: "… The conclusion that a consultation

exercise was unlawful on the ground of unfairness will be based on the finding by the court not merely that something went wrong but that something went "clearly and radically" wrong."

49. In the present case, nothing went wrong, let alone “clearly and radically wrong”.

50. The starting point is that a public authority is entitled to consult upon a preferred option: see, for example, *Nichol v Gateshead MBC* (1988) 87 LGR 435. Consultation that takes place after a specific proposal has been put out to consultation is still consultation “at a formative stage”. The requirement that consultation must take place at a time when proposals are still at a formative stage does not, however, require that there should be consultation about all possible alternative options. There is no general principle that a decision maker must consult on all the possible ways in which a specific objective might arguably be capable of being achieved: see, for a recent example, *R (Vale of Glamorgan Council) v the Lord Chancellor* [2011] EWHC 1532 (Admin) at [24].

51. Consultation must include sufficient reasons for a particular proposal to allow those consulted to give intelligent consideration and an intelligent response. There is no obligation for a decision maker carrying out a consultation to disclose all material relied upon for his decision: *Edwards v Environmental Agency* [2006] EWCA Civ 877, at [103]. Moreover, it is not incumbent upon a consultor to summarise the arguments against a particular proposal, or to set out the reasons why an alternative was not being considered: see *R (Beale) v London Borough of Camden* [2004] HLR 48 at [19]. What needs to be published about a proposal is very much a matter for the judgment of the person carrying out the consultation, to whose decision the courts will accord a very broad discretion: see *R (Devon County Council and Norfolk County Council) v Secretary of State for Communities and Local Government* [2010] EWHC 1456 (Admin) at [68].

52. “Sufficient information to enable an intelligible response” requires the consultee to know not just what the proposal is in whatever detail is necessary, but also the factors likely to be of “substantial importance” to the decision, or “the basis upon which the decision is likely to be taken”: see R *(Devon County Council and Norfolk County Council* [2010] EWHC 1456 (Admin) per Ouseley J at [68], where he adopted the observations of Silber J in *R (Capenhurst) v Leicester City Council* (2004) 7 CCLR 557.

53. It is not necessary for a public body engaged in a consultation exercise to circulate information about the way its consideration of the matters before it is developing and to afford an opportunity for further responses. To hold otherwise has the potential to lead to a never-ending dialogue and to be inimical to the principle that there must come a time when finality has to be achieved: see *R (Robin Murray & Co) v Lord Chancellor* [2011] EWHC 1528 (Admin) at [46]-[48]. As the courts have held, consultation is not the same as negotiation. It is only in exceptional cases, for example, where the matters which have emerged lead the public authority to wish to do something "fundamentally different" from the proposals consulted upon, or fairness otherwise requires further consultation on a matter or issue that has been thrown up, that such further consultation may be required.

54. The consultation undertaken in the present case meets all of these requirements:-

(1) The Council's preferred option was to adopt the Libraries Transformation Project, to improve six existing libraries and to close six libraries. As part of this preferred option, it invited proposals for the alternative use of buildings that would be vacated in the event that the Council adopted the proposal to close six libraries. Its preferred option was that any such proposals would be based on a "robust business case" and would be "at no cost" to the Council.

(2) Any consultee was free to make a submission that alternative means should be considered to achieve the Council's objectives, including that other libraries should be closed: see w/s Harper, at [48]-[50]. Indeed, many consultees did just that (see, for example, the Save Preston Library proposal and analysis of consultation responses, [2/E/576].

(3) The Council explained in the consultation document why it proposed to close the six libraries in question - namely that those six libraries had low usage and/or were sited in a poor location [2/F/2]. The consultation document contained a table setting out the number of visits per year for each library, and the cost per visit.

(4) During the course of the consultation period, further queries were raised about how the usage figures had been calculated. Those queries were answered and published on the consultation website: see, for example, [2/F/319]. No queries were raised about how the

libraries proposed for closure were said to be "poorly located" compared to others, as such a matter is obvious.

(5) The Claimants contend that requests for information required to formulate their plans were not fully addressed. However, they have not identified what information they say they should have been provided to them and was not provided to them.

55. The Claimants then contend that "insufficient information was provided to consultees to enable proposals as to alternative models of provision to be advanced on a sufficiently informed basis and to stand a chance of being approved." The seven criteria were drawn up to test whether the proposals met those principles; or to ensure that the Council's equalities duties were met. It simply cannot be said that proposers "had no real idea of the case to be met". They must have done: the criteria were obvious criteria by which the viability and adequacy of proposals would be addressed: see *R (Robin Murray & Co.) v. Lord Chancellor* [2011] EWHC 1528 (Admin) at [41].

D. Standing

56. The Council does not oppose, on grounds of standing, the Claimants' challenge to the Council's decision to implement the improvements to the library service at the six remaining libraries, and to proceed with the closure of the other six libraries. However, insofar as the Claimants seek further or other relief with respect to community group proposals with which they were not associated, the Council reserves its position as to whether these Claimants have standing to bring such a challenge and/or as to whether it would be appropriate to grant relief. In this regard, it is noted that *none* of the community groups that put forward alternative proposals have sought to challenge the Decision by way of judicial review.

Conclusion

57. In summary, this claim is nothing more than an attack on the merits of a difficult decision - taken by elected members against the background of unprecedented public sector spending cuts – in the guise of a common law and legal equality case (see *R (Cordant*

Group plc) v Secretary of State for Business, Innovation and Skills [2010] EWHC 3442 (Admin)).

58. For the reasons set out above, it is submitted that this claim is unarguable and that permission should be refused; alternatively, that this claim should be dismissed.

CLIVE SHELDON QC

JOANNE CLEMENT

23 June 2011