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Case No: CO/4207/2016

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2016

**Before** :

**MR JUSTICE OUSELEY**

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**Between :**

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| **THE QUEEN (on the application of) DERBYSHIRE COUNTY COUNCIL** | **Claimant** |
| **- and -** | |
| **BARNSLEY, DONCASTER, ROTHERHAM AND SHEFFIELD COMBINED AUTHORITY** | **Defendant** |
| **- and -** | |
| **(1) SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT** | **Interested Parties** |
| **(2) CHESTERFIELD BOROUGH COUNCIL** | |

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**James Goudie QC and Edward Capewell** (instructed by **Winckworth Sherwood**) for the **Claimant**
**Richard Clayton QC and Vivienne Sedgley** (instructed by **Sharpe Pritchard**) for the **Defendant and Second Interested Party**
**Jonathan Moffett** (instructed by **Government Legal Department**) for the **First Interested Party**

Hearing dates: 9th and 10th November 2016

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# Approved Judgment

**MR JUSTICE OUSELEY:**

1. In this judicial review, Derbyshire County Council challenges the lawfulness of a public consultation exercise carried out by the Barnsley, Doncaster, Rotherham and Sheffield Combined Authority, the Combined Authority. It came before me as a rolled up hearing. I grant permission.

2. The public consultation was carried out in connection with a scheme proposed by the Combined Authority under the Local Democracy, Economic Development and Construction Act 2009, the 2009 Act, now significantly amended by the Cities and Local Government Devolution Act 2016, the 2016 Act. The 2009 Act introduced powers to create combined authorities, which could benefit from "Deals" with central government involving devolution of some powers, with additional government funding.

3. The proposed scheme involved extending the area of the Combined Authority to include Chesterfield Borough Council, a district council within Derbyshire County Council's area, and Bassetlaw District Council, a district council within the area of Nottinghamshire County Council. It also included the devolution of powers from the Government to the Combined Authority and the transfer of some powers from the two County Councils. The proposed scheme would also change the name of the extended Combined Authority to the Sheffield City Region Combined Authority, SCRCA.

4. Whilst Bassetlaw DC is contiguous with the existing Combined Authority, Chesterfield BC is not, but wishes to be a part of it. Parts of North East Derbyshire DC's and Bolsover DC's areas, both district councils within Derbyshire, surround Chesterfield BC's area, and lie between Chesterfield BC's area and the current boundary of the Combined Authority.

5. The Combined Authority was established on 1 April 2014 by the Barnsley, Doncaster, Rotherham and Sheffield Combined Authority Order SI 2014 No. 863 made under section 103 of the 2009 Act and other powers. Its constituent councils are Sheffield City Council, Barnsley Metropolitan Borough Council, Doncaster MBC, and Rotherham MBC. Chesterfield BC, Bolsover DC, Derbyshire Dales DC and North East Derbyshire DC, from Derbyshire, and Bassetlaw DC from Nottinghamshire are non-constituent councils. Both types of council appoint one of their elected members to be a member of the Combined Authority, but those appointed by non-constituent councils generally have no vote.

6. The Combined Authority became a Mayoral Authority by the Barnsley, Doncaster, Rotherham and Sheffield Combined Authority (Election of Mayor) Order SI 2016 No.800. As yet it has no mayor. The first Mayoral elections are due to take place on 4 May 2017.

7. The starting point for this case need go back no further than a Devolution Deal or agreement made in October 2015 between, so far as material, HM Treasury and the four constituent members of the Combined Authority. The agreement, subject to the necessary legislation, and building on earlier Deals, provided for the devolution of a range of powers and responsibilities to the Combined Authority, and for a new

directly elected mayor, as the "next step in the transfer of resources and powers from central government to the Sheffield City Region." The "necessary legislation" included what became the 2016 Act and the Bus Services Bill 2016, together with the statutory orders.

8. Under the agreement, the Combined Authority would control an additional £30m funding a year over 30 years "to boost growth" and there would be more effective working with the Government to "to boost trade and investment". Other economic initiatives were referred to. Some of the powers to be devolved related to employment skills, and employment support. Housing and planning powers were to be exercised by the Mayor, including the creation of a spatial framework for managing planning across the Sheffield City Region "and with which all Development Plans will be in a strategic alignment". This would need to be approved by the constituent councils of the new Mayoral Combined Authority, MCA. The mayor would also be responsible for "a devolved and consolidated local transport budget, franchising of bus services, and helping delivery of integrated smart ticketing across all local modes of transport". A Key Route network would be identified to be maintained at City Region level across the area of the constituent councils.

9. The agreement spelt out the governance arrangements as then envisaged, including an elected mayor, additional powers from central Government, but there was "no intention to take existing powers from local authorities without agreement."

10. It is necessary now to consider the legislation in order to understand the next steps which were taken.

**The 2009 Act as amended by the 2016 Act**

11. The Combined Authority with the agreement of Chesterfield BC and Bassetlaw DC wanted to expand its boundaries to encompass the areas of those two District Councils, for the more effective operation of the Sheffield City Region. For all purposes other than those functions carried out by the SCRCA, they would remain parts of the two tier Derbyshire and Nottinghamshire CC authorities.

12. S106 of the 2009 Act, as amended by the 2016 Act, enables the Secretary of State by order to change the boundaries of a Combined Authority by adding a local government area to an existing Combined Authority. The amendments brought in by the 2016 Act on 28 March 2016 mean that there are now only two conditions to be met, set out in s103; they are met. Condition D would preclude Chesterfield BC joining the SCRCA if it had been part of another Combined Authority, such as that mooted for Derbyshire and Nottinghamshire under the name of the North Midlands Combined Authority. S106 does however permit removal of an area from the combined authority. One other condition, which no longer applies, was that no part of the Combined Authority should be separated from the rest of it by a local government area which was not within the Combined Authority. This condition would not have prevented Bassetlaw DC being part of the SCRCA, but would have prevented Chesterfield BC being part of the SCRCA.

13. The consent requirements in 106 (3A) are satisfied. Chesterfield BC consents; the consent of Derbyshire CC to Chesterfield BC becoming a constituent council of the Combined Authority was not required, by virtue of s 106(3B). By virtue of s107A (8)

and s107C (6), where the Combined Authority is a Mayoral Combined Authority, MCA, although as here without a mayor as yet, the consent of the mayoral substitute is required but has been or will be obtained.

14. S104 enables orders to be made conferring powers on the Combined Authority, by reference to powers which could be conferred on Integrated Transport Authorities (ITAs) under the Local Transport Act 2008, the 2008 Act, in what must have been seen as a handy form of cross reference. These govern a number of aspects of a combined authority, but important for these purposes is s85(2) of the 2008 Act which provides that the constituent councils of an ITA, and so for these purposes the constituent councils of a combined authority, are any district and county council for an area within the Combined Authority. So an order making Chesterfield BC a part of the Combined Authority also makes Derbyshire CC a constituent member, whether either the Combined Authority or Derbyshire CC wish it or not. This is not a matter of choice or discretion; it is the legal effect of s104 of the 2009 Act with s85 of the 2008 Act.

15. S105 enables the Secretary of State to make an order granting powers to a combined authority which, by a further handy cross reference, are those which could be given to an Economic Prosperity Board, a body which is believed on one occasion to have got beyond the pages of the legislation. These powers enable a local authority function to be exercised by the combined authority. S105A empowers the Secretary of State by order to enable the function of a public authority, other than a local government authority, also to be exercisable by a combined authority.

16. S106A(1)(a) deals with the transfer of powers where a district council, which is part of a county council area, as Chesterfield BC is, is added to the area of a combined authority, as is proposed here. By s106A(1)(c) the Secretary of State may exercise his power to make an order under sections 104, 105 and 105A. If he proposes to make such a power-transferring order "as a result of or otherwise in connection with the making of the order" to add an area to the combined authority, he may do so whether or not the county council for that added area consents to the transfer of powers. The possible use of that power is a matter of some concern to Derbyshire CC.

17. S111 enables a combined authority, and others, to undertake a review of those matters in relation to which an order can be made under ss 104-107. That is what the Combined Authority did in June 2016, and the review concerned the proposed scheme, to which I now turn.

18. The governance review of June 2016, referred to the "long history of collaboration" in various guises between the South Yorkshire Councils, and North East Derbyshire DC, Derbyshire Dales DC, Bolsover DC and Chesterfield BC, with Bassetlaw DC from Nottinghamshire, the formation of the Combined Authority in April 2014, and its fruits in the Devolution Deal. The Deal was contingent upon the Combined Authority becoming a Mayoral Combined Authority. The Review concluded that Bassetlaw DC and Chesterfield BC should become constituent members of the SCR Combined Authority because "the economy, the transport connections and the shared challenges of the current Combined Authority members are inextricably interwoven" with those two areas. The commuter flows from Chesterfield into Sheffield are "strong", and so it was "entirely logical that the interests of residents in Chesterfield are better served by an SCRMCA operating over a shared transport function through a

single Local Transport Authority", able to deliver Smart ticketing and investment through a single devolved transport budget than under current arrangements. The "administrative geography should match the functional economic geography"; there were strong ties between the six authorities. "On balance, it is clear that these economies are part of the SCR whilst remaining firmly part of the counties of Nottinghamshire and Derbyshire." So the "footprint" of the Combined Authority should logically be extended to include those two areas, which as a Mayoral Combined Authority would exercise control over skills, transport, new investment, spatial planning and housing investment far more effectively, rather than control over those functions stopping at "arbitrary" administrative boundaries.

19. The review stated that the changes in the proposed scheme would improve the exercise of statutory functions in the areas to which the proposed order related, i.e. the six constituent areas. They would have a neutral or no impact on the identities of local communities, since the proposals were about the economy of the area and not identity. The arrangements would secure more effective and convenient local government, reducing complexity and streamlining the delivery of public services:

> "i) within the combined authority area;
>
> ii) of those areas within the SCR but outside the combined authority area (non-constituent areas);
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> iii) for neighbouring areas."

20. The areas at (ii) are the areas of North East Derbyshire, Derbyshire Dales and Bolsover DCs, which would remain non-constituent members of the MCA and "key participants in the ongoing work of the MCA…." They would enjoy voting rights on "relevant and appropriate matters." The areas at (iii) must include areas neighbouring constituent and non-constituent councils in Derbyshire. Any short term complexity associated with the proposed changes would be dealt with by transitional arrangements.

21. By s112(1), where a combined authority concludes that the "exercise of the power to make an order under any one or more of ss 104-107 would be likely to improve the exercise of statutory functions in relation to an area of a combined authority or a propose area of a combined authority", it may by s112(2) "prepare and publish a scheme relating to the exercise of the power or powers in question". That is what the Combined Authority did, and its governance review made its case for the proposed scheme.

22. The scheme of June 2016 proposed the expansion of the Combined Authority to include Chesterfield BC and Bassetlaw DC. The SCRCA would include not just the four South Yorkshire Councils, Chesterfield BC and Bassetlaw DC, but Nottinghamshire and Derbyshire CCs as constituent councils. Bolsover DC, North East Derbyshire DC and Derbyshire Dales DC would continue to be non-constituent Councils. The constituent council role for Derbyshire CC was described as being "in relation to the area of Chesterfield" or "only in relation" to it. The effect of that limitation, which enjoys no statutory basis, was not spelt out. Derbyshire CC and each of the three Derbyshire District Councils, as part of two tier authorities, would have one vote each on non-mayoral functions. Non-constituent members could vote where

it was "relevant and appropriate." The area of the new Combined Authority was defined. Its functions were delineated. Its new name was proposed.

23. The SCRCA would be the Local Transport Authority, LTA, for the areas of Chesterfield and Bassetlaw. Their inclusion "will result in additional functions in respect of transportation being transferred from the County Councils." A range of transport powers were to be exercised by the SCRCA as LTA. There would be no transfer of statutory highway responsibility, and the "key Route Network" would be "collaboratively managed" by the Highway Authorities "in partnership".

24. Local Planning Authorities would be required to consult the Mayor on applications of "Potential Strategic Importance". A spatial development strategy would be produced by the Mayor; constituent members would have to have regard to that plan when preparing their own development plans; development plans would have to conform generally to it. The strategic spatial planning framework would require the approval of all constituent members, including the two County Councils. Various local authority education functions in relation to skills, as envisaged by the Devolution Deal, were to be exercised concurrently with the Mayor. The MCA would have power to issue a levy to its constituent councils in respect of the costs of its transport functions, apportioned on a per capita basis. Other costs were to be apportioned between the constituent and non-constituent members as might be agreed. It added that it had been agreed by the existing constituent members that, "without a further explicit policy decision, the implementation of this Scheme will not lead to an impact on Council Tax Bills for residents within the area of the MCA."

25. S113 governs the next stage. By subsection (1) the Secretary of State may make an order under those sections in relation to an existing combined authority only if:

> "a) the Secretary of State considers that to do so is likely to improve the exercise of statutory functions in the area or areas to which the order relates, and
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> b) any consultation required by subsection (2) has been carried out.
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> (1A) If a scheme has been prepared and published under section 112 the Secretary of State must have regard to that scheme in making the order.
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> (2) The Secretary of State must carry out a public consultation unless----
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> a) a scheme has been prepared and published under section 112.
>
> b) the authorities that prepared and published the scheme carried out a public consultation in connection with the proposals in the scheme and provided the Secretary of State with a summary of the consultation responses, and

> c) the Secretary of State considers that no further consultation is necessary."

26. Subsection (2A) brings in subsection (2B), because part of the proposed expanded Combined Authority, i.e. the area of Chesterfield BC, is separated from the rest of the Combined Authority by one or more local government areas not in the Combined Authority. Subsection (2B) provides:

> "(2B) In deciding whether to make the order under section 106, the Secretary of State must have regard to the likely effect of the change to the combined authority's area on the exercise of functions equivalent to those of the combined authority's function in each local government area that is next to any part of the area to be created by the order.
>
> (3) In making the order, the Secretary of State must have regard to the need----
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> a) to reflect the identities and interests of local communities, and
>
> b) to secure effective and convenient local government."

27. It is clear that there is no obligation on a combined authority to carry out a public consultation in connection with a scheme which it proposes to ask the Secretary of State to proceed with under s113. That duty lies upon the Secretary of State. But the duty does not need to be performed if the combined authority has carried it out already.

28. What happened here is that the Combined Authority did carry out a consultation process between 1 July and 12 August 2016. It is at issue whether it was "public" and "in connection with" the June scheme, whether sufficient information was made available for intelligent response, and whether it was so unfair as to be unlawful. These proceedings were commenced on 9 August 2016, but the claim form was not issued by the court office until 18 August due to the vacation.

29. The Combined Authority then prepared a summary of the responses, and on 12 September resolved to send the summary and rather more, including Derbyshire CC's representations, to the Secretary of State, and then did so, as Mr Clayton QC for the Combined Authority and Chesterfield BC told me and I accept. In any event, it was and remains open to Derbyshire CC to send its representations to the Secretary of State and any other material it wishes.

30. The Secretary of State has not yet decided what further steps to take, and when. He has not yet decided what further consultation if any is required. That is not surprising in view of this challenge.

31. The Secretary of State had, however, hopes of a tight timetable, starting with a decision by him on the adequacy of the consultation in mid-November, and if no more

were required, the seeking of the necessary consents of the Combined Authority and relevant local authorities, in so far as not yet obtained, with a view to laying the draft Order before Parliament in mid-December. The final step in the process comes after affirmative approval by both Houses of Parliament of the Order, with the making of the order by the Secretary of State. That would be by the end of January 2017. If further consultation is required, the process would be delayed by 2 months or so. The Secretary of State, through Mr Moffett, told the court that no irrevocable step would be taken before its ruling, but that the only irrevocable step is his making of the Order.

**Issue 1: Compliance with s113: "Public consultation in connection with the proposals in the scheme…."**

32. Mr Goudie QC for Derbyshire CC raised two interrelated issues as to why the consultation process carried out by the Combined Authority did not satisfy the requirements of s113(2)(b), enabling the Secretary of State to dispense with further public consultation. The first was that the consultation was not "public" because of the limited geographical scope of those targeted in the process. It did not include areas outside the Combined Authority and its proposed extensions, and in particular, it did not include residents of the districts of Derbyshire and Nottinghamshire other than Chesterfield BC and Bassetlaw DC. It should have done so, because those other districts were affected by the proposals in the scheme. The second argument was that it was not "in connection with the proposals in" the scheme because some questions were too general to make such a connection and relevant topics were omitted.

**(a) "Public consultation"**

33. I do not need to set out the very extensive consultation process which the Combined Authority carried out with the residents in the area of the Combined Authority and its proposed extensions. It is not disputed that the residents of the other areas were not "targeted", in the sense that no public events or local meetings were held there, nor were consultations leaflets distributed there. There were press notices in newspapers based in Bolsover and Derbyshire Dales DC areas. The Combined Authority provided a contact telephone number, and a variety of social media, email and postal addresses, but the Combined Authority did not try to publicise those outside the areas of the district councils in the proposed SCRCA, apart from those two newspapers.

34. By far the prime source of consultation responses analysed in the report on consultation was an online questionnaire, whether or not it was the Combined Authority's intention that it should dominate the responses. The paper version was not distributed outside the proposed area of the district councils of the SCRCA. There were 2892 consultation responses, of which 2719 used the questionnaire, of which 2444 were online responses. It appears that much of the consultation publicity directed would-be respondents to the online facility, without making it the sole source of information about or response to the scheme proposed.

35. The questionnaire invited respondents to go to the Combined Authority's devolution website where information about the scheme could be found, notably the scheme itself and the review. The questionnaire asked for the local government area of residence of respondents. The six districts to form the SCRCA were separately named along with the 3 non-constituent members**,** Bolsover DC, Derbyshire Dales DC and North East Derbyshire DC. 533 responses came from those 3 areas. There was also a

box for "Other (please specify)". 161 responses were from "Other". The views of "Other" were separately analysed for each question. The answers were not ignored by the Combined Authority, but taken into account. But it is clear that the consultation process did not set out to obtain the views of the parts of Derbyshire CC which were not to be constituent parts of the Combined Authority.

36. Derbyshire CC submitted its own extensive and critical response. In addition, Derbyshire CC, strongly opposed to the scheme, and others, campaigned against it. Much of that effort was directed to Chesterfield BC residents and businesses, but it ranged more widely. Mr Stephenson, Derbyshire CC's Chief Executive, said, in his first witness statement, that it was Derbyshire CC and not the Combined Authority which, through websites and other communications, "repeatedly encouraged residents of Derbyshire as a whole to take part in the SCR consultation despite its fundamental misgivings as to [its] fairness." He was concerned about the isolation of Chesterfield BC from the rest of the districts of Derbyshire CC. Derbyshire CC residents would be unaware of the questionnaire.

37. He expressed concern, in his second witness statement, about the effects of the scheme on the other district councils in Derbyshire, and the limited "engagement" with the non-constituent members of the Combined Authority. The questionnaire did not pose what he described as the key question of "whether some Council services in Chesterfield BC should be governed by a Sheffield City Mayor". The highly technical papers underplayed the implications and the extent of what was unknown in short and long term. To that end, Derbyshire CC, in his words "produced a range of communications, materials and published information on its website using accessible and inclusive language whilst also providing more in-depth information." Residents were encouraged to take part in the Combined Authority consultation. Derbyshire CC's own poll generated over 5200 responses, overwhelmingly hostile to Chesterfield BC becoming a full member of the Combined Authority.

38. What the Act requires in my judgment is consultation, not with public authorities or bodies, but with the general public. The consultation must be with those who are judged to be affected to a degree which may make their views of significance to the Secretary of State's decision. This is not a judgment with a sharp edge but involves degrees of impact on a variety of topics.

39. The question is whether the consultation was "public" in view of the geographical limit placed in reality on the areas targeted for information and response, as I have found. There is no explicit evidence as to whether that limit was placed on the area because it was thought that such a boundary was required by the legislation, or whether there was some judgment about the area which ought to be targeted.

40. To the extent that the Combined Authority limited the area targeted because that was the area which would constitute the new Combined Authority, and it therefore thought that it should not target residents beyond its area as a matter of law, it was wrong to do so. There is no such geographic limit. The words "public consultation" are very wide, and deliberately so. There is no purpose behind so artificial a limit in this Act. There is no reason why a Combined Authority should not wish to find out the views of those outside the area who might be affected, now or in the future, or why the Secretary of State should not want to find out those views. Here those would include views from the non-constituent and other parts of Derbyshire CC, especially as

Chesterfield BC is wholly surrounded by District Councils which are not to be constituent members of the Combined Authority, and the whole of Derbyshire CC, because it is to be a constituent member. It would be lawful for their views to be explored as part of the consultation process, to the extent that the consultation remained "in connection" with the scheme.

41. S113 (2B), although not directed at the consultation process, also shows that the views of those beyond the area of the SCRCA can be relevant. The topic was touched on briefly in the Combined Authority Review, which said that the involvement of the constituent district councils had not affected their identity during the operation of the Combined Authority thus far, whether districts in Yorkshire, Derbyshire or Nottinghamshire. But the provision reinforces my view that s113(2) does not impose an arbitrary limit on the area of targeted responses to the functional area of the SCRCA. If Parliament had intended specific restrictions on the area to be consulted, it would have said so. Indeed, the review asserted that there would be effects, which it regarded as beneficial, though no doubt two views on that are possible, on the areas "neighbouring" the non-constituent council areas.

42. I cannot conclude however that the Combined Authority did limit the area of its consultation process as a result of such a misinterpretation, since were it to have felt so constrained, I can see no reason why it would have taken into account the "other" responses, including from areas not part of constituent or non-constituent councils in the Combined Authority, as well as from those in the non-constituent Councils. If the consultation was obliged to stop at the boundaries of the functional area of the Combined Authority, then the responses beyond would have been irrelevant. It is also for that reason that I consider Derbyshire CC's charge, that the limits were deliberately chosen to exclude the views of those in the areas beyond the Combined Authority cannot be made out, a charge denied by Mr Smith, Chief Director of the Combined Authority.

43. I also do not think that s113 requires a consultation exercise to be undertaken throughout the whole of a county council area simply because the whole county is to become a constituent member, or one of its district councils is to become one, contrary to Mr Goudie's submissions. No such requirement is stipulated for, and again I judge that such a specific and large requirement, if intended, would have been made express by Parliament when amending the legislation to enable this sort of change to occur.

44. Mr Goudie's alternative formulation was that the consultation should have covered those district councils in the hinterland to the Combined Authority, notably the three non-constituent Councils, North East Derbyshire DC, Derbyshire Dales DC and Bolsover DC. But that is a submission of a different order; it is not a submission that a restriction was necessarily to be implied. It is a submission that a judgment is required of the areas to be affected and which fairness requires are consulted, and rationally had to cover those areas.

45. As I have said, the words "public consultation" express a broad requirement. This needs a judgment from the Secretary of State as to what areas or people require to be consulted for the purposes of s113, in relation to the effect of a particular scheme. The Combined Authority consultation, if it is to satisfy the Secretary of State that he need not undertake any further public consultation, needs to be based on a judgment

as to the areas or people to be consulted, which is both lawful and sufficient to satisfy the Secretary of State that he need undertake no further public consultation.

46. Mr Clayton is right in submitting that the determination of the area to be targeted is one for the rational judgment of the Combined Authority, as long as it qualifies as a public consultation, but that does require a judgment from the Combined Authority on the point. I see no evidence of explicit judgment or consideration of the area to be targeted. Mr Clayton was unable to point to one. Nonetheless, since the area targeted appears not to have been the result of an assumed legal restriction, judgment there must have been as to the area to be targeted and the areas from which "other" responses would be considered, as one of the decisions as to how the consultation process was to be conducted. The consultation could not happen without a decision based on some judgment, however instinctively obvious the answer was felt to be, as to the areas to be targeted and as to how areas beyond were to be treated.

47. I do not think that was the only rational judgment which could have been reached, however exiguous the reasoning, but it would be a rational judgment. Chesterfield BC is the area primarily affected in Derbyshire CC, as is Bassetlaw DC in Nottinghamshire, and if there were significant objections from the residents, businesses and those other "stakeholders" operating within those two areas, that is primarily what the Secretary of State, and so the Combined Authority, would have been concerned with. The purpose of consultation targeted over a larger area of Derbyshire CC would be to ask those residents what they thought about the impacts of the changes not just on Chesterfield BC but also on the rest of Derbyshire CC's area. But it is plain that there is a major disagreement between Derbyshire County Council and the Combined Authority over whether there would be any significant effects outside the Chesterfield BC area. The CombinedAuthority's implicit judgment is not irrational so as to be unlawful; it could therefore rationally limit the area to be targeted.

48. There was also bound to be a degree of spill over from the area of the SCRCA to the surrounding areas, since Chesterfield BC is surrounded by other District Councils and three of them are non-constituent members of the Combined Authority; those other residents and interested bodies would have some awareness of what was going on. It is quite reasonable for there not to have been an equal effort throughout all the areas of Derbyshire CC and Nottinghamshire CC, and the resource implications of doing a consultation exercise equally intensively throughout those areas would have been considerable; (the exercise cost £350000 as it is). All responses from non-targeted areas were considered, and none were excluded on geographical grounds, which is also important.

49. The disagreement between Derbyshire CC and the Combined Authority had been well known for a long time, and whether or not the particular reaction of Derbyshire CC could have been anticipated, the fact is that Derbyshire CC did try to involve residents of Derbyshire CC more generally in the Combined Authority consultation exercise, to point out the scheme drawbacks for them, which could lead them to express opposition to the proposal. It conducted its own poll and submitted its own representations as did some of its district councils. The consequences of Derbyshire CC's actions have to be borne in mind in judging whether or not the consultation was in fact public for the purposes of the Act. For the consultation not to be what s113 required by way of public consultation, Derbyshire CC would need to show that there

were significant areas, which the Combined Authority appreciated or ought to have appreciated were likely to be affected sufficiently to warrant their views being obtained, from which views were not in fact adequately obtained, even allowing for Derbyshire CC's own efforts. That simply has not been demonstrated. Overall, in my judgment, this was "public" consultation for the purposes of s113.

50. If the Secretary of State wants public consultation more targeted on those areas of concern to Derbyshire CC, and thinks that consultation is necessary for him to reach his judgments on the statutory criteria, he can of course conduct it or ask the Combined Authority to do so. Derbyshire CC's response or further representations should provide the detail and technical workings for its case that there were wider, significantly adverse effects, for the Secretary of State to consider further. Derbyshire CC can make those points to him; he may or may not disagree. The fact that no explicit reasoned judgment was reached about the area to be targeted is again a matter which the Secretary of State can consider. He may reach a rational conclusion that the area targeted was sufficient to bring in the main areas affected in a way which sufficed for public consultation for the purpose of s113.

**(b) "In connection with the proposals in the scheme…"**

51. The second issue under this head is whether the consultation was "in connection with the proposals in the scheme". It took two forms. First, there was criticism of some of the questions in the questionnaire on the grounds that they were overly general and not tailored to the specific issues in the scheme. Hence they were not "in connection with the proposals in the scheme." Second, other questions should have been asked in the questionnaire, in connection with proposals in the scheme; without those questions, the consultation was not "in connection with the proposals in the scheme."

52. Ipsos MORI responded, through the second witness statement of Mr Smith, to Derbyshire CC's criticisms of the questionnaire, not all pursued before me. The Combined Authority is entitled to make the point that the questions were framed as they were on the advice of Ipsos MORI, to cope with the problem of a limited grasp by the general public of the technicalities of local government, and which body did what, and of what the changes signified, while still obtaining from the public a useful level of sufficiently informed response. The debate, conducted largely in witness statements, about the way in which Norfolk and Suffolk County Councils dealt with the questions they wished to ask did not illuminate the issues here. They did not play the role of the Birmingham consultation in *R (Moseley) v Haringey LBC* [2014] UKSC 56, [2014] 1 WLR 3947. I have no doubt that consultations of this sort can satisfy s113 in many different ways.

53. I turn to the first aspect, which focussed on the first question in the questionnaire. This question asks for views on the extent to which respondents support or oppose "the principle of more decision-making powers being transferred from the government in Westminster to groups of local councils (on issues such as economic development, skill, transport, housing and infrastructure planning)?" It was intended to introduce the general concept behind the scheme and is about the fundamental rationale for such schemes in general. I see nothing unlawful in that. Although taken individually, some other questions can also be read as quite general, and Q4 in particular is problematic, as a whole they become more specific especially when read with the preambles to the questions. They are all about aspects of or purposes of the

proposals in the scheme. This aspect of the argument is not sound. It was not pressed by Mr Goudie**.**

54. So I turn to the second aspect, that is the topics which Mr Goudie says should have been addressed through the questionnaire, with explanatory preamble, but were not. Mr Goudie gave five examples of topics on which he said the questionnaire should have sought the views of the public.

55. Mr Goudie contends that the questionnaire asked no questions for the public to express views about (i) the membership of the Combined Authority, (ii) the voting rights of the members, (iii) the specific functions which it would have, (iv) the specific functions which would be conferred upon the Mayor, nor (v) about the funding of the Combined Authority. Mr Clayton accepted in his Skeleton Argument, and orally, that those questions were not asked. He pointed out that the questionnaire directed respondents to the Combined Authority website where more information, including the scheme, was available. He is also right that the questionnaire was not the sole basis for the consultation but Mr Goudie is right, and this is more important here, that the answers to the questionnaire represented by far the largest source of public responses to the consultation.

56. Mr Goudie submitted that the 2009 Act was intended to improve public involvement in relation to local authorities. The consultation was to stand for the performance of a statutory obligation on the Secretary of State to consult. The statutory provisions did not derive from, nor were they confined by, common law duties of fairness. I should apply, to this issue as to the other issues he raised, the approach of Lord Reed in *R (Moseley)* above, at [38-39] in particular. Mr Goudie submitted that the purpose of the duty to consult in this particular statutory scheme, as in *Moseley*, was "to ensure public participation in the [Secretary of State's or Combined Authority's] decision-making process." This required proper information about the scheme to be provided, and views to be sought on the topics which the subject-matter of the consultation raised. I regard that as pertinent to the contentions here.

57. I take the five unasked questions in turn. First, membership of the SCRCA: the views of the public were not sought on whether Chesterfield BC should be a part of the Combined Authority. They were told in the preamble to Q2 in the questionnaire that the scheme proposed that Chesterfield BC would be part of the SCRCA, and that there would be new powers for the Combined Authority. But Q2 did not ask for views on that. Instead, it asked for views on the transfer of certain powers from central government to the Combined Authority, and whether additional powers should be transferred. The preamble to Q4 stated that the scheme proposed "to formally include Chesterfield Borough Council and Bassetlaw District Council"; it referred to strong economic links and said that the scheme proposed that the six local authorities "work together more closely on issues such as the economy, skills and transport, housing and infrastructure planning." Q4 then asked respondents to state whether they agreed or disagreed "that local authorities should work together formally where there are strong economic links with neighbouring areas." It was not directed at the proposed additional constituent councils. The preamble to Q7 stated that the scheme proposed to extend the Combined Authority to include the two District Councils and to provide new powers on "things like the economy, skills, transport and infrastructure planning. The objective is to improve how local councils create economic growth and work

more effectively together across the Sheffield City Region". Q7 however asked if they thought there were any alternative ways of achieving this objective.

58. Mr Clayton accepted that the consultation needed to cover major features of the proposals, but submitted that that did not require specific questions on this or the other topics raised by Mr Goudie. He saw this as a disguised rationality challenge. The statute shaped the obligation of fairness, which was not different in result from what the approach of Lord Reed in *Moseley* would lead to. He simply asserted that it was not unfair or unreasonable not to ask the question in the questionnaire. Not merely was Chesterfield BC becoming a constituent council not seen as a major point; Mr Clayton said that being a constituent council was irrelevant. His Skeleton Argument simply treated the absence of such a question as the logical corollary of the irrelevance of others which were not asked.

59. I cannot accept Mr Clayton's approach to this. Fundamental to a consultation which would achieve the statutory purpose of s113 is that at least the major proposals in the scheme should be identified and be made the subject of consultation, with adequate, even if simplified, material provided to explain it so as to permit of sensible response. I do not think that a consultation is "in connection with the scheme", merely because it asked questions which were connected to the proposals, if major issues were nonetheless omitted.

60. Chesterfield BC's new role in the SCRCA is one of the fundamental proposals or changes to be wrought by the scheme. Although various questions in the questionnaire touched on Chesterfield BC becoming a constituent member, no question actually asked whether respondents supported that or not. Respondents via the questionnaire could attach additional evidence, and so express the view that that should not happen, but their mind was not directed to that issue.

61. I accept that self-selecting public consultation responses are not the same as an opinion poll, and the numbers responding may not match the value of the information imparted by them. The reliance placed on the analysis of the questionnaire results by Ipsos MORI is, however, clear from the "Summary of the Statutory Consultation", considered by the Combined Authority in September 2016. The questionnaire in particular was used by the Combined Authority to establish the preponderance of public views on the proposals, regardless of why, and with what understanding or misconceptions, they held those views. The consultation report said that one of the "four key messages that the Secretary of State should be drawn [sic] from this consultation" was that "the majority of residents, business and civic institutions who responded to the consultation support the general principle of devolution and the proposals set out in the scheme document". The first part may be a permissible conclusion from the answers to Question 1. The second part about support for the proposals is apt to mislead unless it is recognised that it has to be a conclusion drawn from those who wrote in specifically about this particular proposal, and that no question about this proposal of the scheme was actually asked of the vast majority of respondents. The impression might easily be given that the questionnaire had included such a question. It did not: it alerted respondents to the existence of the proposal, but did not ask them about it.

62. Some questionnaire respondents, however, added views to questions which did not seek their views on whether Chesterfield BC should become a constituent council.

The sample of those answers to Q1 which contained comments, quoted in the "Summary of the Statutory Consultation", show that some respondents viewed Q1 as an opportunity to comment on the inclusion of Chesterfield BC in the Combined Authority. Chesterfield BC respondents showed a significant level of disagreement but they were in the minority. In both Derbyshire Dales DC and North East Derbyshire DC, the majority of respondents to Q4 disagreed with the proposition that local authorities should work together formally where there were strong economic links, which implies that they were answering the unasked question. As with the answers to Q1, there was a significant minority in disagreement from Chesterfield BC.

63. The Summary also refers to the common reason for opposing the transfer of powers as being that those respondents did not want Chesterfield BC to join the Combined Authority; they also feared that its services would receive a lower priority in it; it did not border the Combined Authority. But the problem with this is that the views on the unasked question came in via these side winds, indeed perhaps through a misunderstanding of the question. If the question needed asking, as in my view on the material before me it did, it needed to be asked explicitly.

64. Question 4 in the questionnaire merits further comment in this context for it is a very odd question. First, the preamble to Question 4 stated that the scheme proposed extending the Combined Authority (using the name it was yet to acquire as an extended authority) "to formally include Chesterfield Borough Council and Bassetlaw District Council." It continued: "Based on independent research carried out by SQW, the local authority areas of Chesterfield and Bassetlaw have strong economic links with the local authority areas of [South Yorkshire]." It said that this research was available on the Combined Authority website, and provided a link. Question 4 asked: "To what extent, if at all, do you agree or disagree that local authorities should work together formally where there are strong economic links with neighbouring areas?"

65. It takes the proposition as to the strength of the links as established in the preamble. The question does not ask about it. It does not even ask whether the authorities at issue should work together, but asks the question more generally. Ipsos MORI say, via Mr Smith's second witness statement, that this question was directed to the concept of authorities with such ties working together. That is a correct linguistic analysis which emphasises the very general nature of the question. They also say that the evidence in the SQW report could be examined in relation to the specific authorities, but to what end is not clear if the question means what it says.

66. The vast majority of responses from Bassetlaw and a majority from Chesterfield agreed with the proposition, but a substantial minority did not. Those from Derbyshire Dales and North East Derbyshire did not, by small majorities on quite low responses. The question is also highly tendentious, and on the face of it could only receive one sensible answer. A "No" to the general concept seems distinctly odd, yet "Noes" there were, dominated by 324 from Chesterfield. To my mind, this divergence suggests that, conceptual though the question is, and may have been so understood by many or most, it was also treated by some others as asking whether the various councils should work together through extending the SCRCA. It may not have been answered by them as if the comment in the preamble about the economic links was correct, or had to be assumed for the purpose of a conceptual answer to a conceptual question.

67. The real problem is: what do the answers signify for the purpose of consultation under s113 especially in the light of the fact that no direct question about whether the two areas should be part of the SCRCA was asked? Are they conceptual answers, based on the assumption in the question? Are they specific answers, based on agreement with the assumption? Or are they specific answers, which may or may not agree with the assumption? Or are they a melange of all of those? The report by Ipsos MORI on the consultation is of no assistance on this point. I accept that the questionnaire is not the only source of responses, and there were "stakeholder" responses which varied.

68. I am satisfied that reliance cannot be placed upon the question and answers for the purposes of this consultation as showing what the views of respondents are as to the justification for the proposed extension of the Combined Authority. It cannot be a proxy for the simple question along the lines, and with whatever preamble: do you agree/disagree that the area of Chesterfield should be part of the SCRCA in the light of their economic and other ties? This reinforces my views on that question, already expressed.

69. For a consultation to be lawful, if questions are asked, they must be ones which can be properly understood by the general body of consultees and can therefore generate answers which the consulting body can properly understand in its decision-making process. The question is clear enough as to what it asks, but it is equally clear that some respondents thought that it must have been driving at something else. I find it difficult to see what value it had, but it was not an unlawful question. The real point to my mind is that it cannot stand for a question asking whether the Combined Authority should be extended.

70. I accept that the questionnaire is not the only source of responses, and there were "stakeholder" responses which varied. The issue of whether Chesterfield BC should be part of the SCRCA was indeed raised in other responses, and the consultation report concluded that, from the responses selected, the expansion of the Combined Authority was the "most contentious issue" raised in the consultation. So there were opportunities for the public to express their objections on that point in the absence of a question in the questionnaire. However, the questionnaire was by far the largest vehicle for public response on that point, as was or ought to have been anticipated.

71. It was plainly a controversial topic, within and outside the area of Chesterfield, and could readily be thought to affect areas outside those targeted. Although Chesterfield BC was in favour of Chesterfield BC's inclusion in the Combined Authority, the second witness statement of Mr Stephenson, Derbyshire CC's Chief Executive, at [65] gave evidence of a significant, albeit self-selected adverse response from cards in libraries in and around Chesterfield to Chesterfield BC's becoming a constituent council of the Combined Authority. Derbyshire CC's own questionnaire, asking the "three big questions Sheffield City Region isn't asking you" included whether Chesterfield BC should become a full member of the SCRCA. There was a 92 percent adverse response for the Derbyshire CC poll question.

72. This was on any rational view a major part of the proposals in the scheme. As the questionnaire was the major vehicle for public response, it ought to cover the major proposals of public controversy in the scheme. Put another way, the public were not in substance consulted about a major proposal of the scheme.

73. I also accept that, on some topics or proposals, the questionnaire for the public might have been regarded as sufficiently unlikely to produce informed responses, for the issue to be left to other means and sources of response. The Combined Authority consulted Ipsos Mori about the structure and content of the questionnaire. But there is no evidence that they advised against such a question, or that the Combined Authority even asked them to consider it or adjudged it as so much more technical and complex than the topics which were raised in the questionnaire, as not to permit of being asked in the questionnaire. I accept that there may be difficulties in asking the question without some explanation of the pros and cons or a description of the consequences. But that is not the reason put forward as to why it was not asked. There is no satisfactory explanation. I am not prepared to infer one.

74. The Secretary of State does not know the views of the public on whether Chesterfield BC should be part of the SCRCA in the same way he knows the public views given in response to the questionnaire on other topics. In my judgment something has gone seriously wrong with the consultation process in this respect because the major vehicle for public response arbitrarily omitted one of the major controversial proposals in the scheme.

75. If this were the final stage in the consultation process, I would quash it on that ground. But much of my reasoning relates to the absence of reasoned justification from the Combined Authority as to why it had not included such an obvious and fundamental question in the questionnaire. I am not at present minded, and subject to submissions, to rule out the possibility that the Secretary of State, in possession of all the material from all sides, might lawfully conclude that he had enough from all the responses and criticisms to say that a further assessment of the numbers holding which view on this point was not necessary for his decision on future orders, and that the public had been adequately consulted for the purposes of s113. But he could not lawfully do so without some careful reasoning about the purpose of the consultation, and its results. And of course such a decision could itself be challenged. I will hear counsel on the appropriate terms of order.

76. In saying that, it is important in my judgment to remember, and this applies to other grounds as well, that there is no statutory duty on the Combined Authority to undertake public consultation at all. If it had not done so, the Secretary of State would have had to undertake it pursuant to his statutory duty under s113(2)(b). If there are deficiencies in the consultation process, in the eyes of the Secretary of State, for example in the questions asked or the areas covered, he can undertake what steps he thinks necessary to deal with those issues, even though the consultation might still be lawful in public law terms, and adequate to meet the requirements of s113; s113(2)(c). It does not follow that he must be satisfied with the public consultation merely because it might satisfy the terms of s113.

77. It does not follow either that, if the consultation does not satisfy s113 as matters stand on the material and reasoning deployed before me, the Secretary of State has to start completely afresh for the purpose of s113(2)(b), as if there had been no consultation at all; what he needs to do rather depends on the nature of the errors. No doubt he can also ask the Combined Authority to undertake a repeat consultation, this time putting matters right.

78. I now deal with the other aspect of membership of the SCRCA. The consultation respondents would have had to read the scheme to realise that Derbyshire CC would be a constituent council. Mr Clayton submitted that that change was also irrelevant. I am not persuaded that Derbyshire CC has a sound complaint, to the extent it was pursued at all, that no question was asked about Derbyshire CC's role. Self-evidently, views about the significance of that change differ as between Derbyshire CC and the Combined Authority. There was no clear explanation by Derbyshire CC of the particular problems which its becoming a constituent council would create so as to require explanation and a question. The omission of such a question was not irrational or unfair. The consequences would have involved so far as I can see, after submissions and two papers on the point, a very technical explanation of somewhat speculative effects. The absence of a question, directed to Derbyshire CC's role and position more directly, may not be regarded as important in view of the complexities of the position, the absence of intention by the SCRCA to seek other powers, and the fact that Derbyshire CC has not been able to point to any specific aspect of substance which should have been the subject of a consultation question, and it has been able to make its opposition known. This particular point raises its head again as an issue of fairness which I deal with later.

79. There was no question (ii) about whether respondents agreed with the proposed constituent and non-constituent council voting rights. I find it hard to see, important though that is to the operation of the scheme, that it was an issue upon which the general public were likely to want to express views. I do not regard the consultation as flawed in law in that respect. Whether or not it is satisfactory to the Secretary of State is for him to decide.

80. No questions, (iii) and (iv) from above, were asked which enabled the questionnaire respondents to express a view on the functions which the Combined Authority, and the Mayor would have. The preamble to Q2 referred to the scheme giving the Combined Authority new powers in relation to areas such as the economy, skills and employment, housing and infrastructure planning and transport. The question then asked *how important* respondents thought it was for those powers to be devolved to the Combined Authority. Q2a offered respondents the chance to add further powers which they thought should be devolved. The preamble to Q5 refers to the functions in relation to which the Mayor would have powers, but the question asked is whether the residents of the Combined Authority should form the electorate for the Mayor. That is not irrelevant but does not ask whether he should have power in relation to the functions suggested. These are however both important parts of the scheme. The structure of the questions is decidedly odd, with the preamble and question not quite meeting each other. The question of whether one or other body should have such powers might have been thought to be among those which would not usefully be answered by a general respondent. But the same answer was given for the absence of those questions too; they did not include any reasoned justification. But they are of such a nature that the value of the response would lie more in technical detail and understanding than in a head count. I am not prepared to hold that that made the consultation unlawful or outside the scope of s113. The Secretary of State may be persuaded that the consultation was nevertheless unsatisfactory.

81. There is simply no question (v) about the funding arrangements for the Combined Authority, a topic on which the scheme is quite vague. Yet it is important to the

effective operation of the scheme. But I cannot find any proposal which could usefully have been made the subject of question in the questionnaire. Those who understand local government finance could usefully reply outside the framework of the questionnaire, including responding to the problems created by vagueness. Again the Secretary of State may not consider the outcome satisfactory for his purpose, lawful though the consultation was on that count.

82. Accordingly, it is the absence of a question in the questionnaire about whether Chesterfield BC should be a constituent council of the SCRCA which would make the consultation unlawful for the purposes of s113, and indeed unfair, because something has gone seriously and significantly wrong. But I have to recognise that this is but a precursor to the Secretary of State considering his duties. He may consider that it is lawful and by the quality of his reasoning justify what the Combined Authority has failed to justify. He may seek to improve his understanding on other issues too. He can decide what to do and take whatever consequences then flow. What order should follow is a matter for submissions.

**Issue 2: The fairness of the consultation**

83. There is an overlap between the basis upon which Mr Goudie deployed his first group of submissions and the basis for this group of submissions. Mr Goudie again relied on *Moseley*. The Supreme Court endorsed the Sedley criteria for the assessment of whether a consultation was fair and lawful. The second criterion is material here: did the proposer give sufficient reasons for any proposal to permit of intelligent consideration and response? The degree of specificity may be influenced by the identity of those being consulted; [26]. Fairness will sometimes require interested persons to be consulted, [27], "not only on the preferred option but also upon arguable yet discarded alternative options." Even if the subject matter of the consultation is limited to the preferred option, [28], "fairness may nevertheless require passing reference to be made to arguable yet discarded alternative options." Lord Reed said:

> "[39] Meaningful public participation in this particular decision-making process, in a context with which the general public cannot be expected to be familiar, requires that the consultees should be provided not only with information about the draft scheme, but also with an outline of the realistic alternatives and an indication of the main reasons for the authority's adoption of the draft scheme."

84. Mr Goudie criticised the consultation process on what I have formulated as four grounds under this head, which I shall take in turn.

**(1) Alternatives.**

85. Mr Goudie submitted that there was no reference to other potential options for devolution for the region or even to the maintenance of the status quo. Derbyshire CC was developing a separate scheme for regional devolution, known as the "North Midlands Combined Authority" proposal; it was under active consideration, albeit at a much earlier stage than the SCR CA.

86. The Combined Authority accepted that there was no reference to the North Midlands proposal, but said that no reference was needed as the proposal was not viable.

87. I do not accept Mr Goudie's contention. First, *Moseley* is rather a different case on its facts. There were genuine alternatives to the council tax reduction scheme, which the Council could have adopted, which it must have thought about, but did not mention or explain. Instead, in a complex area, it presented the consultation on the basis that there were no alternatives, with obvious implications for its outcome. This was wrong and misleading. Here, it is the maintenance of the status quo which is the obvious consequence of disapproval of the proposed scheme. There was no need for that to be the subject of specific mention as an alternative. The alternatives were by contrast not obvious to those to whom the consultation was directed in *Moseley*.

88. Second, there was no need for the North Midlands proposal to be referred to as an alternative. I see nothing in *Moseley* which, on either of the two approaches it contains, goes beyond requiring the consulting body to explain alternatives or possible alternatives which it itself has discarded. There is no suggestion of any obligation on the consulting body to put forward ways in which a different objective could be achieved by another body. The North Midlands proposal is not one which the Combined Authority could bring about. It is not an alternative to the proposed scheme for the Combined Authority. It is not an alternative way of achieving the same objective for the Combined Authority; it is not even a different objective for it. It would provide for participation in a different regional body for those proposed for inclusion in the Combined Authority. It is not incumbent, whether under the heading of fairness, or for specific compliance with s113, for the possibility of Chesterfield BC joining that other authority to be raised for consideration as an alternative in this consultation, or even mentioned as a basis for rejecting the proposed scheme. That possible option is one upon which an opponent can encourage opposition, but that does not make it an alternative of the sort envisaged by *Moseley*, which the proponent of a scheme should identify and refer to in the consultation about another proposal.

89. Third, the reason why the North Midlands proposal was not mentioned by the Combined Authority was its view that it was not viable and that it would be a long time before it got off the ground, if ever it did. No "Devolution Deal" had been reached, in contrast to the position with the Combined Authority. Chesterfield BC and Bassetlaw DC had each reached the view that they would join the Combined Authority, rather than wait for the North Midlands proposal to progress. There was positive evidence from the Chief Executive of Chesterfield BC, not denied or refuted, that four other Derbyshire district councils had decided not to join the North Midlands proposal, and that from April 2016 senior leaders in Derbyshire and Nottinghamshire CCs did not regard it as something to spend much time or money on. The Derbyshire CC website stated, at the time of the consultation, that "all councils in Nottinghamshire and Derbyshire were working together on their own devolution deal which the government said had to include a mayor. Some councils weren't happy with this and so there are no plans for an alternative deal at the moment and no plans for a Derbyshire and Nottinghamshire Mayor." "Were" in that context plainly means "had been".

90. Fourth, it was open to those who favoured development of the North Midlands scheme to urge that consultees reject the SCRCA scheme so that at some future date they would be free to join the North Midlands scheme, were it to come about, rather

than having to go through the statutory departure process. This is an area of very considerable local and regional political controversy; there were enough bodies opposed to the proposed scheme to draw attention to the North Midlands proposal in order to persuade consultees to register opposition to the Combined Authority proposal. Although that was not the reason why the Combined Authority made no reference to it, it is very relevant in judging whether the consultation was fair, or satisfied s113. There is no substance in this first point.

**(2) The constitution of the new Combined Authority**

91. Mr Goudie submitted that there was no reference to the fact that both Derbyshire and Nottinghamshire County Councils would become constituent councils in the new Combined Authority, and could be required to relinquish further powers to it or to its Mayor.

92. The consultation did not state that Derbyshire CC did not agree to becoming a constituent council, but would have to be one, like it or not. It also incorrectly stated in the Review that membership was subject to the discretion of the Secretary of State, when it was now agreed that Derbyshire CC would be a constituent council, by operation of statute. This was the real gravamen of Derbyshire CC's complaint.

93. The questionnaire refers to the proposal to extend the Combined Authority to include Chesterfield BC and Bassetlaw DC, without asking any questions about it, but does not by contrast even refer to the fact that the two County Councils, by operation of the 2008 and 2009 Acts, as explained above, would also become constituents of the Combined Authority. The consultation leaflet makes no mention of this either, but says that no powers will be transferred from councils "within the Sheffield City Region". The scheme itself to which the questionnaire directed respondents does refer to the fact that the two County Councils would become constituent councils of the Combined Authority. It adds that this would be "only in relation to the area of Chesterfield" in the case of Derbyshire CC. So far as I could tell, that did not mean that Derbyshire CC could not vote in the interest of the whole County when a Combined Authority issue affecting Chesterfield BC arose.

94. One effect of the enforced inclusion of Derbyshire CC in the SCRCA, troubling to Derbyshire CC, is that the Secretary of State can exercise powers in s105 to transfer further Derbyshire CC functions to the SCRCA. I accept, as did Mr Clayton eventually, that the powers in s105 would arise because the SCRCA would become for those purposes an existing combined authority. Mr Moffett confirmed that position and that there was no time limit on the use of those powers after the expansion of a combined authority.

95. The Combined Authority says that it is not looking for any, and is right that any such order would be subject to the procedures of s106A, but that also means that the consent of Derbyshire CC would not be required. It is only the inclusion of Derbyshire CC in the SCRCA which creates the potential for the use of that power. The door would be opened, even if no one intends to enter- at present. The scheme does provide for the transfer of powers from the County Councils to the Combined Authority in relation to transportation, contrary to what the leaflet might suggest.

96. I do not consider that the absence of reference to the position of Derbyshire CC in the SCRCA in the questionnaire means that the consultation is misleading or that it has failed to provide sufficient information for an informed response. First, it is clear enough from the scheme itself, for any interested enough to read it, that the two County Councils would be constituent parts of the SCRCA. The questionnaire directs the respondent to that information; they would then understand that aspect. I find it difficult to see that those content to answer the questionnaire without that further research, would have been discontented to discover what they had missed in the scheme about the role of Derbyshire CC. Derbyshire CC was well able to make its position clear, loud and publicly and did so. There is no evidence of respondents being taken aback to discover the true position.

97. Second, there is little enough in the scheme about what Derbyshire CC becoming a constituent council means in practice. The review and scheme leave many aspects unclear. The qualification to the County Councils' voting position is not clear. Loose ends still remain to be tied up, which could affect the activities of the County Councils, in strategic planning, precepting and funding, since both the SCRCA and County Councils would be precepting authorities, and in transport, with smart ticketing, subsidies, bus routeing and key routes interacting with Derbyshire CC's functions, crossing areas for which the SCRCA is not responsible. Derbyshire CC however can take up those points with the Secretary of State, who should also be better placed to understand their impacts, technical and complex as they are, than members of the public. The issues being consulted upon involved an awkward blend of high and general strategy with some quite technical changes and consequences for new constituents of the extended Combined Authority, and others. As I have said, this issue is interrelated with the area to be targeted.

98. Third, I can understand why Derbyshire CC finds assurance that the Combined Authority has no present intention of seeking the use of powers under s105 to be of little comfort. But the question is whether the consultation was unfair because it did not make the point that the door was open to their use, even though the SCRCA did not intend any further use of them, at least at present. I do not consider that it was. Although the questionnaire gives the impression incorrectly, that it has stated who the new joining authorities would be, the link to the further information and the recommendation that the link be used, suffices on that aspect. Derbyshire CC made its opposition known publicly. The possibility of the transfer of further powers in consequence of being a constituent council could usefully have been stated, but its omission is not the omission of a central point of the scheme. The adverse consequences for a body, in this highly political arena, was one which Derbyshire CC was well placed to make, identifying its fears, as part of its opposition to the scheme. It will be known to the Secretary of State as decision-maker anyway, so the need for the consultation process to bring information to light for the benefit of public decision-making body is satisfied, albeit in a different way, and without the general respondents' comments on it.

99. On 23 November 2016, Derbyshire CC wrote to the Court enclosing a draft of the proposed Functions Order, and expressing "disappointment" that GLD had failed to disclose its existence at the hearing. It appeared also that the Combined Authority's monitoring officer had had a copy for some days before the hearing. Derbyshire CC indicated that it would, if it considered it necessary to do so, make any further

submissions by 25 November 2015; but in the event nothing transpired. This rather reinforces my conclusion.

100. Fourth, in many ways, Derbyshire CC's complaint stems from a dislike of the amendment to the Act, which created the consequential inclusion of the County Council, if a District Council within it became part of the Combined Authority. Derbyshire CC does not want to be dragged into a body whose expansion it opposes. I do not think that the omission of the question about that affects the fairness of the consultation or its ability to fulfil the statutory purpose. I note that a question about Derbyshire CC becoming a constituent Council in the Combined Authority was not a question which its own questionnaire included as one of the "three big questions" omitted by the Combined Authority.

**(3) Derbyshire CC's input**

101. The Combined Authority stated in the Review that Derbyshire CC had had "significant input" into the review. The accuracy or otherwise of that comment was debated with discernible ill will between the witnesses for both sides in their witness statements; the issue they argued to and fro was whether the Combined Authority had rebuffed or evaded Derbyshire CC's attempts at engagement, or whether Derbyshire CC had spurned the Authority's attempts at engagement. Either way, submitted Mr Goudie, there was no evidence of any significant input in fact.

102. I observe first, that the quotation in fact relates to Nottinghamshire and Derbyshire CCs, taken together. Second, it refers to "significant input into this review". It makes no larger claim about the scheme, and is a quite particularised assertion. It is not repeated in the questionnaire, which is silent on Derbyshire CC's input and views. Third, the comment in the review, which was a document available for consideration on the website to which questionnaire respondents were directed, at least in relation to Derbyshire CC, is however not supported by any evidence from the Combined Authority or Chesterfield BC, if it meant to convey either that the principle of an extension, or the transfer of powers from the County Council, reflected Derbyshire CC's views at any time, or that details of the scheme had been modified so as to take account of them. If it does not mean that, I do not know what it means.

103. But I do not think that that comment, misleading though it appears to be about the actual degree of "input", is of any real significance to the fairness of the consultation process. It is but a quite general comment in a document, which leads up to the scheme, rather than being the specific scheme proposals consulted upon or the questionnaire. I do not think that it can be treated as having a misleading effect here. It did not make false claims about some particular aspect of the scheme or Derbyshire CC's views on it. Derbyshire CC was well placed to correct any such impression, and did so publicly. I do not think that anyone can have understood that Derbyshire CC had changed its mind or that it agreed that if there were to be an extended Combined Authority, this was in some way the best of a bad job, improved as a result of its input. While it may be an affront to Derbyshire CC, I do not think that picking on that one phrase in the review, shows any significant unfairness or misleading feature in the consultation.

## 4) Question 4 in the questionnaire

104. Mr Goudie made two related points here. I have already set out the question. The research was commissioned by the Combined Authority from the SQW consultancy. The comment that it was "independent research", submitted Mr Goudie, was misleading as the commission brief and the Executive Summary in the SQW Report itself made clear that it was to provide advocacy material to support the economic case for the expansion of the Combined Authority.

105. It is right that the commissioning brief says that its purpose is "to develop the economic case" for the scheme. Its Executive Summary refers to SQW being commissioned "to develop the Economic and Spatial Argument for expanding the SCR's Combined Authority Constituent Membership." But there is nothing in this point. I do not regard those initial words as showing that the research was not independent; they do not mean that SQW was asked to produce something other than its views. The questionnaire could more accurately have said that independent research had been commissioned "to develop the economic case", since it was not asked to produce its economic assessment of whether the proposal was a sound idea economically, although the two points rather overlap. Anyone in doubt about its role could read the report, and the point would have been plain from the first page. I was not taken to any part of the report where the views were said to reflect an advocacy point such as "it could be argued that" or "it would be reasonable to argue." The language of the Executive Summary is not of that sort but rather is of firm views, reached after research, which support the proposal. This is not a point of significance for the fairness of the consultation; rather it is the sort of small complaint to which every consultation exercise must be prey.

106. Second, Mr Goudie argued that the review and questionnaire should also have made it clear that whether or not there were "strong economic links" between Chesterfield BC and the Combined Authority, including whether they were stronger with Derbyshire CC, was a matter of considerable controversy, rather than incontestable fact. It was misleading for Question 4 to have been asked on that false basis. It prevented members of the public expressing their views on whether the inclusion of the two areas was sensible. That is a different sort of point to which I shall come.

107. Derbyshire CC produced a report of August 2016 by its paid but no doubt equally independent consultants, AECOM, which came to a different view about the merits of the proposal at least as far as Chesterfield was concerned, emphasising the significance of its economic links to, the rest of Derbyshire and more widely. It was presented by the County Council leader as "conclusive evidence", perhaps another way of saying "incontestable fact", of the negative impact of the proposed scheme on the fortunes of Derbyshire and Nottinghamshire.

108. It is not necessary for me to resolve those issues, or the extent to which the reports covered the same topics or were looking at the same topics from very different viewpoints: one focusing on the position of the SCRCA, the other on the position of the other authorities.

109. I judge that the sort of statement at issue would be seen by respondents as the clear view of the consulting body, supported by consultants and as a view with which they might agree or disagree from their knowledge of the areas, and of the local political

controversies. It is a view of the sort which would be understood of its nature to be debateable rather than capable of definitive proof, however assertive to the contrary its economic or political protagonists were.

## Overall Conclusion

110. I have concluded that there should have been a question asking whether Chesterfield BC should be part of the SCRCA. Without it the consultation did not achieve its statutory purpose under s113. That conclusion is based on the arguments before me. I am not minded at present to quash the consultation since the Secretary of State might decide that he can sustain the lawfulness of the consultation by different reasoning based on all the material he considers. He might decide that only a part of the consultation need to be done again; it is not the whole of the consultation which is unlawful. I will hear counsel however on the appropriate terms of order, including whether there should in fact be a quashing order or declaration on that point.

111. I have not accepted the other grounds of challenge.