Neutral Citation Number: [2018] EWHC 3059 (Admin)

Case No: CO/5493/2017

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

Civil Justice Centre,
1 Bridge Street West
Manchester M60 9DJ

Judgment handed down at:
Royal Courts of Justice,
Strand, London WC2A 2LL

Date: 16/11/2018

Before :

MR JUSTICE KERR

- -

Between :

THE QUEEN **on the application of** **SEFTON METROPOLITAN BOROUGH COUNCIL**	**Claimant**
- and -	
HIGHWAYS ENGLAND	**Defendant**

- -
- -

Tom Cosgrove QC and Jack Parker (instructed by **David McCullough, Sefton Metropolitan Borough Council**) for the **Claimant**
Tim Buley (instructed by **General Counsel's Office of Highways England**) for the **Defendant**

Hearing date: 23rd October 2018

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Approved Judgment

The Hon. Mr Justice Kerr:

Introduction:

1. Did the defendant, Highways England, act unlawfully by declining to include, in a consultation about a new access route to the Port of Liverpool, the option of building a tunnel under the Rimrose Valley? That is the main issue in this application brought by the claimant (the council). At the hearing, it became clear that the claim is no longer said by Highways England to have been brought out of time.

2. Highways England says the tunnel option was lawfully ruled out as too expensive and poor value for the taxpayer and that the two surface routes considered were the only realistic options, although those consulted were able to object to both options by advocating a tunnel and will be able to take the same objection again once a development consent order is applied for.

3. The council says the tunnel option was and is realistic and not unaffordable and that the chosen option – a new dual carriageway through Rimrose Valley Park - would do severe damage to the park, which harbours precious wildlife and offers rare tranquillity in the mainly urban built up area through which traffic bringing goods to the port has to pass.

4. The background is that a major expansion of the Port of Liverpool is being planned and undertaken. It is to include a new deep water container port with much increased capacity. This, it is agreed, will bring public benefit to the area in the form of productive economic activity and the creation of new jobs. The council is as much as anyone in favour of the project.

5. It is also agreed that the present access route to and from the expanded deep water container port is unsatisfactory. There is a stretch of slow going traffic running from, at one end, the junction of the M57 and M58 motorways and, at the other, the port. Existing routes are beset with heavy traffic. Highways England is required to provide improved road access. The council agrees that a faster link road to and from the port is needed.

6. Highways England and the Secretary of State were unwilling to consult on the option of building a tunnel under the park. The proposal for the new highway has sharply divided local opinion and aroused passionate opposition from those for whom the environmental price is too high to justify the cost saving. They believe a tunnel, though more expensive, should at least have been considered.

7. I wish to emphasise that it is no part of the court's role to consider the rights and wrongs of the competing views in this acute controversy. Decisions of this kind are taken by those accountable for them, in accordance with our democratic processes. The court's role is limited to adjudicating on whether or not the law has been observed in the decision making process.

Statutory Provisions, Directions and Guidance:

8. I was told that this is the first judicial review of a decision made by Highways England. The parties were not in agreement about the nature of Highways England and its functions, though by the time of the hearing before me, it was accepted by Mr Tim Buley, counsel for Highways England, that its challenged decision is amenable to judicial review.

9. Highways England is a body appointed as a highway authority by an order of the Secretary of State made under section 1(1) of the Infrastructure Act 2015 (the 2015 Act). To be so appointed, it must be (and is) a company limited by shares and wholly owned by the Secretary of State (section 1(2)). It is called a "strategic highways company" (section 1(4)).

10. Section 2 provides for a strategic highways company to be the statutory "highway authority" for highways in the geographical area specified in the terms of its appointment. Section 3 empowers the Secretary of State to set a "Road Investment Strategy" for the company, specifying the objectives to be achieved and the "financial resources to be provided" for achieving them.

11. The procedure for setting or varying a Road Investment Strategy (RIS) is governed by section 3(8) of and Schedule 2 to the 2015 Act. It consists of a dialogue between the Secretary of State and the strategic highways company, leading to publication of the RIS, but also includes "appropriate consultation".

12. That procedure does not apply to publication of the first RIS, which the Secretary of State must lay before Parliament. A copy of the first RIS published by the Secretary of State was before the court but I was not taken to the detailed provision within it, since neither party relied on any particular part of it for the purposes of their arguments.

13. The Secretary of State must also (section 4 of the 2015 Act) from time to time direct a strategic highways company to prepare a "route strategy", i.e. "proposals for the management and development of particular highways in respect of which the company is appointed" (section 4(1)). The company must comply with such a direction. The Secretary of State must publish the route strategy.

14. Section 5 gives general duties to a strategic highways company. It must in exercising its functions co-operate with others, such as local authorities through whose areas new highways are built, exercising functions that relate to highways and planning. In exercising its functions, it must have regard to the effect, on the environment and on the safety of highway users, of the way in which it does so.

15. By section 6, the Secretary of State may give "directions or guidance" to a strategic highways company "as to the manner in which it is to exercise its functions" (section 6(1)). The company must comply with such a direction and have regard to such guidance; both directions and guidance must be published by the Secretary of State "in such manner as he or she considers appropriate" (section 6(4)).

16. The Secretary of State published "statutory directions and guidance" to Highways England in April 2015. It took the form of a document entitled *Highways England: Licence* (the Licence). In the foreword, the Minister of State for Transport explained that the document sets out:

> "what we expect Highways England to achieve and how they must behave in discharging their duties and in delivering our vision and plans for the network, set out in the [RIS]".

17. He added that the role of Highways England:

> "is about more than just complying with the letter of the law. We expect the company to go the extra mile in the way it engages with road users and collaborates with other organisations to develop shared solutions."

18. The parties relied on specific provisions of the Licence. Highways England must operate and manage its highways network in the public interest (paragraph 4.1) and must (paragraph 4.2) in exercising its functions, act in a manner it considers best calculated to achieve objectives set out under letters a-h in paragraph 4.2. The manner of achieving those objectives is then amplified and expanded in detailed provisions in part 5 of the Licence.

19. The objectives include ensuring efficiency and value for money (paragraphs 4.2.d and 5.2); co-operation with other persons or organisations for the purposes of coordinating day to day operations and long term planning (paragraphs 4.2.f and 5.17-5.22); minimising environmental impacts (paragraphs 4.2g and 5.23-5.24); and conforming to the principle of sustainable development (paragraphs 4.2h, 4.3 and 5.25-5.28).

20. I also need to mention the law governing applications for development consent orders (DCOs). A highway project such as proposed in this case would require the grant of a DCO as the necessary form of permission to proceed with the development. A person proposing to apply for a DCO must, before doing so, "consult … such persons as may be prescribed" (Planning Act 2008 (the 2008 Act)) section 42(1)(a)) and local authorities affected by the development (section 42(1)(b) and section 43).

21. The developer proposing to apply for a DCO must also prepare a statement setting out how it proposes to consult "people living in the vicinity of the land" to which the proposed application relates (section 47(1) and 41(2) of the 2008 Act). Before doing that, the developer must consult the same local authorities about what is to be in the statement (section 47(2)). The statement must be published and consultation of local people must then take place in accordance with the statement (sections 42(6) and (7)).

22. The developer must publish the proposed application (section 48 of the 2008 Act). It must take account of responses to the pre-application consultation before deciding whether and if so in what terms to apply for a DCO (section 49). It must have regard to guidance from Secretary of State about pre-application consultation (section 50). The current guidance dates from March 2015.

23. The Secretary of State can only accept an application for a DCO if satisfied that (among other things) the pre-application consultation requirements have been met

(section 55(3)-(5)). In deciding whether they have been met, the Secretary of State must consider the "consultation report", which the developer must produce and submit to the Secretary of State (section 37(3)(c)) together with the other application documents and any representation about "adequacy of consultation" from a local authority.

24. The guidance states that an objector can "both object in principle to a proposed scheme and at the same time suggest amendments to design out the unwelcome features of a proposal" (paragraph 16). Consideration of "an iterative, phased consultation" in stages is recommended, to "manage the tension between consulting early, but also having project proposals that are firm enough to enable consultees to comment…" (paragraph 69).

25. The guidance also (paragraph 80) states what should be in the consultation report. Among other things, it should include an explanation of why "responses advising on major changes to a project were not followed" and "an explanation for … action taken or not taken", where a local authority's advice has not been followed.

26. Once the pre-application process is complete and the application is made, if the application is for consent to "EIA development", it must be accompanied by an "environmental statement" (Infrastructure Planning (Environment Impact Assessment) Regulations 2017 (the 2017 Regulations), regulation 14(1) and (2)).

27. "EIA development" means types of development listed in Schedule 1; or in Schedule 2, if "likely to have significant effects on the environment …" (regulation 3(1)). Broadly, these are large infrastructure projects, or smaller ones likely to have a significant impact on the environment. It is common ground that construction of a highway such as is proposed in this case would be "EIA development".

28. The environmental statement must include, among other things, a description of "reasonable alternatives studied by the applicant, which are relevant to the proposed development and its specific characteristics, and an indication of the main reasons for the option chosen, taking into account of the effects of the development on the environment" (regulation 14(2)(d) of the 2017 Regulations).

29. As I understood the arguments addressed to me, it was common ground that the option of tunnelling below the park in this case, rejected though it was, would be one of the "reasonable alternatives" that would need to be covered in the environmental statement, if an application were made for a DCO for the project as currently proposed. Such "reasonable alternatives" can, in principle, include options rejected earlier in the process on cost grounds.

30. Finally, the DCO application is then determined by the Secretary of State. The procedure involves a series of hearings, consideration of objections and a report by an independent inspector (or a panel known as an Examining Authority) appointed by the Secretary of State, who bring objective planning judgment to bear on the proposal and objections to it and report their recommendation to the Secretary of State, who then decides to grant or withhold consent to the development; a decision that is, if unlawfully made, susceptible to judicial review.

Facts:

31. In November 2014, the Highways Agency, acting on behalf of a body of local interested parties called the Liverpool City Region Port Access Steering Group (the steering group) published a study prepared by consultants, *Access to the Port of Liverpool Feasibility Study* (the feasibility study). As its long title suggests, the feasibility study looked at, among other things, ways of providing good road transport access to the port.

32. The consultants were required to consider which "online" or "offline" options for a new improved access road would be best. The "online" option considered was the upgrading the existing road linking the two motorways to the port. That road is the A5036 which is currently badly congested. The "offline" option considered was a new single lane road through the rural area of the Rimrose Valley.

33. As explained in the executive summary at the start of the feasibility study, the two options presented different problems. Both raised issues relating to noise and air quality. The online option was "likely to impact on domestic and commercial properties"; while the offline option "would impact on the landscape setting and use of the Rimrose Valley, and also on the local nature reserve and other habitats and species of ecological interest".

34. In section 5 of the feasibility study, the environmental impact of each option was examined in more detail. Both options would result in a worsening of nitrogen dioxide concentrations in areas that already exceed relevant thresholds. As regards landscape and townscape, the environmental impact of the offline option would be worse, because the A5036 is already an urban environment, while the Rimrose Valley is not.

35. The valley runs from north to south between Crosby and Litherland and brings "the countryside into the urban conurbation of Liverpool and with this a sense of tranquillity", with "a couple of semi-naturalised and/or naturalising wetland areas … that provide a haven for wildlife" with "an absence of vehicular traffic with a good network of formal and informal paths, which provide access to this tranquil area" (paragraph 5.4.3.9).

36. The feasibility study went on to state that the offline route "would significantly change the character of the area from a simple wide linear open green space fringed by buildings into two narrower spaces fringed by buildings on one side and a road corridor on the other" (paragraph 5.4.5.1). That was at a time when the offline route proposal was for a single lane highway, not for a dual carriageway as the proposal now is.

37. The conclusion in the comparative landscape and townscape assessment was, not surprisingly, that the offline route would bring "significant adverse effects on landscape character, specifically tranquillity, pattern, landcover and views"; and that "[s]ignificant landscape mitigation would be required", with "any amenity land lost" needing to be "replaced elsewhere within the Rimrose Valley…" (paragraph 5.4.5.6).

38. In section 13, the feasibility study dealt with other options. The first was a tunnel about 3 to 3.5 km long, with two lanes in each direction for safety reasons. Based on the prevailing design assumptions, the cost for a 3.5 km bored tunnel was estimated at £380m to £570m; and of a "cut and cover" tunnel at ££280m to £425m. It was, therefore, "very unlikely that a tunnel option could be justified in economic terms" (paragraph 13.1.4).

39. The overall conclusion was that doing nothing was not an option; much benefit from the new port would be lost. The A5036 would become a significant barrier to economic growth. A major road improvement was required. Both the online and offline options represented good value for money. Each of the offline and online options should be considered further to "allow a choice to be made on a preferred option" (paragraph 14.2).

40. Mr Dave Clark of the Highways Agency reported to the steering group on 17 November 2014 (according to the minutes) that the next step would be a detailed appraisal "to develop 'buildable' options", which would then form the basis of public consultation. The appraisal process would take about 18 months, with public consultation anticipated after that. "A preferred option would be decided on after the public consultation, probably in late 2016". The preferred option would then go "through the approvals process".

41. At the next steering group meeting on 16 March 2015, Mr Carl Stockton of the Highways Agency reported that the "options identifications process" was underway and was expected to be completed by May 2016 or a bit later. Then on 1 April 2015, Highways England was appointed as a highways authority by the Secretary of State, by an order made under section 1 of the 2015 Act. It effectively took over the project from the Highways Agency.

42. The same day, the Licence entered into force. At about the same time, the Secretary of State published the first RIS. The process of gathering information and evidence (in particular, from traffic surveys) continued apace. In October 2015, Highways England published its first newsletter on access to the port. It explained that it was "investigating ways to improve access to the Port … and to reduce congestion on the A5036 and in the surrounding area".

43. In the newsletter, Highways England went on to explain that it was "looking at two options to address this [congestion on the A5036]. 1. Upgrade the existing road. 2. Build a new road through the Rimrose Valley ….". These corresponded to the online and offline options discussed in the feasibility study. Both route options "need to be developed further before any decision is made so we have been conducting surveys …".

44. This survey work would continue "throughout the winter and into the spring". The findings would then be presented at "consultation events", of which several were planned in early 2016. At that stage, Highways England would "like to hear your views on the options to help determine a preferred scheme".

45. The second newsletter came in January 2016. The two options being considered were repeated. A brief update on the survey work that had been carried out was

provided. This now extended to analysis of samples of materials from boreholes, and review of habitats where protected species of animals live – newts, voles, badgers and migrating birds. A series of public events in February and March 2016 was advertised. More detailed information and explanation would be given at those events.

46. The next and third newsletter was published in June 2016. It was "still too early to identify specific proposals but we are continuing to look at two possible options", Highways England explained in it. The online and offline route options were then again stated. Highways England expected:

> "[t]owards the end of this year … to be in a position to present our outline plans and proposals to members of the public, at what is known as 'preferred route consultation'. This will be your opportunity to discuss with us the options we are proposing, as well as those that we have dismissed. Ultimately, the decision on what will be chosen as our preferred route will be made by the Secretary of State for Transport after considering the public's view and our recommendations".

47. There had been no mention of the possible construction of a tunnel in either of the first two newsletters. The tunnel option had been considered in the feasibility study but dismissed as very unlikely to be justifiable in economic terms. The third newsletter referred for the first time in the public documents to options that had been "dismissed" as open to discussion, as well as the two options of which one would become "preferred".

48. The leader of the council, concerned that only two options were being considered, wrote to the Secretary of State and Highways England on 22 July 2016 saying that both options would cause significant detrimental environmental, health and amenity impact. The leader advocated a tunnel; it represented "the optimum balance between supporting economic growth, minimising environmental impact and ensuring our communities have the opportunity to live healthier and happier lives".

49. The leader also wrote that the council was "sceptical that it [the tunnel option] has been discounted purely on the basis of cost". He pointed out that over £50 billion had been invested in a tunnel for Crossrail, benefiting London and the south east and that "[o]ur communities deserve the same consideration and need to benefit from port expansion and not suffer as a consequence". The letter ended with a formal request that a tunnel option be fully considered and consulted upon. A press release was also attached.

50. The Minister of State responded on 22 August 2016, referring to the estimates in the feasibility study which excluded additional costs for design, land, diversion of utilities and links to the existing road network. The cost estimate for a tunnel could therefore only increase. As the maximum economic benefit of all the options assessed was about £300 million, which would be obtained with or without a tunnel, the tunnel options "would not provide sufficient value for the taxpayer to warrant further consideration".

51. The preparatory work continued through the rest of 2016. In early January 2017, a consultation document was published by Highways England. The online and offline route options were examined in detail and the pros and cons of each set out.

The "current cost estimate" of the online route was put at £16m to £41m; that of the offline route at £187m to £294m. The planned offline route by this time was a dual carriageway, not a single lane road.

52. There was no mention in the consultation document of possibly building a tunnel. There was brief passing reference to "discounted options", stating that "[m]ore information about discounted options is available on our website or at the public exhibition events". A visitor to the website at the time could find a leaflet listing a tunnel as one of eight discounted options; the reason given was "[h]igh cost and poor value for money".

53. On 24 February 2017, the council responded, making clear that it did not support either option. Both would have significant negative impacts. The letter referred in detail to the environmental damage and social detriment that would arise. The council was "extremely disappointed that information has only been provided about two options". It deplored the omission of a tunnel option from the consultation process and urged Highways England to "reconsider the options and place the needs of local people first".

54. The consultation period ended on 27 February 2017. On 13 March, Highways England answered the council's letter, saying that the tunnel option had been ruled out as unaffordable and as a result, was included "within the options which we presented at the consultation as discounted". The letter claimed that the steering group, which included representatives of the council, had endorsed the finding in the feasibility study that a tunnel should be discounted and only the online and offline options pursued.

55. When the steering group met on 10 July 2017, Mr Stockton of Highways England told the meeting that the announcement of the "preferred route" was likely to be on 14 August 2017. Further design and modelling work would then be done to complete the detailed assessment required for the planning process. There would be a further public consultation in late 2017 or early 2018 about the preferred option.

56. Responding to a query about the council's request for a tunnel to be considered, Mr Stockton advised that consultations would do more work to determine the pros and cons of a tunnel, beyond the cost related work done previously; and that information would be provided about all the rejected options, including the tunnel option. However, there is no evidence of any further such work having been done or presented to the steering group.

57. Highways England announced on 31 August 2017 that the preferred route was the offline option, a new road through the Rimrose Valley Park. A report on the consultation published in September 2017 explained the reasoning. In summary, the online option would not succeed in preventing congestion as effectively as would the offline option. The responses were summarised, with Highways England's commentary on them.

58. The report indicated that a number of responses had advocated building a tunnel as "the only solution". Highways England's comment was that this had been

dismissed in the feasibility study in 2014 as it was "uneconomical to deliver", i.e. too expensive. Highways England had reviewed the cost estimates and now considered that a 5 km (no longer 3.5 km) cut and cover tunnel would be between £620m and £1.2 billion. This would outweigh the economic benefits and "represent poor value for money".

59. By then, the council had announced its intention to bring a legal challenge to the consultation process and the decision on the preferred route. A judicial review was expected. It was explained to the steering group on 30 October 2017 that the next step in the scheme would be an application for a DCO, with statutory pre-application consultation expected to take place in about June 2018.

60. Pre-action correspondence then followed. On 12 February 2018, I granted permission to bring the claim for judicial review. In March 2018, Highways England published a further newsletter. It included a list of "frequently asked questions", with responses. The first question was "[w]hy are you ignoring calls from the community for a tunnel?" The answer was again the cost: "[f]rom the work we have done we know that a tunnel could cost around £1.5 billion"; while the budget allocated was "around £250 million".

61. The response elaborated further on the disadvantages of a tunnel quite apart from cost: it would take up to six years to build, rather than two and a half years for a bypass. Use of Rimrose Valley Park would be prevented during construction. Compulsory purchase and demolition of up to 200 homes and businesses might be needed. Large amounts of waste material would have to be transported to landfill. There would be high maintenance costs, without necessarily providing "the 'greener' option people hoped for".

62. On 18 September 2018, just before the hearing before me, Mr Stockton said in his second witness statement under the heading "[b]udget" that Highways England "has been allocated funding of £221m from the [RIS] budget to deliver *a comprehensive upgrade to improve traffic conditions on the main link between the Port of Liverpool and the motorway network*" (italics in original). He said that work carried out on "a tunnelled solution" in "recent months … provides a current cost estimate for such a scheme of c. £2bn".

63. However, after the hearing before me, Mr Stockton produced a third witness statement to "correct an error". The figure of £221 million was not, he explained, the budget for the comprehensive upgrade to improve traffic conditions on the main link between the Port of Liverpool and the motorway network. It was "the current forecast *cost* of the scheme rather than the budget". The budget remained at "around £250 million". Highways England had agreed a budget with the Department of Transport but the precise figure is not published because it is commercially sensitive.

Issues, Reasoning and Conclusions:

64. The legal principles governing consultation exercises in the public sphere are now too well known to bear repetition and were agreed. The Sedley criteria, as they have become known, have now received the express endorsement of the Supreme

Court in *R (Moseley) v. Haringey LBC* [2014] 1 WLR 3947. It is also agreed that it is for the court to judge whether the consultation was fair; and that fair it must be, whether undertaken voluntarily or not, and whether governed by statute or common law.

65. The following further propositions were, not surprisingly, uncontroversial. The context in which consultation takes place is important when judging whether it was fairly carried out. The issue of fairness is highly fact specific. Normally, it is for the decision maker to decide how to pitch the consultation and what options to include or exclude; but the exclusion from consideration of a particular proposal may, depending on the facts, be so unfair as to be unlawful.

66. For the council, Mr Tom Cosgrove QC made the following main submissions in written and oral argument:

(1) Highways England had misunderstood its functions by behaving as if it were an ordinary private sector developer. Its functions are public and it is not, unlike a private developer, free to advance only its own commercial interest. It was obliged to act in the public interest; an ordinary developer is not. The fairness of the consultation exercise had to be viewed in that light.

(2) Highways England was bound under section 5 of the 2015 Act to co-operate with the council in exercising its functions, and by section 6(1) and (3) to act in accordance with the terms of the Licence. These required it to co-operate with others in order to take account of local needs, priorities and plans in planning (paragraphs 4.2(f) and 5.17(c)).

(3) Specifically, Highways England was required to "co-operate with, consult with and take reasonable account of the views of", among others, the council and local communities (paragraph 5.18), in a way that is demonstrably open and transparent, positive and responsive and collaborative (paragraph 5.19(a)-(c)).

(4) The consultation had to be "consultation or engagement proportionate to the circumstances in accordance with government guidance on consultation principles" (paragraph 2.2). These provisions in the Licence, together with the statutory underpinning of sections 5 and 6 of the 2015 Act, amounted to a statutory duty to consult on more than just the two options.

(5) By failing to consider seriously and consult upon the option of building a tunnel and rejecting the council's formal request to include the tunnel option in the consultation process, Highways England acted in breach of these duties and the consultation was consequently unfair and unlawful.

(6) Mr Cosgrove accepted that Highways England was not bound to include in the process every discounted option, however remote or fanciful it might be. For example, he accepted that Highways England

had not been obliged to include in the consultation the option of building a flyover or overpass to link the two motorways with the port.

(7) The tunnel was different because it was a serious prospect supported by the council whose area includes the Rimrose Valley Park and the A5036. The cost was not necessarily prohibitive. The economic benefits expected to flow from development of the port will be substantial. The environmental damage from both the online and offline route options would be severe.

(8) Although the case was not put on the basis of a legitimate expectation, Highways England had promised in the third newsletter that it would consult not just on the two options to which consideration was eventually restricted. It promised to consult on those options "as well as those that we have dismissed". That promise had to be kept if the consultation was to be fair and lawful in accordance with the Licence.

(9) The promise was broken in the Minister of State's letter of 22 August 2016 refusing to include the tunnel option in the consultation process and thereby rendering that process unfair, unlawful and in breach of the Licence provisions. The promise was not "publicly withdrawn" (see *R (Save Britain's Heritage v. Secretary of State for Communities and Local Government* [2018] EWCA Civ 2137, per Coulson LJ at [51]).

(10) The exclusion of the tunnel option from the consultation was a "show stopper" requiring the intervention of the court at this stage, to borrow the phrase of Carnwath LJ (as he then was); see *R (Hillingdon LBC) v. Secretary of State for Transport* [2010] EWHC 626 (Admin) at [69]. It was no answer that the decision to build the new highway has yet to be formally taken. The tunnel option has been ousted and it will be impossible to resurrect it later unless the court intervenes.

(11) The issue was one of procedural fairness for the court and is not governed by the *Wednesbury* standard. The unfairness lies in loss of the opportunity to advocate the excluded option at a time when the proposals are still at a formative stage: see *R (Medway Council) v. Secretary of State for Transport* [2002] EWHC 2516 (Admin) per Maurice Kay J at [27]-[32], where the exclusion from an airport runway consultation of a possible new runway at Gatwick Airport meant the consultation was unfair.

(12) The tunnel option was presented to members of the public at consultation events in early 2017. That was done recognising the obligation to consult about discounted options as well as the two considered viable. Highways England had accepted in its letter of 13 March 2017 that it was obliged to do so.

(13) The letter of 13 March 2017 wrongly asserted that the steering group had endorsed the findings in the feasibility study, including its rejection of the tunnel option as not practical. Highways England had

undertaken in July 2017 to do more work on the tunnel option, which would be pointless if it had been discounted entirely. But that further work was not done.

(14) The DCO process is not an adequate alternative and is not capable of curing the unfairness. The pre-application consultation is on only one option, the construction of the offline route. Advocating a tunnel option as a viable alternative and therefore a basis for objecting to the DCO, is no substitute for consulting on that option while the proposals are still at a formative stage. The objection will be met with the response that the tunnel option has already been discounted.

67. Mr Buley, for Highways England, countered those arguments with the following main submissions:

(1) The position of Highways England was closely analogous to that of a private developer. It was entrusted with the task of building the network in accordance with the RIS. It did not have any free standing statutory duty to consult. The primary duty imposed by the Licence was one of co-operation, not consultation.

(2) Indeed, there was no specific duty to consult at all, in advance of selecting the preferred option that would become the subject of a DCO application. In so far as the Licence required it to do so, the obligation was flexible not rigid and did not prescribe the limits of the consultation exercise.

(3) It was for Highways England to set the parameters of the consultation. The authorities had consistently recognised the entitlement of consulting bodies, both statutory and non-statutory, to delineate the scope of a consultation exercise, including the ability to consult by reference to a preferred option or a range of possible preferred options.

(4) It would make no sense for Highways England to consider a tunnel option in detail, as that option had been identified early in the process, when the feasibility study was done, as not feasible because it was seen as representing poor value for money. Detailed examination of a non-starter would waste time and money and would be a sham because it could not realistically be undertaken with an open mind.

(5) The third newsletter of June 2016 had not contained any promise worth the name; it meant only that there would be an opportunity to comment on options that were regarded as impractical, as well as the two options that were serious contenders to be subjected to detailed examination.

(6) Even if the wording were interpreted as a promise to consult on a tunnel option, the promise was unequivocally withdrawn by the Minister in his letter of 22 August 2016. It did not matter that the withdrawal was not set out in a public document; this was not a legitimate expectation case

and it was not unfair to withdraw an option the Secretary of State would not pay for.

(7) This was a case in which the consultation process was fair overall; nothing had gone clearly and radically wrong in the course of it. The advocates of a tunnel had their opportunity to advocate one, albeit with no realistic prospect of success given the financial constraints on the project. There was no "show stopper" requiring the intervention of the court.

(8) The DCO process was highly relevant to the fairness of the consultation. Although the pre-application consultation would only relate to the plan to build the new offline route, objectors would be able to object by advocating the tunnel as a less environmentally damaging, albeit more expensive, alternative.

(9) The Examining Authority and the Secretary of State would be obliged to consider conscientiously those arguments and the content of the environmental impact assessment before, respectively, recommending and then deciding whether to grant development consent for the project.

(10) Even if the grounds of complaint were well-founded, relief must be refused under section 31(2A) of the Senior Courts Act 1981: it is highly likely the outcome would have been substantially the same if the matters complained of had not occurred. It would make no sense to grant relief now when no decision with direct and immediate legal consequences has yet been taken.

68. I turn to my reasoning and conclusions. I start by considering the rival contentions about the nature and functions of Highways England. I think its position lies somewhere in between the positions advanced by the parties.

69. On the one hand, Mr Cosgrove is right to submit that Highways England is not in the same position as a private developer. It must exercise its functions in the public interest, not just its own financial interest. Indeed, it is not a commercial body; although it is in form a company limited by shares, its sole owner is the Secretary of State and its brief is to build and maintain a roadwork using public money limited by a budget.

70. Mr Buley correctly concedes that the decision challenged in this case is amenable to judicial review. Highways England exercises its functions according to a regime established under statutory authority. It must follow directions and have regard to guidance from the Secretary of State. It is required to engage with bodies such as the council which have responsibility locally for planning and highways.

71. On the other hand, Highways England is not a body whose functions have to be conducted according to a formula. Within the limits of the 2015 Act and the Licence, it has considerable freedom to act in the manner it considers best calculated to perform its duties efficiently and economically. It does not have to

consult widely or in detail on every decision, though in practice will doubtless do so where major infrastructure projects are contemplated.

72. I do not think the provisions in the Licence relied on by Mr Cosgrove bear the weight he seeks to place on them. The duty to consult, as far as it goes, is non-specific. It is a duty to engage with what, in the jargon of the public sector, are commonly called stakeholders. That duty is general and pitched at quite a high level.

73. In the present case, the duty of engagement was performed in quite large measure through discussions with the steering group, which pre-existed Highways England and continued after it was created. I am not able to spell out from the Licence provisions a direct duty to consult the council about building a tunnel under the Rimrose Valley Park instead of a highway through it or an upgrade to the existing A5036.

74. I respectfully agree with Maurice Kay J's observations in the *Medway* case at [25]-[26]. He said there that subject to considerations of fairness considered later in his judgment, the Secretary of State was entitled to proceed with a consultation on the basis that it did not intend to renege on an agreement with West Sussex County Council, reached in 1979, not to build a second runway at Gatwick before 2019. "Other things being equal, it was permissible for him to narrow the range of options within which he would consult and eventually decide" ([26]).

75. That observation reflected the words of Lord Woolf MR in *R v. North and East Devon Health Authority ex p. Coughlan* [2001] QB 213, at [112], stating that the decision maker's obligation:

> "is to let those who have potential interest in the subject-matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this."

76. In the present case, Highways England informed interested parties what it was considering and why. It gave a clear and simple explanation of why it did not consider the tunnel option to be viable: it was too expensive and regarded as poor value for money. That did not prevent argument to the contrary being presented, nor did it mean that such argument would fall on deaf ears. But it did mean that it would not, in practice, be accepted unless the budget were substantially increased.

77. I conclude from the authorities and the factual context that Highways England was entitled, absent any other vitiating feature, to limit the parameters of the consultation in the way it did. It was not obliged to consult on the tunnel option on an equal footing with the other two options. It did not have to expend time and public money on detailed examination of a proposal lying beyond the funding constraints to which it was subject.

78. The question remains, however, whether the consultation exercise was nevertheless unfairly conducted. Maurice Kay J treated this as "a free-standing issue" in the *Medway* case, at [27]. It is a matter for the court to determine, not the decision

maker applying a *Wednesbury* standard of review. It is now recognised that the adequacy of consultation is part of the law of procedural fairness. This is so whether the consultation is voluntary or mandated by law. What fairness requires is notoriously fact sensitive.

79. Mr Cosgrove submitted that it was unfair to exclude the tunnel option because Highways England promised in its June 2015 newsletter to include consultation on "dismissed" options. In my judgment, this argument cannot be accepted. The wording in the newsletter meant no more than that "dismissed" options other than the two to be considered in detail would not be excluded from consideration altogether.

80. Thus, consultees would remain free to advocate the so-called "dismissed" options and bring them back to centre stage. They could, if they wished (and some including the council did), attempt to persuade Highways England, against the odds, to adopt a third alternative "outsider" solution. The wording in the newsletter did not elevate the discounted options to the level of an equal footing with the two serious contenders to become the preferred option.

81. Moreover, the June 2015 newsletter did not, as Mr Cosgrove accepts, create a legitimate expectation. He relies on the so-called promise only as an aspect of what he submits was the unfairness of the consultation exercise. The concession that the statement in the newsletter did not create a legitimate expectation was, with respect, correct; it was not a clear, unambiguous and unequivocal representation.

82. When the matter was taken up with Highways England and the Secretary of State in the exchange of correspondence in the summer of 2016, the Minister of State made it clear again that the tunnel option was not regarded as practical, because it was too expensive. His letter made it clear, if it was not already, that the consultation would be on the two possible preferred options and would not include any detailed proposal to build a tunnel.

83. For reasons I have already touched upon, I do not find any unfairness in the government and Highways England taking that position. It must be for government to set the budget for this project, as part of the RIS. It is difficult to sustain an argument that fairness requires time and public money to be spent on a proposal costing substantially more than the budget will bear.

84. Indeed, the argument that the tunnel should not be regarded as unaffordable is a political rather than an economic one. The council reproached the Secretary of State with lavishing taxpayers' money on Crossrail, while depriving the Sefton area of much lesser sums that would avoid severe environmental damage and give proper weight to the well being of local residents.

85. That is a political argument. The council did not make an economic case to meet the government's argument that a tunnel would be too expensive. It did not challenge the proposition that the cost lay far beyond the allocated budget for the project. Rather, its case implied that the budget should, if necessary, be revised upwards to preserve the tranquillity of the Rimrose Valley Park and the well being of the local inhabitants.

86. The funding of infrastructure projects such as this one is a matter for government, not the court. The balance to be struck between environmental protection and economic regeneration is *par excellence* a matter for the executive. It will be further debated if and when a DCO is applied for in the present case. In the factual context here, the requirements that must be met before a DCO is granted are relevant to the fairness issue.

87. I accept that advocates of a tunnel may be at some disadvantage in objecting to a DCO that would permit a new dual carriageway. They will be vulnerable to the argument that a tunnel has already been ruled out as too expensive. But I do not think that point alone establishes unfairness in conducting the consultation. The DCO process does provide an appropriate forum for the environmental case against the new dual carriageway.

88. The procedural elements in the DCO process provide opportunities for opponents of the new dual carriageway. The pre-application consultation is one. The environmental impact statement, and public examination of it, is another. The Examining Authority will have to make a dispassionate assessment of the environmental arguments before making a recommendation to the Secretary of State. Highways England accepts that part of that assessment may require revisiting the possibility of a tunnel as a possible alternative.

89. I accept also that the Secretary of State, who must ultimately decide whether to grant development consent, is also the 100 per cent owner of Highways England, the promoter of the project. It does not follow that the decision of the Secretary of State would be a foregone conclusion. The economic, political and environmental arguments, not to mention the budget, may have changed by the time any DCO application is determined.

90. For those reasons, the case advanced by the council is not made out. For completeness, I would not have withheld relief under section 31(2A) of the Senior Courts Act 1981, had I been of the view that the consultation had been unfairly conducted. That provision requires the court to refuse relief if it appears highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.

91. The conduct complained of was the alleged unfairness of excluding the option of a tunnel from the consultation. If that conduct had not occurred, the tunnel option would have been included within the consultation despite the high estimated cost of building one. Had it been included, I do not know what the outcome would have been. It does not appear to me highly likely that it would necessarily have been substantially the same.

92. For those reasons, I dismiss the application for judicial review.