

Legitimate Expectations

1. The main focus in this talk is on legitimate expectations which give rise to a right to be consulted and/or expectations as to the content of the consultation process.

**Overview of types of legitimate expectation**

2. A useful starting point for an overview of the doctrine of legitimate expectation is the judgment of Laws LJ in R (Bhatt Murphy) v Independent Assessor [2008] EWCA Civ 755 (also known as R (Niazi v Secretary of State for the Home Department)).
3. As Laws LJ put it in Bhatt Murphy at paragraph 50, the place of legitimate expectations in public law can be summarised very broadly as follows:

“The power of public authorities to change policy is constrained by the legal duty to be fair (and other constraints which the law imposes). A change of policy which would otherwise be legally unexceptionable may be held unfair by reason of prior action, or inaction, by the authority”.

He described the following three categories of legitimate expectation.

- (1) If the public authority has distinctly promised to consult those affected or potentially affected, then ordinarily it must consult (the paradigm case of procedural expectation).
- (2) If the public authority has distinctly promised to preserve existing policy for a specific person or group who would be substantially affected by the change, then ordinarily it must keep its promise (substantive expectation).
- (3) If, without any promise, the public authority has established a policy distinctly and substantially affecting a specific person or group who in the circumstances was in reason entitled to rely on its continuance and did so, then ordinarily it must consult before effecting any change (the secondary case of procedural expectation).

What is common to each category of case is that was that acting contrary to the legitimate expectation: “would be to act so unfairly as to perpetrate an abuse of power”.

**Part 1: Legitimate expectation and consultation: (paradigm case)**

4. The paradigm case of procedural legitimate expectation arises where a public authority has provided an unequivocal assurance, whether by means of an express promise or an established practice, that it will give notice or embark upon consultation before it changes an existing substantive policy (see Bhatt Murphy at paragraph 22).
5. In the paradigm case, the court will not allow the decision-maker to effect the proposed change without notice or consultation, unless the want of notice or consultation is justified by the force of an overriding legal duty owed by the decision-maker, or other countervailing public interest.
6. The jurisprudence of the paradigm case is fairly settled. As analysed by Laws LJ in Bhatt Murphy it is rooted in the requirements of good administration.
7. A relatively recent case on the reach of this paradigm case of procedural expectation was R (Majed) v London Borough of Camden [2010] J.P.L. 621.
8. In Majed, the Court of Appeal held that a local planning authority’s statement of community involvement gave rise to a legitimate expectation that the consultation set out in it (which was additional to the statutory minimum under the relevant procedural order) would be carried out. The Court held that legitimate expectation came into play when there was a promise or a practice to do more than that which was required by statute and that the statement of community involvement issued by the local authority was a paradigm example of such a promise and a practice (see judgment of Sullivan J at 14-15).
9. See also parts 4 and 5 below which deal with topics which are relevant to this category of legitimate expectation.

**Part 2: Substantive legitimate expectations**

10. This category of legitimate expectation cases is not the main focus of this talk. I will do no more than mention in passing some of the points which have been occupying the courts in recent cases.

Construing the assurance

11. The first issue to mention is the construction of the “promise” or “assurance” which gives rise to the legitimate expectation.

12. The basic approach is easy to state but its application in practice has divided the higher courts (especially recently within the Supreme Court).

13. In the Privy Council decision in Paponette and others v Attorney General of Trinidad and Tobago [2011] 3 WLR 219 the Board formulated the approach to construing promises as follows (at paragraph 30):

“the question is how on a fair reading of the promise it would have been reasonably understood by those to whom it was made”.

14. But this clear guidance has been difficult to apply in practice.

15. The following are examples of cases where different judges have found difficulty in the construction of the relevant assurances which were the foundation of the legitimate expectation claim.

*Example 1*

16. In Regina (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2) [2009] 1 A.C. 453, the Supreme Court was divided as the meaning of the statement made by the Foreign Secretary in the aftermath of previous proceedings which indicated that the UK government accepted a court ruling that the inhabitants of the island in the British Indian Ocean Territory had been unlawfully removed to make way for a US air base.

17. Lord Hoffmann (majority) at paragraph 60 held that the Foreign Secretary’s statement did not contain any unambiguous promise in respect of the right to return.

18. By contrast Lord Mance (minority with Lord Bingham) at paragraph 174 considered that “these statements are only consistent with a clear policy decision taken by the United Kingdom to recognise and give legal effect to a right to return on the part of the Chagossians, while continuing the feasibility study which had already been started, in order to assess the feasibility of any resettlement programme which the Government might or might not in due course support”.

*Example 2*

19. Similar divisions emerge in the recent Supreme Court case of R (Davies) v Revenue and Customs Commissioner [2011] 1 WLR 2625. The issue was whether tax guidance issued by HMRC gave rise to a legitimate expectation that a benevolent approach would be adopted to determining whether a tax payer would be treated as not resident or ordinarily resident in the UK for tax purposes.

20. At paragraph 29 Lord Wilson (majority) described his approach to construing the guidance relied upon in the following terms:

“It is better to forsake any arid analytical exercise and to proceed on the basis that the representations in the booklet for which the appellants contend must have been clear; that the judgment about their clarity must be made in the light of an appraisal of all relevant statements in the booklet when they are read as a whole; and that, in that the clarity of a representation depends in part upon the identity of the person to whom it is made, the hypothetical representee is the “ordinarily sophisticated taxpayer” irrespective of whether he is in receipt of professional advice.

21. Thus, his approach was (see paragraph 45):

“My view ... is that, when all the passages in it to which I have referred were considered together, it informed the ordinarily sophisticated taxpayer of matters which indeed were unlikely to come as a surprise to him, namely that: (a) he was required to “leave” the UK in a more profound sense than that of travel, namely permanently or indefinitely or for full-time employment; (b) he was required to do more than to take up residence abroad; (c) he was required to relinquish his “usual residence” in the UK; (d) any subsequent returns on his part to the UK were required to be no more than “visits”; and (e) any “property” retained by him in the UK for his use was required to be used for the purpose only of visits rather than as a place of residence. He will surely have concluded that these general requirements in principle demanded—and might well in practice generate—a multifactorial evaluation of his circumstances on the part of the revenue albeit subject to appeal. If invited to summarise what the booklet required, he might reasonably have done so in three words: a distinct break”.

22. However, the same guidance was interpreted differently by Lord Mance’s in his dissenting speech (at paragraph 102):

“My own view....., is that to treat [the relevant booklet] as pregnant with the detailed implications listed [Lord Wilson’s speech at] paragraph 45 (or, in summary, as informing an ordinarily sophisticated taxpayer of a need for a “multifactorial evaluation” of his or her circumstances and for a “distinct break”) runs contrary not only to the wording and sense of the document itself but also to its genesis and purpose: ....”.

Internal Guidance

23. A similar lack of uniformity is apparent in respect of judicial approaches to whether internal guidance to decision makers gives rise to any legitimate expectation.
24. In The Queen (on the application of Elayathamby) v The Secretary of State for the Home Department [2011] EWHC 2182 (Admin) at paragraph 29 Sales J construed a Home Office circular as giving general guidance to decision makers as to how the system works rather than creating specific expectations.
25. The Claimant had relied on a statement in the secretary of state's mandate refugees policy which stated that if a mandate refugee made an application for resettlement arriving in the United Kingdom his claim had to be considered under the Convention relating to the Status of Refugees 1951 (United Nations). The Claimant contended that in accordance with the statement in the mandate refugee policy, he was entitled to have his claim for asylum considered and the Dublin Regulation (which would enable that UK to claim that a different member state would be responsible for considering the asylum claim) would not be applied.
26. Sales J rejected this contention. His approach to the construction of the relevant part of the Home Office circular was as follows:

“The context in which the statement relied upon by the Claimant appears is given by the mandate refugee policy, read as a whole. In my view, it is clear that the main point of the policy is to explain to UK Border Agency officials ... I think the relevant statement is properly to be read as a reminder to officials ... The sentence relied upon cannot fairly be read (as the Claimant seeks to read it) as a clear and unambiguous statement that the Defendant will herself consider the asylum claim in the United Kingdom, and will not seek to operate the Dublin Regulation procedures even in a case in which she would be entitled to do so”.
27. By apparent contrast, in R (Jackson) v DEFRA at McCombe J [2011] EWHC 956 (Admin) at paragraph 67-69 held that an instruction to DEFRA staff requiring them not to mix samples did give rise to a legitimate expectation because the “public might reasonably expect that, to apply the principles of good administration, an instruction

requiring them not to mix samples, expressly stated as being for the avoidance of possible contamination, would be observed unless good reason to the contrary exists”.

28. The relevant issue may be whether the guidance contains a prescriptive instruction as opposed to a general explanation. But much will depend on how the judge in question characterises the statement.

#### Legitimate expectation and reliance

29. The position in respect of the need for detrimental reliance and legitimate expectations is now fairly settled in the following terms (as encapsulated by Lord Hoffman in Bancoult at paragraph 60):

“It is not essential that the applicant should have relied upon the promise to his detriment, although this is a relevant consideration in deciding whether the adoption of a policy in conflict with the promise would be an abuse of power and such a change of policy may be justified in the public interest.....”

### **Part 3: The Secondary case of Procedural Legitimate Expectation**

30. Laws LJ in Bhatt Murphy also identifies the “secondary case of procedural legitimate expectation”.
31. This was seen as an “exceptional” (paragraph 41 of Bhatt Murphy) category of cases in which a public decision maker “will be required, before effecting a change of policy, to afford potentially affected persons an opportunity to comment on the proposed change and the reasons for it” even where there has been no previous promise or practice of notice or consultation.
32. The key issue is in what circumstances such a requirement will arise. Laws LJ gave the following guidance in Bhatt Murphy (at paragraph 42):

“.. the court will (subject to the overriding public interest) insist on such a requirement, and enforce such an obligation, where the decision-maker's proposed action would otherwise be so unfair as to amount to an abuse of power, by reason of the way in which it has earlier conducted itself. In the paradigm case of procedural expectations it will generally be unfair and abusive for the decision-maker to break its express promise or established practice of notice or consultation. In such a case the decision-maker's right and duty to formulate and re-

formulate policy for itself and by its chosen procedures is not affronted, for it must itself have concluded that that interest is consistent with its proffered promise or practice. In other situations — the two kinds of legitimate expectation we are now considering — something no less concrete must be found”.

33. But, what constitutes “something no less concrete”?

34. He stated: “for this secondary case of procedural expectation to run, the impact of the authority's past conduct on potentially affected persons must, again, be pressing and focussed. One would expect at least to find an individual or group who in reason have substantial grounds to expect that the substance of the relevant policy will continue to enure for their particular benefit: not necessarily for ever, but at least for a reasonable period, to provide a cushion against the change. In such a case the change cannot lawfully be made, certainly not made abruptly, unless the authority notify and consult”.

35. So much for the principle, but how is it to be applied in practice?

As Laws LJ warns:

“What is fair or unfair is of course notoriously sensitive to factual nuance”.

36. Recent cases in respect of the application of this secondary category of legitimate expectation to spending cuts cases bear out that health warning.

Example 1 – successful reliance on the secondary category of procedural legitimate expectation (the BSF case)

37. First, the example of successful reliance on that principle – see R (Luton Borough Council and others) v Secretary of State for Education [2011] EWHC 217 (Admin).

38. The case concerned challenges brought by 6 local authorities to the cuts to the Building Schools for the Future (BSF) programme.

39. The claimant local authorities applied for judicial review of a decision of the defendant secretary of state to stop certain school building projects which had been earmarked under the BSF programme. That programme aimed over a 15-year period from 2005 to rebuild or refurbish every secondary school in England. After the change of government in May 2010 the secretary of state decided on July 5, 2010 to end it. The claimants contended that his decision was unlawful, at least in so far as it

affected them, and that he should be required to reconsider the affected projects in their areas.

40. Their claims for breach of substantive legitimate expectation that the projects would be funded failed. But they succeeded in respect of the claim that it was unfair for funding to be withdrawn without any consultation (and also in respect of a claim in respect of breaches of equality duties).

41. In rejecting the claims based on substantive legitimate expectation, Holman J stated (at paragraphs 81-2):

“I perfectly understand what high hopes were raised with the claimants and many other local authorities, and with local communities of pupils, parents and staff by the BSF process and the milestones that were reached. But .....neither the OBC [Outline Business Case] approvals (whether actual or indicative), nor any other material which I have seen, go so far as to create a substantive legitimate expectation that any given project would definitely proceed”.

42. However, notwithstanding the failure of the substantive legitimate expectation argument and the absence of any express promise or assurance that consultation would take place, the local authorities succeeded in their claim for breach of legitimate expectation on the secondary ground for legitimate expectation described by Laws LJ in Bhatt Murphy.

43. In deciding that the impact on the local authorities of the withdrawal of funding would be “pressing and focussed”, Holman J identified the following factors which he considered brought the authorities within the exceptional secondary category of procedural legitimate expectation formulated by Laws LJ in Bhatt Murphy (see judgment at paragraphs 93-96).

- a. The local authorities had been in continuous and intense dialogue with department to drive BSF forward over many years. This process of collaborative dialogue was central to Holman J’s analysis that the Department’s conduct towards the authorities had been “pressing and focussed”.
- b. That process continued almost until last moment. (The evidence in the case was that the executive agency “Partnerships for Schools” had been instructed

by the Department to continue on a “business as usual case” even after the election).

- c. Five of the authorities had obtained “outline business case approval” for the projects at issue and had been acting, spending money (and to varying degrees) incurring liabilities in reliance on them.
  - d. Holman J considered that the “very large sums involved” fortified the duty to consult.
  - e. Holman J rejected the contention that to allow consultation would have been unduly time consuming. On the facts of the BSF case this conclusion was influenced by the fact that the Secretary of State had deferred off to further consultation decisions as to the extent of cuts in other areas – such as in respect of academy schools. The judge decided that there would have been the opportunity for consultation in respect of what was a limited category of peculiarly affected claimants (whose projects were at an advanced stage and had the benefit of OBC approval).
  - f. The judge rejected the submission made by the Secretary of State that a case study prepared by the department relevant to one authority (Kent County Council) amounted to a sufficient consideration of the individual circumstances of that authority. He considered that consultation envisaged the opportunity for the affected party to have input into the decision making process themselves (not just have their circumstances considered).
44. In the context of these particular circumstances, Homan J held that the “abrupt stop” of funding without consultation was “so unfair as to amount to an abuse of power”.
45. The unfairness of the lack of consultation was not overridden by any countervailing consideration. Homan J held that: “However pressing the economic problems, there was no “overriding public interest” which precluded any consultation or justifies the lack of any consultation”.
46. In paragraph 97, Holman J dealt with the one of the local authorities (Sandwell) which had not yet received OBC approval. The judge regarded their case as “more

difficult and more marginal” but held that by failing to consult they too were “deprived of an opportunity to remind the Secretary of State of what they claim are the unique or highly unusual facts and to press that case”.

47. Accordingly, the absence of consultation was held to amount to an unlawful process in respect of their claim as well as the other five authorities concerned.

Example 2- unsuccessful reliance on the secondary category of procedural legitimate expectation

48. The judgment of Langstaff J in R (Cheshire East Borough and others) v Secretary of State for the Environment, Food and Rural Affairs [2001] EWHC 1975 (Admin) is in stark contrast to the Luton decision.
49. The claimant local authorities applied for judicial review of a decision of the defendant secretary of state that Private Finance Initiative (PFI) funding would not be provided for their waste-diversion project.
50. In 2005, Cheshire submitted their outline business case for PFI support for a waste-diversion project. The project proposed two mechanical biological treatment (MBT) plants together with an Energy from Waste (EfW) facility. The Department for the Environment, Food and Rural Affairs (DEFRA) approved the outline case and an interdepartmental review group endorsed the DEFRA recommendation that the project should receive central government support.
51. Approval was subject to conditions. DEFRA said that it expected the PFI credits to be £40 million. In 2009, Cheshire approached DEFRA to request additional PFI credits. DEFRA stated that the Executive Board of the Waste Infrastructure Delivery Programme (WIDP) was broadly sympathetic to the case outlined and was prepared to hold £30 million PFI credits in reserve for the project until September 30, 2010.
52. In August 2010, DEFRA confirmed its approval of close of dialogue on the procurement process and named the preferred bidder (Viridor). It stated that this should not be taken as a guarantee of the issue of PFI credits, which remained subject

to an approval of the final business case and any other necessary approvals, as well as the project remaining consistent with departmental policies and priorities.

53. DEFRA was aware at that time that the project as originally outlined differed from that which the Viridor now proposed. Viridor planned that the waste which had not been reused, recycled or composted should be treated in a MBT facility, which would produce solid recovered fuel (SRF), which would then be sent for combustion. Rather than fuelling an EfW plant close to the MBT facility, as originally planned, the SRF was to be sent to an EfW facility at Runcorn. The Runcorn facility was a project which had already been approved, part funded by PFI credits, and was in the process of construction as part of a project for another local authority.
54. Before the Government's Comprehensive Spending Review, which was due in October 2010, DEFRA decided to consider a reduction in the number of local authority waste infrastructure procurements supported by PFI credits. As part of that process, WIDP developed a methodology to appraise each of the projects which was a potential candidate for part funding.
55. The application of that methodology led to the decision that PFI funding would not be provided for Cheshire's project.
56. Cheshire argued that (1) the methodology was irrational (in that it disregarded the SRF produced by the MBT facility when assessing the contribution to diversion from landfill made by the project); (2) they enjoyed a substantive legitimate expectation that, on fulfilment of certain conditions, they would receive some £70 million worth of PFI credits in connection with the project; (3) there was a procedural legitimate expectation of consultation in advance of the decision to withdraw funding from the project; (4) DEFRA failed to take into account a relevant consideration, or acted under a mistake of fact, in the assumptions it deployed as to the nature of the waste produced and dealt with by the project.
57. Each ground failed.
58. For present purposes the relevant part of the judgment is paragraphs 68-93 under the heading: "procedural legitimate expectation".

59. The case argued by the Claimants was that the factual circumstances were parallel to those in the Luton case and that the councils had a procedural legitimate expectation of consultation in advance of decision to withdraw funding under the category of procedural legitimate expectation articulated by Laws LJ in Bhatt Murphy namely that a legitimate expectation might arise where without any promise an authority had established a policy distinctly and substantially affecting a specific person or group who in the circumstances was entitled to rely on its continuance and did so and that consultation was necessary before affecting any change.

60. In rejecting the Claimant's reliance on this secondary type of procedural legitimate expectation, Langstaff J:-

- a. Emphasised the exceptional nature of the jurisdiction (see paragraph 74).
- b. Emphasised that the requirements of fairness must be judged overall not purely from the perspective of the aggrieved (paragraph 75).
- c. Accepted that in the particular circumstances of the case, there were arguments for not consulting. DEFRA had argued that there was a need for speed in the delivery of those projects which would go ahead, it was necessary to reach a decision within the time set by the comprehensive spending review and that consultation had carried a danger of destabilising all projects. It was argued that it might be counterproductive to announce the cuts without details of which projects were affected. There was fear that any delay may have an adverse effect on the market.

In the critical passage of his judgment dealing with the fairness of making the announcement without consultation, Langstaff J said (at paragraph 82):

“Once a decision had been taken to withdraw funding from 7 projects, it was in my judgment a matter for central government to determine whether there should be consultation about this or not. The policy judgment not to engage in it was rational. It was not unlawful. It was not wholly unreasonable. It is relevant to unfairness that the decision could not have been impugned on traditional public law grounds, for the court is then required to deal with non-consultation where there is no statutory or specific promissory obligation nor practice to consult, and a perfectly acceptable decision (in public law terms) not to do so. It was not unfair: although the councils might have thought that they would have funding for their particular projects, and had (in Cheshire's case) expended considerable sums in

that belief, it was a proper exercise of power and not abusive for central government to choose to review it, and having so chosen, to determine internally and without consultation upon a method which was rational and sought reasonably to achieve a fair selection of the projects which would, or would not, be funded. The internal discussion about whether to consult at all was not premised on that consultation having no value, but rather upon it being counter-productive. That was a judgement which I cannot say was wrong. Nor do I consider it unfair”.

61. The reasoning that the decision maker acted rationally in deciding that there did not need to be consultation seems to water down the relevant approach compared with the previous cases. The essence of doctrine of this type of secondary legitimate expectation has been rooted in objective principles of fairness and good administration which the Court takes responsibility for deciding.
62. The way in which Langstaff J expressed himself at approach seems to set uncomfortably with the decision of the Administrative Court in R (Medway Council) v Secretary of State for Transport, Local Government and the Regions [2003] J.P.L. 583 concerning the exclusion of Gatwick options from the consultation exercise on the future of air transport in the South East. In that case at paragraph 32, Maurice Kay J (as he then was) said:

“It is for the Court to decide what is or is not fair. If a consultation procedure is unfair, it does not lie in the mouth of the public authority to contend that it had a discretion to adopt such a procedure. The question is whether the procedure in the present case is fair or unfair.”

63. Langstaff J’s comment about the decision maker making a rational decision not to consult may therefore be best regarded as a commentary on the particular circumstances of the Cheshire case rather than a statement of general approach.

Making sense of the decisions in Luton and Cheshire

64. The key distinguishing features between Cheshire and Luton seem to be that:-
- a. There was a credible case in Cheshire that consultation could have been counter productive. In the BSF case there was no such suggestion and in fact the judge was able to rely on the fact that there was already set to be further consultation in respect of some categories of schools.

b. In Luton the Claimants were able to characterise themselves as a relatively small part of a much large decision making process. Thus the case as presented to Court in Luton affected only part of the overall savings to the public purse. The main authorities concerned were able to say that their projects were at a particularly advanced stage and this warranted their cases being considered more carefully and fairly than the generality of cases. By contrast in Cheshire, the judge took the view that there was no realistic way that Cheshire's circumstances could be carved out of the overall decision implementing the general imperative to make savings.

65. That said, it is hard to explain why for example Sandwell succeeded (in the BSF case) and Cheshire failed and it is hard to escape a conclusion that to some extent the differences in outcome may well be explained by the fact that different judges have different sense of what constitutes fairness in particular factual circumstances.

#### Other cases

66. In R (Police Negotiating Board and others) v Secretary of State for Work and Pensions [2011] EWHC 3175 (Admin) the Divisional Court (Elias LJ, McCombe J and Sales J) (discussed further in Part 5 below) rejected a procedural legitimate expectation argument. The court was required to determine whether the Government's decision to alter the basis upon which public service pensions were adjusted to take account of inflation from the Retail Price Index (RPI) to the Consumer Price Index (CPI),

67. The submission made was that a procedural legitimate expectation arose which gave rise to an obligation to consult (see paragraph 41 of the judgment). This line of the argument was not dealt with in any detail in the judgment.

68. It is simply touched upon in paragraph 83 of the judgment but said to fail because “the Claimants cannot establish that relevant promises about the future use of the RPI were made to them”.

69. However, the Court did comment that that the process of vigorous representations by the unions in the run up to the change would have satisfied any obligation to consult

because “the unions had their opportunity to deploy the same arguments in the period of months between the budget in June 2010 and the making of the statutory orders in March 2011 that would have arisen in the consultative process which the Claimants contend was necessary”.

**Part 4: Legitimate expectation as to way that the consultation exercise is conducted**

70. It is also possible for the legitimate expectation to arise in respect of the way in which the consultation process is conducted.

Example 1 – successful challenge

71. An example of a successful claim is Royal Brompton & Harefield NHS Foundation Trust v Joint Committee of Primary Care Trusts, Croydon Primary Care Trust (on its own behalf and as representative of all Primary Care Trusts in England) [2011] EWHC 2986 (Admin).

72. The claimant NHS foundation trust applied for judicial review of a consultation exercise undertaken by the first defendant body concerning the reconfiguration of paediatric congenital cardiac services in England.

73. The Claimant was a specialist heart-and-lung centre based at the Royal Brompton Hospital in London and at a hospital in Middlesex. Its paediatric service provided a specialist service for children's heart and lung disease and comprehensive paediatric critical care services.

74. In 2008, the National Health Service Medical Director requested the NHS National Specialised Commissioning Group to review the provision of paediatric congenital cardiac services.

75. In 2010, the Defendant was established as the formal consulting body with responsibility for the conduct of the consultation on the review and for taking decisions on issues the subject of the consultation. In March 2011, it published a consultation document. The central proposal in that document was that the number of centres providing paediatric cardiac surgical services be reduced from 11 to either 6 or 7 and that the paediatric congenital cardiac service be reconfigured into one of four national configuration options, each of which included two London surgical centres.

76. The Claimant challenged the consultation process on the basis that the decisions to exclude a "three London centre" option from the proposed options and to exclude it from the preferred "two London centre" options were legally flawed.
77. The relevant issue was whether there had been a breach of legitimate expectation in respect the way in the self assessment part of the review process had been used in the process of choosing options..
78. Owen J allowed the claim on this ground finding that clear and unequivocal representations had been made that the criteria and scoring for the "configuration evaluation" were separate from the "assessment evaluation" and that the information supplied in the assessment stage of the process would not have any direct bearing on the scoring of the configuration evaluation process.
79. Those representations had been breached and a conclusion had been reached, challenged by the Claimant, that it was poor in the areas of research and innovation. That must inevitably have affected the responses to the consultation document in a manner seriously adverse to it.
80. Owen J (at paragraph 178) considered that the appropriate test for determining whether there had been unfairness in the consultation exercise itself as a result of a departure from the promised basis was whether as Sullivan J observed in R(Greenpeace Ltd) v Secretary of State for Trade and Industry [2007] EWHC 311 (Admin) at paragraph 63:

“In reality, a conclusion that a consultation exercise was unlawful on the ground 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”.

81. He concluded that this threshold was met in the circumstances of the case because:

“I have come to the conclusion that that is the case. The assessment of the quality of the service provided by the RBH Trust would plainly be regarded as of central importance by a consultee when considering the options for reconfiguration of [paediatric congenital cardiac services]; and it seems to me that the low scoring of the RBH Trust on ‘quality’ in the weighted scoring of the London centres, must inevitably have affected the responses to the Consultation Document in a manner seriously adverse to the Trust. I therefore consider that the failure to meet the RBH Trust's legitimate expectation as to the use to which the information provided in response to the self-assessment Template, and the

likely consequential effect upon the assessment of ‘Quality’ in the inter London centre scoring, rendered the consultation process unfair to the Trust, the unfairness being of such a magnitude as to lead to the conclusion that the process went radically wrong”.

Example 2 – unsuccessful challenge

82. In Cheshire (discussed above) there was a second argument in respect of procedural fairness. It was argued that it was unfair for DEFRA to invite agreement to a pro-forma pre-populated with figures for the quantum of waste diverted from landfill, only to change the figure, significantly to Cheshire's disadvantage, without notifying the claimants (paragraph 68).

83. The judge considered that there was much greater strength in this argument (than the general complaint about the lack of any consultation). The unfairness alleged here was that Cheshire never appreciated which figures would be used in respect of the quantum of waste diverted from landfill until after the die had been cast (see paragraph 84).

84. This limb of the unfairness argument appears to have come much closer to succeeding. But was ultimately rejected by the judge on the basis that:-

- a. There was no hint of ulterior motive in the timing of the realisation that Cheshire’s solid recoverable waste would go to capacity in Runcorn (paragraph 85) which came (genuinely) very late in the process.
- b. There would have been no basis for consulting Cheshire alone.
- c. The determination of capacity is a matter of logical conclusion and the judge held:

“ This was a matter of logical conclusion, one way or the other, not susceptible of shades of agreement or nuanced argument. I have already determined that DEFRA was entitled (and right) to conclude as it did on this. It was not suggested that the claimants would have done more than seek to convince the department of the correctness of the arguments deployed on their behalf by Mr. Giffin in advancing his first ground of challenge. The failure to permit them to do so, viewed against the background of spending pressures, time pressures, and a rational judgment that consultation would be counter-productive was not, taken overall, a breach of a legitimate expectation that if the figures on the pro-forma were to be changed Cheshire

would be told so that it might make representations about it”. (see paragraph 86).

85. This reasoning is in striking contrast to Holman J’s approach to Sandwell in the BSF case and also to Kent in the BSF where Holman J emphasised the opportunity for an authority to put its own case forcefully and in its own terms as part of what fairness required.

### **Part 5: Frustration of a legitimate expectation**

86. A legitimate expectation of consultation is capable of being frustrated due to a pressing need – even when it arises under the subsidiary category articulated by Laws LJ in Bhatt Murphy.

#### Taking account of the promise in the decision making process

87. The Privy Council in Paponette v Attorney General of Trinidad and Tobago [2011] 3 W.L.R. 219 approved and applied the passage from the judgment of Schiemann LJ in R (Bibi) v Newham London Borough Council [2002] 1 WLR 237 at paragraph 49 and 51; that an authority is under a duty to consider the promise that has been made properly in its decision making process. In Paponette, the Board held that (at paragraph 46):

“ Where an authority is considering whether to act inconsistently with a representation or promise which it has made and which has given rise to a legitimate expectation, good administration as well as elementary fairness demands that it takes into account the fact that the proposed act will amount to a breach of the promise. Put in public law terms, the promise and the fact that the proposed act will amount to a breach of it are relevant factors which must be taken into account”.

88. The Divisional Court’s decision in R (Police Negotiating Board and others) v Secretary of State for Work and Pensions [2011] EWHC 3175 (Admin) (Elias LJ, McCombe J and Sales J) contains an interesting (obiter) discussion of how the promise should be treated in the decision making process.

89. The Claimants contended (amongst other things) that they had a legitimate expectation because representations were made to relevant trade unions representing

public service workers and to public service employees and pensioners, through pension scheme guidance documents and in the course of negotiations with trade unions, to the effect that the RPI would continue in the future to be adopted as the method for determining the relevant up-rate in pension benefits.

90. The Divisional Court rejected the contention that there was any legitimate expectation because there was no promise or assurance given or practice adopted which amounted to an assurance which was clear unambiguous and devoid of relevant qualification that “RPI would be the index adopted in perpetuity” (see paragraphs 73-79).
91. However, the Court went on to consider the approach to be adopted to the issue of whether (assuming that there had been a legitimate expectation), sufficient regard was had to it in the decision making process.
92. The evidence indicated that the government had recognised that “some might consider that a legitimate expectation to continue to use RPI had been created”.
93. The Claimants argued that such limited acknowledgment was insufficient. They submitted: “...it was not proper compliance with the Government’s legal obligation simply to have some regard to the fact that others believed that the expectation existed. The point about a promise is that in the normal way it should be honoured. It has a moral force which should be given substantial weight in the decision making process. It should only be overridden where a countervailing public interest justifies it. This demands as [as Paponette at paragraph 46] indicates, that the legitimate expectation is properly and fully taken into account” (paragraph 80) .
94. The Divisional Court stated that they saw considerable force in that submission and commented: “The weight given to a promise generating a legitimate expectation would naturally be expected to be greater than the weight, if any, given to the fact that the Government recognises that some may think (wrongly, in the Government’s view) that there is a promise” (see paragraph 81).
95. On the face of it, this seems to present a significant dilemma for a public body facing claims that an affected party has a legitimate expectation of an outcome which the public body does not accept. However, the Divisional Court indicated how such a dilemma could be addressed (at paragraph 82):

“it would always be open to a decision-maker to consider that even if, contrary to its own belief, there were a promise amounting to a legitimate expectation, nonetheless the public interest would justify it being overridden; but that was not the Defendant’s approach in the present case”.

96. The Divisional Court also recorded but did not deal with (as it did not arise on the facts) the submission made by the Government “even though they did not accept that promises had been made and so did not confront the moral force associated with that, they considered the issue responsibly and reasonably, so that it could not fairly be said that their conduct in this respect, amounted to an abuse of power” (paragraph 82).

What will amount to a sufficient reason to frustrate a legitimate expectation?

97. As confirmed in the Privy Council’s decision in Paponette at paragraph 37 once it is established that the expectation is legitimate, the onus shifts to the authority to justify the frustration of the legitimate expectation. It is for the authority to identify any overriding interest on which it relies to justify the frustration of the legitimate expectation. The following are recent examples where the public authority has succeeded in frustrating the legitimate expectation on grounds of overriding interest.

*Example 1*

98. In Cheshire at paragraph 90, Langstaff J held that there was an overriding public interest that would have frustrated any legitimate expectation. His reasoning was:

“the Government decided on a macro-political and macro-economic basis that spending had to be cut significantly and quickly. A plan for deficit reduction was to be set out in an emergency budget within 50 days. The Spending Review itself recorded that the Government saw it as an urgent priority to secure economic stability. Choices were required, as a result of which departmental budgets were to be cut by “an average of 19 per cent over four years”. In that context, I accept that a decision maker in an individual department of State must be accorded a very wide margin of appreciation, and a court must be reluctant to interfere with technical expert judgements such as are in issue here: as Lord Millett said in Southwark LBC v Mills [2001] 1 AC 1 at 26, priority in the allocation of resources must be resolved by the democratic process, national and local, and the Courts are ill-equipped to resolve such issues”.

99. He considered that a broad approach to selecting projects to secure the savings was permissible.

100. At paragraph 91, he said he stated:

“If there is a compelling need to cut cost across a broad range of projects, this necessarily implies that the costs of individual projects within that range may be cut as a part of satisfying that need. If it were otherwise, then no individual project would have its costs cut despite the overarching requirement of public policy. There may be particular reasons why amongst projects vulnerable to the impact of costs saving measures some should be “saved”, and others sacrificed – but providing a rational basis for selection between them is adopted by those who are mindful of what has been assured to each, and (at least broadly) of the costs incurred by each in reliance on that assurance, none could complain unless the decision were plainly disproportionate”

*Example 2*

101. Other recent examples of frustration of a legitimate expectation include Trillium (Prime) Property GP Ltd v Tower Hamlets LBC [2011] EWHC 146 (Admin) where the Court held that the Claimant’s legitimate expectation that there would be consultation prior to the designation of a conservation area was overridden by concerns that it may trigger the demolition of an important building in the conservation area.

102. Ouseley J stated (at paragraph 176):

“In my judgment, if the Council properly concluded, on reasonable grounds, that consultation with Trillium or others would put at a real risk of material harm the very proposal being consulted about, the expectation of consultation would not be breached, nor even legitimate or expected. That specific problem was not covered by anything said to Trillium or the public and could not reasonably have been regarded as impliedly covered”.

Ouseley J’s approach conferred discretion on the decision maker to make a judgment about the risks.

Thus as Ouseley put it at paragraph 182, the Council “merely had to consider properly whether there were reasonable grounds for concluding that there was such a degree of risk that Trillium would demolish [its building] were it consulted, that the Council was justified in reaching a designation decision without consulting Trillium or the other building owners. It also had to conclude that there would be material harm to the

potential Conservation Area from demolition. If that was so, then there was no breach of the legitimate expectations which Trillium otherwise was entitled to see fulfilled”.

103. This is another example of submissions succeeding where the contention was that it would be counter productive to consult and the Court deferring to the judgment to the decision maker where it had considered consulting but decided against it on proper grounds.

*Example 3*

104. In R. (on the application of W) v Secretary of State for Education[2011] EWHC 3256 (Admin), the High Court (Singh J) held that although a former teacher had a substantive legitimate expectation that no further action would be taken against him in the absence of further misconduct, a later decision by the Secretary of State for Education to bar him from working with children pursued a legitimate aim and was proportionate.

105. In deciding that it was appropriate for the legitimate expectation to be frustrated the Court emphasised:-
- a. The public interest in protecting children from the risk of sexual abuse was a legitimate aim that was manifest and pressing (see paragraph 53).
  - b. The availability of an appeal on the merits of the barring order was relevant to the question of whether the secretary of state's decision was proportionate (paragraph 56).
  - c. The secretary of state did not simply resile from the legitimate expectation without more; he had devised fair procedures that would be followed before a barring order was imposed (paragraph 57).

*Conclusion from these examples*

106. These cases point to the fact that decisions to frustrate legitimate expectations may be upheld by the Courts where there is an overriding public interest. In such cases, the more the authority can show it has acted carefully in weighing up its decision to override the expectation (considering the substance of the issue and considerations of fairness) the more likely it is that the court will uphold decisions to override the legitimate expectation.

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