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CONSULTATION: *MOSELEY* AND BEYOND[1]

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Consultation and *Moseley*: all change here?

Introduction to the obligation to consult

1. It is well established that there is no general duty that requires decision-makers to consult prior to taking a decision: *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWCA Civ 1189 at [43] – [45], [47] per Sedley LJ. Otherwise, it has been suggested, the business of both central and local government would grind to a halt.

2. Rather, the law has recognised that there are four main circumstances where a duty to consult may arise. First, where there is a statutory duty to consult. Second, where there has been a promise to consult. Third, where there has been an established practice of consultation. Fourth, where, in exceptional cases, a failure to consult would lead to conspicuous unfairness. Absent these factors, there will be no obligation on a public body to consult: *R (Plantagenet Alliance Limited) v Secretary of State and others* [2014] EWHC 1662 at [98(2)].

3. The most commonly cited statement of the key features of a lawful consultation process is that set out in *R v Brent LBC ex parte Gunning* (1985) 84 LGR 168 QBD at 189 per Hodgson J and commonly referred to as the "*Gunning"* requirements. These principles require that consultation should:
    a. be undertaken at a time when the relevant proposal is still at a formative stage;
    b. give sufficient reasons for particular proposals to permit of intelligent consideration and an intelligent response;
    c. give consultees adequate time for consideration and response; and
    d. the product of consultation must be conscientiously taken into account when finalising any proposals.

[1] I am grateful to Heather Emmerson for allowing me to draw on a paper that she wrote.

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4. These principles were cited with approval by the Court of Appeal in *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213 at [108] per Lord Woolf MR giving the judgment of the Court.

Moseley v London Borough of Haringey

5. Prior to the judgment of the Supreme Court in *Moseley v Haringey LBC* [2014] 1 WLR 394 the law relating to consultation appeared to be one of the relatively few areas of public law in which the principles had remained largely unchanged for nearly three decades and in relation to which the Supreme Court had shown no inclination to re-calibrate the approach that had been developed by the High Court and the Court of Appeal. *Moseley* represents the first occasion on which the Supreme Court has considered the law relating to consultation.

6. The case concerned a consultation exercise carried out by the Council in relation to its proposed Council Tax Reduction Scheme ("CTRS"). In light of the Government's decision to abolish Council Tax Benefit ("CTB") and to cut the funding available to local authorities to support those individuals who had previously been in receipt of CTB, the Council was required to put in place a CTRS which would set out the level of support that would be provided to certain categories of person. The Council was required by paragraph 3 of Schedule 1A to the Local Government Finance Act 1992 to publish, and then consult upon, their draft scheme.

7. The consultation material produced by the Council referred to the Government's decision to cut funding and set out the proposal to adopt a CTRS which effectively passed on this shortfall in funding to those previously in receipt of CTB. The consultation document did not refer to other options that had been considered by the Council but disregarded, for example increasing council tax, cutting services or using Council reserves to plug the shortfall. Further, it is relevant to note that part way through the consultation process, the Government announced a Transitional Grant Scheme ("TGS"), which made additional funding available to a local authority in the event that it adopted a scheme which complied with certain criteria. Consultees were not informed about this scheme by the Council or consulted upon it. Following the consultation, the Council decided to adopt a scheme in which the shortfall in Government funding was passed on to those previously in receipt of CTB, such that maximum support that could be received under the CTRS was 80% of Council Tax liability.

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8. A claim for judicial review was brought in respect of the Council's decision, contending that the consultation process had been unfair and therefore unlawful because consultees were not provided with sufficient information to enable them to appreciate that there were alternatives to the proposed CTRS and that the Council should have told consultees about the TGS. The claimant was unsuccessful before the High Court and the Court of Appeal. The main issue in *Moseley* (at least in the High Court and the Court of Appeal) was whether the Council was required to consult on alternative options.[2] Both courts dismissed the claim on the basis that the consultation process was fair and the Council was not required to consult on alternative options, nor required to consult on the TGS. However, the Supreme Court allowed the appeal and held that the consultation exercise was unfair because (i) the consultation document had not referred to alternative options and why these had been rejected and (ii) the consultation document itself was misleading in suggesting that the Council had no option other than to pass on the shortfall, at ([31] and [42]).

9. There are three judgments in *Moseley*. First, the main judgment is given by Lord Wilson (with whom Lord Kerr agrees). Second, Lord Reed expresses himself "*generally in agreement with Lord Wilson*" but notes that he would "*prefer to express [his] analysis of the relevant law in a way which lays less emphasis upon the common law duty to act fairly, and more upon the statutory context and purpose of the particular duty of consultation* ...". Lady Hale and Lord Clarke stated (at [44]):

> *"We agree that the appeal should be disposed of as indicated by Lord Wilson and Lord Reed JJSC. There appears to use to be very little between them as to the correct approach. We agree with Lord Reed JSC that the court must have regard to the statutory context and that, as he puts it, in the particular statutory context, the duty of the local authority was to ensure public participation in the decision-making process. It seems to us that in order to do so it must act fairly by taking the specific steps set out by Lord Reed JSC, in para 39. In the circumstances we can we think safely agree with both judgments".*

[2] Prior to *Moseley*, there had been variable levels of success in arguing this point. Examples of successful challenges include (i) *R (Medway Council) v Secretary of State for Transport* [2003] JPL 583, (ii) *R (Montpelier and Trevors Association) v Westminster CC* [2006] LGR 304 and (iii) *Madden* [2002] EWHC 1882 (Admin). Examples of failed challenges include (i) *Nichol v Gateshead MBC* (1988) 87 LGR 435, (ii) *R (Royal Brompton and Harefield NHS Foundation Trust* (2012) 126 BMLR 134 and (iii) *Vale of Glamorgan* [2011] EWHC 1532 (Admin).

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10. The statement by Lady Hale and Lord Clarke that there was "very little" between Lord Wilson and Lord Reed is susceptible to debate.

11. For example, Lord Wilson agreed with the view expressed by Underhill J at first instance, that "*consulting about a proposal does inevitably involve inviting and considering views about possible alternatives*" (at [29]). By contrast, Lord Reed expresses the view (at [40]) "*that it is not to say that a duty to consult invariably requires the provision of information about options which have been rejected*". On one reading of these statements, it appears difficult to reconcile the view adopted by Lord Wilson that it is inherent in a fair consultation that consultees are invited to give views on alternative options[3] (which necessarily entails provision of some degree of information about those options) and on the other hand, the statement of Lord Reed that the duty to consult does not inevitably require information to be given about alternative options.

12. Perhaps more fundamentally, the distinction between the approach adopted by Lord Wilson and Lord Reed has highlighted a wider divergence of views in relation to the concept of procedural fairness[4].
    a. Lord Wilson's analysis was grounded in the concept of procedural fairness, namely that irrespective of how the duty to consult has been generated (i.e. whether by statute or common law), the same common law duty of procedural fairness will inform the manner in which the consultation should be conducted (at [23]). Two of the three purposes of consultation (as expressed by Lord Wilson) were transposed from Lord Reed's judgment in *Osborn v Parole Board* [2013] UKSC 61 (a paradigm case of procedural fairness) and ultimately the question posed by Lord Wilson was whether the consultation was "fair".
    b. By contrast, Lord Reed's judgment proceeds on the basis that the case was not concerned with the common law duty of procedural fairness and he states (at [37]), that "*issues of fairness may be relevant to the explication of a duty to consult. But the present case is not in my opinion concerned with the circumstances in which a duty of fairness is owed, and the problem with the consultation is not that it was "unfair" as that terms is normally used in administrative law*". Further, Lord Reed expressed the view that a wide-ranging consultation in respect of a local authority's power in relation to finance is far removed from the situations where

[3] A view which was expressed by Pitchford LJ in the Court of Appeal in *Moseley.*
[4] A detailed analysis of the jurisprudential basis for *Moseley* is set out in a case comment by Jason N.E. Varuhas in C.L.J. 2015, 74(2), 215 – 218.

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the common law has recognised a duty of procedural fairness, and the purpose of the consultation in that context was not to ensure procedural fairness but to ensure public participation (at [38]).

13. Therefore, whilst the Supreme Court unanimously agreed that the consultation exercise carried out by the Council was unlawful, arguably by a 3-2 majority the Court favoured an approach which focuses on the particular statutory context and the statutory purpose of the consultation, rather than the demands of the common law of procedural fairness.

14. In any event, and despite the potential differences of approach, there was nevertheless a large amount of agreement on a number of key points of substance:
    a. *First*, at [24], Lord Wilson sets out the purpose of conducting a consultation. This, he makes clear, should inform the requirement of fairness. He describes fairness as a "*protean concept, not susceptible of much generalised enlargement*." He went on to note the three purposes for which a consultation is conducted.
        i. First, consultation is "*liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested*".
        ii. Second, it avoids "*the sense of injustice which the person who is the subject of the decision will otherwise feel*".
        iii. Third, its purpose is "*reflective of the democratic principle at the heart of our society".*

    b. *Second*, at [25], Lord Wilson, refers to *Gunning* in which the Court articulated four requirements of a fair consultation (referred to variously as the Sedley criteria, *Gunning* criteria and *Coughlan* criteria). Lord Wilson noted that it is "*hard to see how any of his four suggested requirements could be rejected or indeed improved*" and that "*the time has come for the court to endorse the Sedley criteria*" as put by the Court of Appeal *in R (Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts* (2012) 126 BMLR 134 at [9] as they are a "*prescription for fairness*". The criteria now have judicial recognition at the highest level and the four requirements set out in *Gunning* are the starting point for a lawful consultation.

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c. *Third*, at [26], Lord Wilson noted the variable requirements of a lawful consultation. He stated that the degree of specificity with which the public authority should conduct its consultation exercise may be influenced by the persons being consulted and the impact that the proposed decision would have, namely whether it would deprive someone of an existing benefit or advantage as opposed to a consultation where the consultee is a bare applicant for a future benefit.

d. *Fourth*, at [27], Lord Wilson held that "*sometimes, particularly when statute does not limit the subject of the requisite consultation to the preferred option, fairness will require that interested persons be consulted not only upon the preferred option but also upon arguable yet discarded alternative options."*

e. *Fifth*, at [28], even where the subject of the requisite consultation is limited to the preferred option, "*fairness may nevertheless require passing reference to be made to arguable yet discarded alternative options",* citing the statement of Arden LJ in the Royal Brompton Hospital case that "*a decision-maker may properly decide to present his preferred options in the consultation document, provided that it is clear what the other options are…*"

f. *Sixth*, on the facts of the case, the Court agreed that the consultation exercised conducted by Haringey was unlawful. Whilst the subject of the consultation under the statutory scheme was the Council's preferred scheme (and not any alternative scheme), in order for the consultation to be fair and fulfil its statutory objective of public participation in decision-making, it was necessary for consultees to be aware of the other ways in which the shortfall in funding could have been absorbed and why the council had rejected them. The alternatives options, and more particularly the reasons these had been rejected by the Council, were not reasonably obvious to consultees. Further, the consultation document had in fact misled consultees by suggesting that the Council has no option other than to pass on the shortfall in funding (at [29] – [31] per Lord Wilson, and [42] per Lord Reed).

15. However, notwithstanding these areas of agreement, a number of questions remain unanswered by the judgment in *Moseley.*

a. *First*, a degree of uncertainty surrounds the question when a public body will be required to consult on alternative options. Whilst Lord Wilson noted that "sometimes" fairness will require consultation on alternative options, very little was

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said about the circumstances in which a body may be required to consult on alternative options. The only indication given was that it would be more likely in circumstances in which the statute does not limit the consultation to a preferred scheme (as it did in that case). In practice, it seems likely that whether the circumstances require consultation on alternative options is likely to turn on a range of factors including the statutory framework (if any), the nature of the decision, and the individuals affected. The particular difficulty that arises in this context is that the judgment of the Court of Appeal in *Rusal v London Metal Exchange* [2015] 1 WLR 1375 (which was handed down after the hearing but before judgment in *Moseley*) seems to take a different approach to the requirement to consult on alternative options. In that case, the Court of Appeal held, at [40] that a public body is permitted a wide discretion in choosing the options on which to consult and refers to "exceptional cases" where the courts have held that a consultation process was unfair by reason of the failure to set out alternative options. The Supreme Court refused permission to appeal in *Rusal.*

b. *Second,* the question as to what information about other options needs to be given to consultees remains subject to argument. Lord Reed held, at [40], that the duty to consult does not invariably require the provision of information about options which have been rejected. The matter may be clear by the terms of the relevant statute. The question is whether "*in the particular context, the provision of such information is necessary in order for consultees to express meaningful views on the proposal*". The test posed by Lord Reed differed to that of Lord Wilson, namely whether "fairness" requires passing reference to alternative options.

c. *Third,* in relation to the change of circumstances which arose during the consultation period, the Supreme Court upheld the decision of the Court of Appeal that it was not unlawful for the Council to fail to refer consultees to the TGS published by the Government for two reasons. First, the Court held that the TGS did not "add any substantially different dimension" to the relevant possibilities given that adopting this would still have left the Council with a shortfall and second, practical considerations loomed large, namely at the time of the announcement only five weeks of the consultation exercise remained (at [32]). In practice, little guidance is given in helping to determine when an obligation to bring new material to the attention of consultees will arise. We suggest there are a number of potentially relevant factors, including (i) does the new material change the character of the decision the public authority is taking, (ii) is the new information

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in the public domain, (iii) is the public authority likely to rely on that new information to support its decision and (iv) if a further period of consultation is required, are there reasons a decision has to be taken urgently?

16. When *Moseley* was first handed down, it was the statement of Lord Wilson at [27] in relation to consultation on alternative options that was thought to be of the most practical significance. The common understanding prior to *Moseley* was that public bodies are rarely required to consult on anything other than their preferred option. For example, the Divisional Court in *Vale of Glamorgan Council v Lord Chancellor* [2011] EWHC 1532 (Admin), held that there is no general principle that a public body must consult on all possible alternative ways in which a specific objective might arguably be capable of being achieved, as that would make the process of consultation inordinately complex and time consuming (at [24]). At first glance, *Moseley* was thought to widen that obligation.

17. Therefore, on first reading, it appeared that the main point of significance arising from *Moseley* was that claimants were no longer confined to seeking to challenge the consultation proposals put forward by a public authority on the basis of the *Gunning* principles, but rather could seek to challenge the consultation and decision-making more broadly by arguing that a public authority had not provided information about other options, or had failed to consult on alternative ways of meeting its objectives. The decision in *Moseley* appeared to pave the way for a broader challenge to the consultation process, namely a challenge that other options that should have been consulted upon and thus appeared to depart from the orthodox position that public authorities have a wide margin of discretion in relation to how to conduct a consultation exercise.

18. This apparent widening of the obligation on a public body to consult on alternative means of achieving their objectives is of particular significance in the current economic climate where large number of decisions are being taken based on reductions in funding. *Moseley* was therefore understood by many as signalling a change in the obligations on public bodies to justify not just their preferred option, but to provide information about and potentially consult in relation all other realistic ways of meeting their objective to reduce spending.

19. The second unexpected feature of the Court's approach in *Moseley* was that the Court was prepared to undertake a detailed linguistic analysis of the consultation documents. For example, at [17] of Lord Wilson's judgment he engages in a detailed textual analysis

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of the consultation materials including the accompanying letter, consultation document and questionnaire including reference to the use of the indefinite article and bold font[5]. He later went on to criticise the Court of Appeal for paying insufficient attention to the terms of these documents (at [31]).

Consideration of *Moseley:* fears of a sea-change appear unfounded

20. As the dust has settled since the judgment in *Moseley*, subsequent case law appears to have dampened fears that *Moseley* represented a sea-change in the approach required of public bodies and the approach of the courts to date has generally been to i) distinguish *Moseley* on its facts by reference to the fact that the consultation document in *Moseley* was positively misleading, ii) re-affirm the orthodox position as it stood prior to *Moseley* that there is no general requirement to consult on alternative options, and iii) emphasise that *Moseley* largely re-states the principles as they have been commonly understood for some time. Five authorities considering *Moseley* and the obligations relating to consultation more generally are of note.

21. *First*, *Thomas v Hywel DDA University Health Board* [2014] EWHC 4044 (Admin) concerned a challenge to a decision to cease provision of in-patient beds at Cardigan Hospital on the basis, *inter alia*, of breach of the statutory duty to consult. Hickinbottom J cited Lord Reed's analysis and noted that where there is a statutory duty to consult:
    a. whether that duty arises in a particular case (and, if it does, the scope of its requirements) will depend upon the statutory context; and
    b. the courts will be slow to add to the burden of consultation which the relevant democratically elected or otherwise democratically accountable body has decided to impose (including, of course, that imposed in statutory guidance); and will only do so if common law fairness requires it, i.e. if there has been a promise or established practice to consult, or where a failure to consult would result in conspicuous unfairness (at [68]).

22. Further, the Court noted that both the *Moseley* and the *Richard III* cases emphasise that the statutory context is important in determining the circumstances in which statutory consultation is required and, if required, its scope. Further, a more robust approach could be taken with regard to consultation with the wider public in circumstances where the

[5] During the hearing, members of the Supreme Court also commented on the use of bold and italicised type face in the document to draw emphasis to particular points.

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statutory scheme involves inherent checks and balances (such as the statutory role of a third party to protect the interests of the public) (at [72]).

23. *Second*, the Court of Appeal in *R (on the application of Robson) v Salford City Council* [2015] EWCA Civ 6 conducted a valuable analysis of *Moseley.* This case concerned a challenge to the Council's decision to close its Passenger Transport Unit and provide alternative travel arrangements for disabled adults between their homes and adult day centres on the basis, *inter alia*, that the consultation exercise was unlawful. In particular, it was argued that the description of the Council's proposal was misleading and suggested that the Council was consulting on something different from the actual proposal.

24. At [22], Richards LJ observed that the decision of the Supreme Court in *Moseley "*has featured large in the argument concerning the consultation issue", however, "in fact the decision in *Moseley* is largely an endorsement at Supreme Court level of principles already established at the level of the Court of Appeal, but it provides an illustration of the application of those principles …". At [29] Richards LJ continued "As to the application of the law to the facts in *Moseley*, the consultation in that case was found to be procedurally unfair because the consultation documentation gave a misleading impression in failing to mention other ways of absorbing the shortfall in funding which the proposed scheme was intended to meet."

25. On the facts of *Robson,* Richard LJ stated that he had not found it easy to reach a decision on the issue because there was a lack of clarity in the Council's consultation material which presented an incomplete picture and lacked a clear statement of the nature of the Council's proposal. However, ultimately he concluded that that is "too formalistic an analysis" and that the judge was right to find that the consultation process as a whole was not unfair.

26. Richards LJ explained, at [34], that in order to determine whether consultees were misled or were not consulted about the actual proposal, it is also necessary to have regard to the wider picture. On the facts, the Council's evidence taken as a whole provided some support for the view that consultees were aware of the proposals. Further, the absence of any substantial evidence on behalf of the appellants that consultees were in fact misled is also highly material.

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27. At [35], Richards LJ distinguished *Moseley* on the basis that the document was not positively misleading in relation to other options, nor was it wrong to place reliance on consultees' assumed knowledge of the position and more generally there is "nothing in *Moseley* to cast doubt on the legal principles by reference to which the judge directed himself in this case".[6]. Permission to appeal the Court of Appeal's judgment has been refused by the Supreme Court.

28. *Third,* in *R (L and P) v Warwickshire CC* [2015] EWHC 203 (Admin) the Court was concerned with cuts to social care budgets for disabled children. The issue of significance in *L and P*, was whether the test adopted by Sullivan LJ in *R (Baird) v Environment Agency and Arun District Council* [2011] EWHC 939 (Admin), namely that a consultation will only be so unfair as to be unlawful when something has gone "clearly and radically wrong", remains the correct test in light of *Moseley*. Mostyn J concluded (at [20]), that the judgment of Lord Wilson did not seek to alter the "high test" propounded by Sullivan LJ where a duty to consult is imposed at common law, but rather had applied such a test as the consultation in *Moseley* had gone clearly and radically wrong. Nor did the judge read Lord Reed's judgment as altering the high test and he suggests that Lord Reed's comments about public participation in decision-making process are inapplicable to common law fairness cases. Ultimately, the judge is reinforced in his view by reference to the remarks of Richards LJ at paragraph 22 in *Robson,* finding that "plainly he thought that the high test of Sullivan LJ was still applicable where the common law had imposed the duty" (at [22]).

29. *Fourth*, in *R (on the application of T) v Trafford MBC* [2015] EWHC 369 (Admin), the Court was once again required to consider a consultation in the context of cuts to adult social care budgets. The challenge was based on an alleged lack of information about alternatives to the Council's proposal to cut funding for adult social care services, namely increased council tax, or drawing on reserves. In the context of a consultation that was voluntarily embarked upon by the Council, the question was whether the common law requirements had been met.

[6] The Court of Appeal indicated, obiter, at [36] that "if I had found that the consultation was unfair, I would have favoured limiting relief to the grant of a declaration, refusing the quashing order sought by the appellants (just as the Supreme Court in *Moseley* declined to grant a quashing order in the particular circumstances of that case). … In my judgment it would not be appropriate in these circumstances to require the Council to go back to square one and to conduct a fresh consultation exercise."

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30. The judgment in *Moseley* is subject to a detailed analysis by Stewart J who proceeds on the basis that Lord Wilson's approach has the support of the majority (at [35]). He disagrees that the judgment of Lord Wilson (with whom Lord Kerr agreed) is rejected by Lord Kerr, Lady Hale and Lord Clarke. In particular, in reaching this view he refers to the fact that i) Lady Hale and Lord Clarke do not perceive a dispute between Lord Wilson and Lord Reed, ii) there is nothing in Lord Reed's analysis which contradicts or undermines Lord Wilson's analysis of the common law and iii) both Lady Hale and Lord Clarke considered that it was safe to agree with both judgments. In these circumstances, Stewart J proceeds on the basis of the principles set out by Lord Wilson.

31. At [36], Stewart J summarises the principles that he considers can be distilled from Moseley. In that context, he noted that Lord Wilson said that "sometimes" fairness requires consultation on discarded options and identified three important issues to consider when deciding whether fairness actually requires consultation on discarded options:
    a. where the duty to consult is statutory, whether that duty requires that consultees be given outline of realistic alternatives;
    b. the purpose of the consultation: consultation on discarded alternatives is more likely to be required where the purpose of the duty to ensure public participation
    c. the nature of issue being consulted upon: his judgment seems to suggest that an outline of realistic alternatives will be required where the general public cannot be expected to be familiar with the context.

32. Stewart J also re-emphasises that the "clearly and radically wrong" formulation posed by Sullivan LJ in *Baird* is not a different test, but rather indicates that in reality a finding that a consultation process is unfair is likely to be based on a factual finding that something has gone clearly and radically wrong (at [36 (iv)]).

33. On the facts, the Court held that fairness did not require consultation upon arguable but discarded alternatives.
    a. The Court suggests that common law cases where consultation on other options was required were ones involving decisions on a single issue.
    b. The Court distinguished *Moseley* on the facts, noting that notwithstanding the fact that the purpose of the voluntary consultation exercise in *T* was to have public participation in the decision-making process and the context was one which the

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general public may not be expected to be familiar, the context was different from *Moseley* because the issue was whether people previously exempt from council tax should have to pay, whereas the case before him involved multi-faceted budget consultations with no pre-existing determination of where budget should fall.

c. *Moseley* does not detract from the position adopted in *Rusal* that public authorities have a wide discretion as to the options on which to consult.

d. On the facts, it was held that given the information already available to consultees, reference to alternatives would have made little difference and therefore the Council were entitled to proceed as it did.

e. Finally, the Court rejected the proposition that if an authority does not consult on disregarded options and only presents one preferred option, then the consultation must be misleading.

34. *Fifth*, and finally, *Morris v Rhondda Cynon Taf County BC* [2015] EWHC 1403 concerns a challenge to a consultation in relation to changes to funding of nursery provision. The key issue was whether it was sufficient for the council to consult only on its preferred option and a "do nothing" option, and in the context of a cut to a public service whether this can be done without providing information about alternatives. As in *T*, the consultation was voluntarily embarked upon by the Council. The Court held that on the facts it was sufficient for the Council to consult on a "do nothing" options, and overloading a consultation document with other options may be confusing for consultees. The Court also attached weight to the fact that other financial options had been consulted on in previous consultation on draft budget. The case is notable for its detailed analysis of the *Moseley* judgment.

35. The claimants argued that *Moseley* established as a general proposition that it is necessary to invite views on possible alternatives so as to enable an intelligent response. The defendant argued that consultation on the preferred option was sufficient given that there remained the alternative option of continuing the status quo.

36. Patterson J held, at [62], that *Moseley* generally states the previous principles on consultation, and, at [63], "as part of presenting information in a clear way, the decision maker may present his preferred option. Part of the available information to be presented

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to the public may be alternative options for change. What is an alternative option will depend on the factual and context specific circumstances of the consultation in question."

37. Having analysed the cases of *Robson*, *L & P* and *T*, Patterson J stated, at [68], that after the decision in *Moseley* it is clear that the issue of fairness in a consultation exercise is very context specific. She noted that no universal principles could be derived from those decisions and therefore she was required to apply the law to the facts of the particular circumstances before her.

38. On the facts, Patterson J referred to the fact that i) the Council was in a difficult financial situation need to balance a substantial gap in funding, ii) prior to the consultation on nursery education specifically the Council had already consulted on its draft budget and proposals to change council tax, iii) the present of the "do nothing" option provided consultees with an alternative to the preferred option and iv) the requirement for the council to consult on all other steps to meet the budget gap would be onerous and unrealistic.

39. She concluded "in short, there is no inviolable rule established by *Moseley* that alternatives must be consulted upon in every consultation exercise. Sometimes fairness may require it to be the case so that consultees can make sense of the consultation exercise. When that is the case the alternatives will have to be realistic alternatives. What is realistic will always depend upon the particular circumstances of the consultation to be carried out."

40. Permission to appeal to the Court of Appeal has been refused by Bean LJ on the papers and Tomlinson LJ and Floyd LJ after an oral hearing: [2015] EWCA Civ 905.

Some concluding thoughts

41. The position to date is that the case law following *Moseley* has largely sought to underplay the significance of the judgment. *Moseley* has been distinguished or understood as consolidating, rather than amending, the previously understood principles relating to consultation.

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42. Whether, as a matter of analysis, such an approach to *Moseley* is justified remains open to debate. However, it does seem that the judgment in *Moseley* had led to at least two practical changes in the way in which consultation issues are being dealt with by lawyers:
    a. *First*, the high degree of scrutiny of the consultation document in *Moseley* is something which seems to have replicated in the cases argued in recent months. The precise text, tone and even formatting of consultation materials is being poured over by lawyers acting for both parties, and the courts appear to be taking a more active role in the detailed scrutiny of consultation documents. This seems to be a departure from the rather more "hands-off" approach that had been adopted to the construction of consultation documents in recent years, when nuanced arguments about the detail of the wording were likely to be met with resistance on the basis that a consultation document should be read as a whole, and is not susceptible to the level of scrutiny that would be expected of, for example, statutory language. In turn, it seems that nervousness around the implications of *Moseley* has led to a significant increase in the extent to which advice is being sought from lawyers in relation to the preparation of consultation materials, in the hope that legal input at any early stage will reduce the prospects of a challenge to the consultation document.
    b. *Second,* the lack of clarity arising from *Moseley* in relation to both (i) the requirement to consult on alternative options, and (ii) the requirement to explain to consultees what other options have been considered and why these have been rejected, has in many cases prompted public bodies to embark on a more extensive consultation exercise than they may have done prior to *Moseley*. In order to reduce the risk of successful challenges to consultation documents, many public bodies would be well advised to include a short explanation in the consultation document summarising the options that they have considered and the reasons for rejecting those options. As Lord Wilson pointed out in *Moseley,* such a requirement is not necessary particularly burdensome exercise, contemplating only "brief reference to other ways of absorbing the shortfall" being required (at [30]). Similarly, Lord Reed noted that there was no requirement for detailed discussion of alternatives or reasons for their rejection (at [41]).

43. It seems unlikely that *Moseley* will be both the first and last occasion on which the Supreme Court is called upon to consider the obligations relating to consultation, not least because the differences between the approach adopted by Lord Wilson and Lord Reed

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have yet to be fully explored. However, the judgment of Richards LJ in *Robson* seems to have firmly closed the lid (for now at least) on the suggestion that *Moseley* marks a fundamental shift in the nature of the obligations imposed on public bodies in respect of consultation.

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