

CO/3872/2007

Neutral Citation Number: [2007] EWHC 3144 (Admin)  
IN THE HIGH COURT OF JUSTICE  
QUEEN'S BENCH DIVISION  
THE ADMINISTRATIVE COURT

Royal Courts of Justice  
Strand  
London WC2A 2LL

Date: Wednesday, 7 November 2007

**B e f o r e:**

**HIS HONOUR JUDGE MACKIE OC**  
(Sitting as a Judge of the High Court)

**Between:**

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**THE QUEEN ON THE APPLICATION OF BERRY**

Claimant

v

**CUMBRIA COUNTY COUNCIL**

Defendant

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**Miss Kate Markus** appeared on behalf of the Claimant  
**Mr Clive Sheldon** appeared on behalf of the Defendant

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J U D G M E N T

1. THE JUDGE: As I am clear in my mind what the answer to this case should be, I propose to give judgment on the spot rather than reserve judgment. For that reason I reserve the right to correct any transcript to ensure that it accords with what I say and also what I meant to say.
2. This application is about consultation over Cumbria County Council's decision to introduce charges to users of their day care centres and about the claimant's standing to bring the case. This application was brought on 11 May 2007. On 13 July Mr Blake QC, as he then was, gave permission for the case to proceed for reasons which I will mention shortly. I have had the benefit of a helpful bundle of all relevant documents and some five witness statements, three from Miss Whitfield the solicitor for the claimant and two from Miss Stannard from Cumbria County Council who was involved in this matter day-to-day.
3. There are a number of points which are either agreed or not greatly in dispute.
4. This case involves the application of settled legal principles which are almost wholly common ground. The right of the defendant to charge for day care services is not in dispute because Section 17 of the Health and Social Services and Social Security Adjudications Act 1983 empowers local authorities to charge for a range of services including this one. It is accepted that the issue in the case is principally the duty to consult. It is conceded that there is a duty to consult, but not a specific one, arising from statute.
5. It is also recognised that the principles to which the court must have regard are the well known Gunning principles:

"First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third ..... that adequate time must be given for consideration and response and, finally, fourth that the product of consultation must be conscientiously taken into account in finalising any statutory proposals."

Gunning was a school closure case. As Mr Justice Webster said in another case:

"In the present case in my view the legitimate expectation of consultation involves - from the point of view of parents - the expectation that they will be given a fair opportunity constructively to criticise the proposal and to express their own preferences in relationship to it."

6. Another reference to consultation on which reliance has been placed is another well known observation of Mr Justice Webster in AMA:

" ..... the essence of consultation is the communication of a genuine invitation to give advice and a genuine receipt of that advice. In my view it must go without saying that to achieve consultation sufficient information must be supplied by the consulting to the consulted party to enable it to tender helpful advice. Sufficient time must be given by the

consulting to the consulted party to enable it to do that and sufficient time must be available for such advice to be considered by the consulting party. 'Sufficient' in that context does not mean ample, but at least enough to enable the relevant purpose to be fulfilled. By 'helpful advice' in this context is meant sufficiently informed and considered information or advice about aspects of the form or substance of the proposals or their implications for the consulted party, being aspects material to the implementation of the proposal as to which the Secretary of State might not be fully informed or advised and as to which the party consulted might have relevant information or advice to offer."

7. I bear in mind the guidance contained in the other cases drawn to my attention, particularly what Lord Justice Latham said in similar terms, derived from similar cases, in R v London Borough of Lambeth ex p N. I also bear in mind, as urged on me by counsel for the defendant, the judgment of Lord Justice Simon Brown, as he then was, in Baker in which he said this at page 92:

" ..... the precise demands of consultation would vary according to the circumstances depending, for example, upon whether the obligation was statutory and absolute or implied in common fairness, and upon the nature of the assistance that might be expected from those to be consulted (in turn dependent sometimes upon their qualifications)."

8. It is also accepted that there is no obligation to consult every single individual user to be affected by a particular proposed change. Consultation may be effected through representative bodies. The issue in this case is the consultation with those bodies, not with Miss Berry herself, it being common ground that individual consultation with all users is often not helpful and sometimes promotes anxiety.
9. I turn next to the facts. In this case there are two related decisions being challenged. The claimant says that the decision taken by the council on 15 February 2006 was unlawful on the grounds that it was taken without adequate consultation and says the same about a later decision taken on 13 September. The claimant is an 89-year old widow who lives alone. She attends a day care centre twice each week, the cost of which is funded by the defendant. She rarely leaves home and then only to attend the day centre. It is said that her situation is typical of those in the area who attend day centres funded by them.
10. The defendant funds day care provision for the elderly, for people with learning disabilities and for those with mental health problems. It is suggested - and there is no reason to doubt it - that for many of these people attendance at the day care centres enables them to continue living independently in their own homes. As well as social opportunities, they receive personal care, including bathing and opportunities for exercise and a range of other activities and facilities. These facilities are only made available to those potential users who are in real need of them. In order to take the benefit of these facilities a potential user must be first assessed as being in a high, substantial or critical need of them. I do not under-estimate the importance and the value of this service.

11. Some day centres, including the one attended by the claimant, are run by Age Concern. Others are run by other voluntary organisations. Until recently, the service users have been charged only a flat rate for transport and meals. No charge has been made for attending the day centres.
12. In October 2006, as part of a budget planning exercise for the following year, the defendant held meetings to discuss a range of pressures on adult social care services. Amongst other matters, the defendant discussed the possibility of charging the sum of £5 a day, that is £2.50 per session, for users who could afford to pay. Just as the importance of the service is recognised, so, too, it seems is the inevitability of the introduction of charging. One gets that from the document prepared by Age Concern in this case, the press release of 14 February, which says:

"As Cumbria is one of the last authorities to introduce charging to day services, local charities recognise that it is inevitable that the people will have to contribute something at some stage."

13. In October 2006 the defendant held meetings with providers to discuss issues, including the possibility of a £5 a day charge. One sees that from materials and slides made available at the time. As a result of those meetings, the officers of Age Concern Cumbria wrote to the chief executive or the defendant and the corporate director of Adult Social Care setting out the concerns they wanted taken into account before there was a decision to implement charges, explaining why they did not consider charges were appropriate. There were a number of issues, including the adverse effect on charitable subsidies and other grants and other matters.
14. The exercise had been started in preparation for the county council's draft budget. On 27 November 2006 that draft budget was posted on the website, with invitations to those who read it to see and comment on the budget before the council finalised the plan on 15 February 2007. The budget mentioned - amongst many other matters it had to address - the problem of savings and that £699,000 could be generated by introducing new day care charges of £5 a session. A press release was put out at the same time as the budget.
15. Bodies like Age Concern were troubled by this. A draft letter had been prepared at the end of October with a view to taking things forward. A letter written by Age Concern on 20 November was circulated by Mrs Bradley to, amongst others, Mr Pearson, one of the senior councillors. The response to Mrs Bradley's letter came from Mr Stybelski, the chief executive, on 6 December 2006. He addressed Mrs Bradley's letter. The last two paragraphs of his letter state:

"Arrangements are being made to consult with voluntary groups early in the New Year so that the views of all groups representing day care users are taken into account, prior to the county council making final decisions, and you will be contacted separately for that.

I will ensure that all the points you raise will be considered at the consultation meeting."

The local authority says that this is part of their twin-pronged approach. They put out the budget to general comments and consultation and were then being more focussed by putting out detailed proposals to those directly involved. Mr Stybelski's letter is no doubt some aspect of that.

16. Those, as it were, behind the claimant say that this letter led them to believe, as stated in terms, that they would be contacted in the New Year so that the process of consultation could be carried out and that that consultation would have the benefit of the points which Mrs Bradley had raised.
17. The council say that it would have been evident to those at Age Concern and other voluntary bodies that this is all in the context of the draft budget finalised on 15 February. Those bodies should by this stage have been putting in hand their preparations for the consultation exercise. Also during December Miss Weaver, the social care procurement manager, sent to a substantial number of providers a letter drawing attention to the draft budget exercise that was being undergone and also to the comments and points raised by providers at a meeting on 27 October 2006. Some 40 organisations had been represented at that meeting, a small proportion of those to whom Miss Weaver wrote.
18. On 20 December the director of Age Concern wrote to the county council expressing concern that the charges would cause people to cease attending day care centres and that that may impact on their ability to live independently.
19. In the New Year, on 2 January, a letter was sent by Sheila Donne, head of support services, to what were described as the voluntary groups. This was a letter specifically inviting consultation. It said that prior to any formal decision being made it would be helpful to engage in a consultation process whereby views were sought from voluntary organisations across the county. She invited those to whom she wrote to a meeting on 24 January. The voluntary groups to whom this invitation was addressed were 11 in number but increased to 14 by additional representatives of people at Age Concern who had not originally been invited.
20. The meeting took place on 24 January, just over three weeks later, attended by those who had been invited and representatives of the authority. I am not going to summarise at length the minutes of the meeting. In the welcome and introductions one finds this:

"Bob Whitson gave introductions and background to the meeting that the county council members are considering charging for day care services. They had been told this was provided free. Sheila Donne gave the background of policy and raising issues that people addressed. This could not be exhaustive to consider issues - voluntary groups and organisation could be raised - and although some initial feed back could be taken today issues could also be taken to organisations and feed back could then be sent back in writing or brought up at another meeting with the group. Notes would be taken of the meeting and circulated."

21. It is suggested on behalf of the authority that there was no point in having another meeting. But it does seem to me that this paragraph indicated that there would be time for further submissions to be considered and brought up at another meeting if one was asked for or required. Some concerns at that point were already raised about the council's proposal being a foregone conclusion. The council emphasised that the matter had been raised in the press as part of a county-wide issue and that no decision would be taken until February.
22. One also sees at that point the beginnings of concerns being expressed that it was too late to consult the service users, which the organisations felt should be done before a decision was made. The council expressed readiness to try to get some facts about potential drop-outs, that is to say what would happen to attendance at centres if people had to start to pay for them following some assessment of their means. There was discussion within the representatives about what to do following this meeting. Attempts were made to draw attention to concerns.
23. On 8 February a consortium of service providers wrote to the leader of the council expressing concerns about the proposal to charge. Their letter stated that in a conference of the voluntary sector groups, held on 1 February, many of those representing service users were unaware of the proposal and there had not been any consultation.
24. There was a further meeting on 14 January of voluntary sector organisations and representatives of the authority, convened not by the authority but by the voluntary sector and by Cumbria Action for Health in particular. The contents of that meeting followed the concerns that had already been expressed. The minutes record that both Sheila Donne and Bob Whitson acknowledged the process of consultation and that important lessons should be learnt from this. There is also reference to the contents, which I shall come back to shortly.
25. There was a cabinet meeting at the end of January to consider the proposals for the council meeting on 15 February. Before that meeting there were submissions from a number of concerned people direct to councillors. For example, Mr Crockford of the Alzheimers Society circulated an e.mail complaining about lack of consultation. There was a similar submission from the South Cumbria Mental Health Users of Health Forum sent out on the day of the meeting.
26. The council meeting took place on 15 February. The proposed budget was approved. An alternative budget put forward by the opposition party was defeated. Complaint is made by the claimant about the lack of information available to the councillors on 15 February about the consultation. It is said that there was a significant amount of lobbying from a variety of sources. In terms of what was reported at the council meeting itself, that amounted only to this extract in the record of proceedings which is 27 pages long:

"This budget would still allow for some £9 million to be allocated to meet the payments. It would not require increases in the cost of Meals on Wheels, day care or home care charges or the abolition of ..... charges."

There is also this reference:

"The desire to safeguard services ..... support from vulnerable groups where concerns have been expressed about the charges for care services and the reduction of the payment of grants."

There appears to have been no actual discussion about the day care except explicitly in the debate about the alternative budget.

27. One learns a little more about the context of that meeting from the document produced on 24 July by the council after these proceedings had been brought, which refers to consultation prior to 15 February, which states:

"Whilst members were aware of the reason ..... the outcome of the detailed discussion did not form part of the budget papers before council which did not include some of the consultation responses or comments on them."

28. The evidence of Miss Stannard explains the choice of invitees for consultation in January. Some criticism is made of this. She says:

"A group of invitees were there ..... they could reflect the views of those who would be subject to charging, these groups representing providers, carers, as well as supporters, users of day care centre facilities throughout the area of the county."

It is said on behalf of the claimant that was a very small sample, when one sees the number of people who actually turned up to object, of the people who were circulated for the purposes of another exercise later in the year. Miss Stannard also says that in the period up to the meeting the council received correspondence expressing views about the proposed introduction of day care charges and she had been discussing this with councillors. There is no doubt that that is correct. But of course the correspondence is not available. One does not see in the records of the meeting itself any reliable indicator that consultation had taken place and been drawn to the attention of members.

29. At this point I should mention the Cumbria Compact. This is a document which sets out a structure for how organisations in Cumbria who want to work together to improve services for local people should operate with the council. I am not going to read out the entirety of the document. It places duties on both sides. Attention is focussed on two particular provisions: one is planning, consultation and representation:

"The third sector can be one route to user and community views. If organisations are to be able to accurately reflect these views they need time to consult with those they represent.

- Partners will work together to draw up plans.
- A minimum consultation period of 12 weeks will be given when a major

service change is proposed, in line with the Cabinet Office Code of Practice on Consultation.

.....

If an organisation cannot do something that is set out in this compact they will explain why, and how they plan to comply with this compact in future.

- Organisations will promote and raise awareness of the compact.
- Organisations will ensure their staff, volunteers and members are aware of the compact through appropriate publicity and training."

That compact had been introduced not long before the events which are the subject of this case.

30. Before turning to the specific submissions about the process leading up to the decision of 15 February, I should refer to the question of standing. Having set out the factual background, I can consider the question of standing. Against that background, it is argued by Mr Sheldon, on behalf of the authority, that the claimant does not have standing to bring these proceedings and may not be a proper party. He points out that the statement of grounds reveals that the claimant's low income means that she is unlikely to be liable for any of the new charges. It is suggested on her behalf that there is a risk that the day care centre she attends will not be able to provide services because of others ceasing to attend rather than pay the charges, and this means she has an interest in the outcome. But Mr Sheldon says that if the concerns expressed and raised by the claimant are shared by the organisations who were or should have been consulted on behalf of individual users, why are they not bringing proceedings and why have we not heard from someone who may be required to pay the charge?
31. The claimant asserts standing on two grounds. First, it is submitted that there is a risk that other users may cease to attend and reduce the attendance at the centre because of the introduction of charges. This will affect the claimant's enjoyment of activities at the centre and social interaction. This is particularly important to the claimant because she rarely leaves home, as I have pointed out. Secondly availability of day care centres is, she submits, endangered by these charges. It is feared that users will cease to attend and reduce attendance. There is a risk to future funding of the centres albeit this is guaranteed in any event in the period up to April 2008.
32. The claimant has standing to bring a claim if she has a personal interest in its outcome. As is well known, interest is given a broad construction and the bar is a comparatively low one. Rather than citing authorities brought to my attention, it is sufficient to turn to the Civil Procedure Rules CPR 54.1.11 for guidance. Mr Sheldon draws to my attention observations made by Mr Justice Sedley in R v Somerset County Council ex p Dixon which provide valuable guidance about the interaction between standing and remedy and how - to some extent - they merge into each other. For reasons that will become apparent, it is not necessary for me to enter into that high level debate. It

seems to me that where the claimant has a reasonable apprehension - because of a fear that co-users will drop out - that changes in the forms of charges that she herself does not have to pay might undermine the structure from which she undoubtedly benefits at present she has sufficient standing to bring this case.

33. I turn next to the competing submissions from the parties about the events leading up to the decision on 15 February. Miss Markus brings her attack in four - I was going to say different but they are - cumulative ways. First, she says the consultation did not enable representations to be made on behalf of those most likely to be affected by the procedure. She says no one much was contacted for proper consultation before the beginning of January. At the beginning of January there began the consultation promised by the chief executive. Only some of the service providers were contacted at that point. She says that is only one out of five organisations that were invited. She says that the defendant was informed that it had become clear at the conference on 1 February that a number of providers had not been invited and had no idea of the proposed additional charges. She invites comparison between the lists of potential representatives being put together at various times and submits that that process was entirely inadequate.
34. Counsel for the authority disputes that. He says that the effect of the twin-track consultation process about the budget, both in general and specifically through specific interest groups, culminating in a wider group on 14 February, was in the circumstances sufficient consultation of those likely to be affected by the proposals.
35. Secondly, the claimant submits that the defendant failed to allow adequate time for those consulted to respond to the meeting. The claimant says the defendant only raised the possibility of charging at a meeting in October. And when it published the draft budget the consultation was limited until 2 January when some voluntary sector organisations were invited. She submits that the meeting on 24 January occurred only three weeks before the council's decision, and the only other opportunity left was on 14 February when it is claimed that the council was still unable to provide what the claimant says was key information. It is said that since the cabinet approved the budget it recommended to the council on 30 January, the prospect of consultation after that date was not promising.
36. Counsel for the authority disputes that and says if one looks at the proposal in a sensible and practical way, and as a whole going back to the previous quarter, there was plenty of time for interest groups to get together to prepare materials for the consultation process. The time given was sufficient for impact analysis on the drop-outs to be done if that is what the organisations thought they had to do.
37. Thirdly, Miss Markus submits that there was a failure by the authority to comply with the compact. She says that that compact required a written consultation exercise. A letter written inviting organisations to meet cannot be construed as such. It simply constituted an invitation to meet. Furthermore there was a failure to comply with the 12-week consultation period. She submits that the claimant has a legitimate expectation - if the claimant could have been unaware of the issue - that the compact will be complied with and there was a failure which the claimant can invoke.

38. Counsel for the claimant rejects this. First, the authority contests as a matter of law the right of the claimant to invoke the compact, the Cumbria Compact as it is formally called. It will be unnecessary for the purposes of my decision to enter into that contention, interesting as it may be. What I will do is to assume, for the purposes only of this litigation, that the claimant has the benefit of that compact in the sense that she has the same right to invoke it as the voluntary organisations.
39. Counsel also submitted that the claimant is reading too much into the compact. It is not a contract. It is a wish list. When you examine its words it is an obligation in spirit only. Moreover he submits that when you look at the reality of what the compact was seeking to achieve, that was a 12-week consultation process - if one looks at the time between when the draft budget was first distributed for consultation and when the decision was taken on 15 February, it is not materially less than 12 weeks.
40. Fourthly, the claimant submits in relation to the February decision that the views expressed by such consultation as took place were not conscientiously taken into account by the council. She says there was no proper information before the council about the views of voluntary organisations and the council could not as a whole take into account information in letters sent by voluntary organisations to some councillors or indeed all of them. They may not have been read. There is no evidence of what concerns were taken into account by the council on 15 February. One cannot be sure that e-mails sent out at the last moment by various bodies were going to come to the attention of busy people on the eve of a meeting. She submits that the matters mentioned by Miss Stannard could not have been sufficient for this purpose.
41. The submissions on behalf of the council are that the evidence of the witnesses should be accepted albeit it is accepted that there is nothing in the documents presented to the council which can demonstrate what was drawn to their attention.
42. I conclude that the decision at the meeting of 15 February was taken without adequate consultation. Of course there was a proposal the previous year. There was a meeting in October. I recognise that there was the twin-track approach. There were limited representations by interested bodies. The draft budget would have been publicised and the matter would be the object of local controversy. Once the formal consultation process was initiated in January, this would not have been a bolt out of the blue. I accept that voluntary bodies should and would have been doing what they could to sustain a campaign, to defeat, if they could, what in the long term they knew to be an inevitable change.
43. But the chief executive's letter, reflecting I am sure the position of the rest of the council, was an indication that they could hold fire on the details of the consultation process until it was actually started in January. The consultation was initially too small a group. I accept the good faith behind the reasons why it was restricted in the way it was. There was also the contemplated possibility of further meetings. But when one compares the time between that point and 15 February, the prospect of sufficient time for a properly reasoned exercise was remote. It was also unrealistic to expect much further progress after the cabinet meeting. It is abundantly clear that what the councillors had in the papers did not reflect such consultation as had taken place. That

absence seems to me of evidential importance. One does not find in the papers anything to remind those councillors who were not individually aware of it what the concerns expressed by voluntary bodies were.

44. It seems to me that the compact was more than a wish list but less than a contract. It is a commitment of intent between the parties concerned. It does not seem to me the reference to 12 weeks incorporates - like a commercial contract often construed in this room might - the Cabinet Office material. The parties are free, within reason, not to comply with the compact although I accept the force of Miss Markus' submission that the 12 weeks must have come from somewhere. It was an indication of what might be an appropriate period for consultation about a major matter place given the restraints on the funding of the voluntary sector and availability of their resources. It is a yardstick.
45. Looking at the four different criticisms addressed, I ask myself "Was it fair?" It seems to me the answer is, no, it was not fair. The authority ran out of sufficient time at the beginning of January to conduct a fair consultation, which I am sure it had in mind and which it wished to carry out. As a result, the council was inadequately informed about the proper concerns of the voluntary bodies. To that extent the decision was unlawful.
46. That brings me on to the second issue which is the decision of 13 September. After the meeting on 15 February legal advice was taken and Miss Berry was put forward as a potential claimant. There was a letter before claim in April and proceedings were issued in May. It is no criticism of anyone to say that subsequent correspondence from both sides was inevitably and properly coloured by the fact that proceedings had been brought. The litigation had some effect on the decision-making process adopted by the council and also on the correspondence from the voluntary sector. Work was carried out with a view to implementation of the decision which led, on 10 May, to discussion in the council about day care provision and similar matters.
47. On 8 June a detailed letter was written by the defendant to service users individually to inform them about the introduction of day care charges asking questions and giving information. On 26 June a report was made to the council cabinet recommending that a decision be taken to re-affirm introduction of day care charges. The claimant's solicitors wrote shortly after that to ask that day care charges should be withdrawn.
48. On 24 July the cabinet decided to recommend that the council re-affirm the decision to charge for day care, pursuant to the report to cabinet of 26 June. Ms Brook and Ms Mangan gave a presentation to the county council cabinet members for about 15 minutes addressing the issues which one finds summarised in the memorandum for the meeting.
49. On 26 July the defendant wrote to day care providers and others for their views in these terms:

"Dear Colleague,

The county council considered day care charges again in a September meeting. Some providers felt the county council did not fully consider

their views on day care charges. Not enough people's views were obtained. Mr Pearson, councillor, has asked me to write to you to ask if you have views on day care charges which have not been heard ..... put this in writing to him before August 2007."

Shortly after there was a letter from the solicitors of the claimant setting out what they felt were the defects in consultation, claiming that the time for consultation was insufficient.

50. In early August Sonia Mangan of Age Concern in South Lakeland wrote summarising concerns about the charges and asking for what she described as a proper consultation period addressing a range of issues, that she sets out in that letter, including the impact of the charges and the effect on users, carers and other services, persons who refuse to be means tested or to pay at all. Meanwhile other organisations - such as South Cumbria Mental Health Carer Forum, West Cumbria Carers - were setting in train their own response. One sees that South Cumbria Mental Health User and Carer Forum made a submission to Mr Pearson about the implementing of day care charges, wanting to know more about that, expressing concerns in the process, financial assessment and matters of that kind. West Cumbria Carers convened a meeting to collate views and forward them to Mr Pearson by the end of August.
51. On 21 August the South Lakeland area sent a very detailed letter:

"Day care members remain confused about ..... the financial assessment process. I am enclosing a petition from members ..... including 66 signatures."

There is a detailed statement of the observations. Sale (?) sent out a letter accompanied by a petition:

"We, the undersigned, are members ..... we provide social day care for the people ..... we are writing to express our concerns about the fact that the county council is phasing in day charges [and so on]

out of the blue."

52. On 23 August a letter was sent to Mrs Stannard by Age Concern North-West Cumbria, making some detailed submissions but also adding:

"However I have been asked to stress I do not view this ..... as a consultation."

There is a reference to a discussion carried out by Age Concern North-West Cumbria management team, day care staff and finance:

"A letter was sent to Mrs Stannard by Sonia Mangan on 7 August making comments about the introduction of charges, again in some detail, making able and succinct points."

That letter, in turn, is responded to by Mrs Stannard on 13 August in a detailed and closely reasoned letter. There are other communications to similar effect.

53. Ms Mangan and Ms Brook also addressed the county council meeting on 13 September before the decision was taken. The papers put to the council for that meeting were unsurprisingly very different from those which had accompanied the 15 February meeting. There is a page and a half of summary of response to consultation. They are headings - A to G: if the amount is too high people would refuse to use it; providers currently subsidise a free service; costs of implementing charges would be greater than the income; effect on carers if people stopped attending; concern over the process of financial assessment; charges would have a negative effect on social inclusion.
54. Responses are attached at page 1 in the papers put before the council. In contrast to the consultations in January, the 26 July letter had been sent to 183 parties and there were 35 responses.
55. The claimant's submissions in respect of the 13 September decision are that the consultation was inadequate and failed to comply with the requirements of lawful consultation because insufficient time was provided to enable consultees to make effective responses. Reference is made to the fact that consultation took place over the summer holidays, Age Concern had limited resources and that in particular five weeks was insufficient to enable the time-consuming task of consulting with providers, users, carers, taxi drivers and gathering relevant information. Consultation was much less than that set out in the Cumbria Compact so that the defendant failed in its obligations. The multitude of responses to the letter of 26 July, it is submitted, does not of itself mean the consultation period was adequate. Miss Markus makes the further points set out in her written submissions and skeleton argument.
56. The Authority says that that complaint is not well founded as is demonstrated by the large number of responses, including detailed ones, and the fact that carers and users were able to have useful meetings in the intervening period.
57. Mr Sheldon submitted that the alleged lack of consultation at this point cannot be taken in isolation. It must be viewed in the context of what had gone before, in particular the previous consultation and discussion. He also submits that neither of the two decisions failed to comply with the Fairer Charging Guidance, to which reference has been made. He submits that looking at the period overall there is nothing in the complaint that there was not enough time in the 12-week period for consultation.
58. It is worth bearing in mind what the claimant says the consultation process should have envisaged. That is in the helpful witness statements of Miss Whitfield, in particular paragraph 22 of what I think is her second witness statement:

"If Age Concern had been in a position to consult properly with users and ..... sufficient time to collate and present information to the council, the details it wanted to ensure the following ....."
59. There is then a list of bullet points of which I will mention just a few:

"Numbers who would be liable, who would refuse to pay and therefore stop attending and reduce the attendance;

Numbers that would refuse to be means tested and therefore stop attending;

Numbers who would refuse to say how often they went in and for how long. Many go for a whole day at present ..... and many only attend one session ie half-a-day impacting on reliability of services and provision;

Impact on income and expenditure of those who are liable;

Concerns for example about people not paying for the heating so they can still attend day care;

The impact on carers of people not attending ie no respite;

Lack of any alternative social interaction for those who stop attending;

Lack of availability of home care due to existing pressures on limited services. The workforce in Cumbria is insufficient to provide enough home care;

What this will mean if people start going .... some might be able but still have limited means, charging £60 a week,"

and so on, and there are others.

60. That is no doubt an admirable list of factors be set out in a needs assessment conducted in a comparatively perfect world. But it does not seem to me that one can, as part of the process of consultation, simply give all the time that is necessary for that extensive and perhaps very expensive exercise to be carried out. To that extent, I end where I began with the observations of Mr Justice Webster:

"In the present case, in my view, the legitimate expectation of consultation evolves from the point of view of expectation ..... the ..... opportunity constructively to criticise the proposal and to express their own preferences in relation to it."

61. Having regard to all the considerable amount of material and submissions put forward by the parties, I do not consider that the decision of 13 September was unlawful on the grounds that it was taken without adequate consultation. That process has to be seen in the context of a campaign and a process begun the previous October. No one suggests that the 12 weeks for the September meeting, if it was that, was triggered the previous October. But a considerable amount of work might have been expected to be done at the outset and in the period leading up to the re-affirmation in September 2007. There was a very much wider consultation in the period between February and September, as one sees from the sheer numbers of people and quantity and quality of material that

came in, including the able submissions made by representatives of Age Concern at various meetings.

62. Finally the outcome of the consultation and the views expressed were very fully reported by officers to Council in the form of the detailed papers to which I have made reference, including what appear to me to be very careful and frank articulation of the concerns that the consultation threw up.
63. Having regard to the other reasons I have expressed about the issues, and notwithstanding the submissions made about the content, it seems to me that the process, once it reached September, was indeed a fair one and in that sense the litigation brought by the claimant back in May has served its purpose. But in terms of liability and relief the application fails. In those circumstances it is not necessary for me to deal with questions of remedy.
64. I will hear submissions from counsel and discussions on matters.
65. MR SHELDON: May I formally make an application for costs? I fully appreciate the claimant is not in a position to pay and probably will never be in a position to pay, but just as a matter of form if I could ask for such an order. The application has failed.
66. MISS MARKUS: The application has only failed in part. Obviously the end result is that the claimant gets no relief, but there were two distinct issues. There was one claim that generated this claim on which we have won and both issues have been fully argued. In my submission, the defendant is entitled to its costs in respect of the argument on the September decision. I cannot argue against that. But the claimant should have her costs in respect of the February decision. I make that application.
67. MR SHELDON: I oppose the application on the basis that ultimately the February decision is immaterial because, as you have said, there was no relief provided. The September decision stands. When the claimant had her attention brought to this new process taking place that would have been the opportunity for the claimant to have withdrawn and to have accepted that a new decision would be made and that would be a lawful decision, and yet they persisted with their application. If however you are not with me in respect of that what I would suggest as an alternative is that there is a set-off of the costs of the first decision with the costs of the second decision. Ultimately they will cancel each other out or there probably will be something in favour of the second decision, but we would be happy to say they cancel each other out.
68. THE JUDGE: There is an application for costs. In the real world, no costs will be paid but I order costs against the claimant. There has been a measure of success for both sides. Having regard to the realities of this case, submissions from counsel and the expressed views of the Master of the Rolls that orders for costs of the kind I am about to make should be made more often, I will make no order for costs. That will lead to a saving in time and money in assessment.

69. MISS MARKUS: Could you order a detailed assessment of the claimant's publicly funded costs? Could I take instructions on one other matter? (Pause) There is no other application.

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