Neutral Citation Number: [2019] EWHC 1618 (Admin)

Case No: CO/599/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 June 2019

Before :

MR JUSTICE SWIFT

- -

Between

THE QUEEN

on the application of

SHANE WILLIAMS	**Claimant**
- and -	
CAERPHILLY COUNTY BOROUGH COUNCIL	**Defendant**

- -
- -

Christian Howells (instructed by **Watkins & Gunn**) for the **Claimant**
Matthew Paul (instructed by **Caerphilly County Borough Council**) for the **Defendant**

Hearing date: 19 June 2019

- -

Approved Judgment

Mr Justice Swift:

A. Introduction

1. In these proceedings the Claimant, Shane Williams, challenges two decisions taken by the Defendant Caerphilly County Borough Council ("the Council"); first, a decision taken by the Council's Cabinet on 14 November 2018 to adopt a Sport and Active Recreation Strategy for 2019 – 2029 ("the Sports Strategy" and "the Strategy Decision", respectively); and second, a further decision by the Council's Cabinet taken on 10 April 2019 to close the Pontllanfraith Leisure Centre with effect from 30 June 2019 ("the Closure Decision").

2. By an Order made by Spencer J on 17 May 2019 the matter comes before me as a rolled-up hearing. Having heard full argument on the Claimant's grounds of challenge I am satisfied that each of the grounds of challenge is properly arguable and I grant permission to apply for judicial review on all grounds. I will now set out my determination and reasons on the merits of the five grounds of challenge. The first three grounds are aimed at the Strategy Decision; grounds four and five are directed to the Closure Decision.

B. Decision

(1) Ground 1. The Strategy Decision was not within the authority of the Council's Cabinet to take.

3. This ground is to the effect that the Strategy Decision was unlawful because it was a decision taken by the Cabinet when, by reason of the provisions of the Local Authorities (Executive Arrangements) (Functions and Responsibilities) (Wales) Regulations 2007 ("the 2007 Regulations") it was a decision that should have been taken by the full Council.

4. By section 13 of the Local Government Act 2000 ("the 2000 Act"), where a local authority operates under executive arrangements (as the Council does), any function not specified in regulations made under regulation 13(3) is the responsibility of the Council's executive. Where Leader and Cabinet executive arrangements are in place, executive arrangements made by the local authority under section 15 of the 2000 Act make further provision for the specific allocation of decision-making responsibility. By section 13(3) of the 2000 Act, Welsh Ministers have power to make regulations including to the effect that a function that would by virtue of section 13(1) fall as the responsibility of an authority's executive, should instead be the responsibility of the authority itself.

5. Regulation 6(1) of the 2007 Regulations provides as follows.

> **"6.— Discharge of specified functions by authorities**
> (1) Subject to paragraph (2), a function of any of the descriptions specified in column (1) of Schedule 4 (which, but for this paragraph, might be the responsibility of an executive of the authority), is not the

> responsibility of an executive in the circumstances specified in column (2) in relation to that function."

None of the provisos contained in regulation 6(2) is material for present purposes. Paragraph 2 of Schedule 4 is the material provision. That provides,

> (by Column 1)
>
> "The determination of any matter in the discharge of a function which (a) is the responsibility of the executive; and (b) is concerned with the authority's budget, or their borrowing or capital expenditure"

is not to be the responsibility of the executive where the person with authority under the arrangements made under section 15 of the 2000 Act to make the determination,

> (by Column 2)
>
> "… (a) is minded to determine the matter contrary to, or not wholly in accordance with (i) the authority's budget, or (ii) the plan or strategy for the time being approved or adopted by the authority in relation to their borrowing or capital expenditure; and (b) is not authorised by the authority's executive arrangements, financial regulations, standing orders or other rules or proceedings to make a determination in those terms."

For the purposes of my decision in this case I will assume that the proviso at (b) above (relevant authorisation under the Council's executive arrangements) does not apply. The Council has not put the material part of its executive arrangements in evidence, and has not otherwise contended that the proviso does apply.

6. That being so, paragraph 2 of Schedule 4 to the 2007 Regulations gives rise to four questions: (1) what is the function that is being discharged when the Strategy Decision was being taken; (2) was the discharge of that function concerned with any of the Council's budget, its borrowing or its capital expenditure; (3) if the answer to (2) is yes, what part or parts of the budget are material; and (4) was the Strategy Decision contrary to or not wholly in accordance with the Council's budget or any approved plan or strategy for borrowing or capital expenditure.

7. For the Claimant, Mr Christian Howells contended that the first two of these questions ought to be formulated differently so that the focus of attention was not the function being exercised, but rather the matter being determined. This may not be a distinction that – at least on the facts of this case – results in any material difference. Nevertheless, I consider that the formulation in terms of functions is correct, both as a matter of ordinary language given the way in which paragraph 2, column 1 is phrased, and also as a matter of construction if the paragraph is read together with section 13 of the 2000 Act. That section is concerned with the allocation of responsibility for functions (i.e. responsibility for the exercise of relevant powers and duties of a local authority). This is clear both from section 13(1) and (2) of the 2000 Act. Paragraph 2 of Schedule 4 to

the 2007 Regulations should be read in the same way since it is by way of derogation from the default position stated in section 13(2).

8. The Officer's Report provided to the Cabinet for the purpose of its decision whether or not to adopt the Sports Strategy does not identify the statutory power/powers relevant to the proposed decision, nor was this a point addressed in the course of either the meeting of the Council's Regeneration and Environment Scrutiny Committee ("the Scrutiny Committee") on 8 November 2018, or the Cabinet meeting itself on 14 November 2018 – at least not so far as is apparent from the minutes of either meeting. Mr Matthew Paul who appeared for the Council submitted that the relevant function exercised by the Council was the power under section 19 of the Local Government (Miscellaneous Provisions) Act 1976 ("the 1976 Act") – the power for a local authority to provide *"... such recreational facilities as it thinks fit ..."* either inside or outside its area. In my view the section 19 power is not the one most naturally framed as a fit for the Strategy Decision. A better fit is the subsidiary power at section 111 of the Local Government Act 1972 *"... to do any thing ... which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions"*. I reach this conclusion having regard to the substance of the Sports Strategy. In my view, appreciation of the substance of the Strategy and hence appreciation of what the Strategy Decision did, and what it did not do, is central to the determination of all the grounds of challenge directed to the Strategy Decision.

9. The Council's description of the Sports Strategy is that it sets out the future purpose and direction for the provision of sport and active recreation in the County Borough, and establishes *"... the key principles and vision over the next 10 years"*. This description is accurate. On consideration of the document, it is clear that it is genuinely a strategy document. It identifies the Council's *"vision"* to *"encourage healthy lifestyles and support ... residents to be more active more often"*. It identifies the role of the Council's Community and Leisure Service as being to lead *"the promotion of sport and active recreation"* and to co-ordinate the delivery of the Strategy. In this way the Sports Strategy signals the Council's intention to move from an approach which assumed that the Council would be the main provider of leisure facilities, and towards one resting on a mix of Council-provided facilities and facilities provided by others. The Sports Strategy next sets out how the Council's approach will fit with the "7 Wellbeing Goals" listed in the Wellbeing of Future Generations (Wales) Act 2015, and the Wellbeing Objectives in the Council's own corporate plan. While it would be wrong to describe these parts of the Sports Strategy as purely aspirational, it is certainly the case that the Strategy is not written in hard-edged or prescriptive language. Rather, the document describes a collection of ideas, principles and objectives. It is not a set of marching orders. In this same vein, the Sports Strategy states that the Council will, in respect of facilities, adopt the approach advocated by the Welsh Government and Sport Wales in their March 2016 document *"Facilities for Future Generations"*, including what is referred to as the *"Decision-Making Matrix"* contained in that document to determine which leisure facilities are to be considered *"strategic leisure facilities"* and are to be directly managed by the Council. Under the heading *"What Needs to be Done"*, the Sports Strategy sets out the Council's Corporate Policy; states that the facilities it will provide are to comprise four *"strategic, high quality, multi-service leisure centres"* in Risca, Caerphilly, Newbridge and either the Bargoed area or the Aberbargoed area; states that a plan will be developed to enhance outdoor recreational spaces; develop a plan for swimming facilities; and will seek to collaborate with

schools, community groups and clubs through a recreation outreach and intervention programme.

10. Mr Howells relies in particular on the part of the Sports Strategy that refers to the four proposed strategic leisure centres, to support his submission that the Strategy Decision was a "gateway decision" which committed the Council to clear and prescribed courses of action. As such, he submitted, the Sports Strategy was a strategy for investment. Although he accepted that the Sports Strategy was not itself a mandate to close or redevelop any specific leisure facility, he contends that when the Sports Strategy was adopted a die was cast. In my view this is a significant over-reading of the Sport Strategy. The Strategy sets a direction – but only in generic terms. Any specific decision, for example to redevelop or close a leisure centre could not be taken by the Council simply on the basis that it was, in general terms, in-keeping with the Sports Strategy; rather, the specifics of any such proposal would have to be worked through in detail. Even by reference to the four strategic leisure centres, the Sports Strategy goes no further than saying that over a 10 year period these facilities should be provided. That is a policy objective rather than a hard-edged plan. The cost or other implications of that objective could significantly change over the 10 year life of the Strategy. Those matters are only capable of being distilled in specifics at such time as the Council chooses to make an operational decision. Put shortly, the Sports Strategy is a demonstration of intent; the way in which or the extent to which that intent becomes manifest in the course of the next 10 years is not set in stone.

11. I now turn to the second question posed at paragraph 6 above – was the discharge of the section 111 power, the decision to adopt the Sports Strategy, *"concerned with"* the Council's budget, borrowing or capital expenditure? The words *"concerned with"* have a flexible meaning. At one end of a scale, any decision that could, even indirectly, result in expenditure or borrowing might be said to be *"concerned with"* those matters. Yet that would not be a realistic application of those words in the context in which they appear. How they are applied must be guided by the purpose of paragraph 2 of Schedule 4 to the 2007 Regulations, namely that decisions which are inconsistent with a relevant budget or borrowing or capital expenditure plan should only be taken by persons authorised under the Council's own executive arrangements to take decisions which have those consequences. Thus while the words *"concerned with"* are to be applied taking good account of the specifics of the decision in hand, the focus should be on the direct consequences of the decision. Applied to the facts of this case, I do not consider it is correct to say that the Strategy Decision was a decision concerned with the Council's budget, borrowing or capital expenditure. Most obviously, the Strategy Decision was concerned with the Council's policy for sports and leisure provision over the period to 2029. It was not in the nature of the Sports Strategy – as I have described it above – that it was concerned with the Council's budget, borrowing or capital expenditure. The Sports Strategy contained no decision that committed the Council, as a matter of law, to specific expenditure, capital expenditure or borrowing. The fact that the Sports Strategy might be described as a plan that if implemented would inevitably entail expenditure of Council funds, is not to the point. Such spending decisions are yet to be taken; when proposals for development are put forward they will have to be assessed by the Council, on their own terms. (The Officer's Report for the Cabinet meeting on 14 November 2018 said as much as paragraph 7.1 – see below at paragraph 15 of this judgment.)

12. The third and fourth questions at paragraph 6 above can be taken together. As submitted by Mr Paul the only budget that can be in issue is the budget for 2019 – 2020, and the only plan in issue is the Council's capital programme which covers the period from 2019 until the end of the 2021 – 2022 financial year. The Sports Strategy does not amount to expenditure outside the budget or the plan. Mr Paul underlined his submission by reference to the Cabinet's decision on 10 April 2019 to make improvements to the fitness suite at the Newbridge Leisure Centre. This entails an investment of £550,000, and decision expressly listed the sources of the funding necessary to meet that expenditure.

13. For all these reasons, my conclusion is that the Strategy Decision was not, by reason of paragraph 2 of Schedule 4 to the 2007 Regulations, a decision required to be taken by the Council in full session. It was a decision that the Cabinet had authority to make.

(2) Ground 2. The Strategy Decision was unlawful because it was taken without information as to the cost of implementing the Sports Strategy.

14. The Claimant's submission on this ground is that when the Cabinet took its decision it had no information about the likely capital cost of the Sports Strategy, in particular there was no sufficient information about the likely cost of establishing the four strategic leisure centres.

15. No such information is in the Sports Strategy itself. The only information of this sort in that document is brief and concerns only the on-going costs associated with the Council's existing leisure centres – i.e. the cost of the status quo. The Sports Strategy was the subject of public consultation between July and September 2018. But no further financial information was provided for that purpose since the only consultation document was the then draft, Sport Strategy document. By the time the Council's Cabinet came to take the Strategy Decision on 14 November 2018 it had the benefit of an Officer's Report prepared for the meeting of the Scrutiny Committee on 8 November 2018, which had considered the Sports Strategy in light of a report on the responses to the consultation exercise and other associated documents. However, none of this contained specific or detailed information about the likely cost of putting the Sports Strategy into practice. The Officer's Report said the following at paragraph 7.1 under the heading *"Financial Implications"*

> "There are no financial implications as this stage. Should the Strategy be formally adopted then the proposed actions will be the subject of separate reports over the 10 year course of the Strategy that will include detailed financial implications. Any decisions will be dependent on the availability of funding and the approval of a robust business case."

16. Mr Howells' submission is that that is not satisfactory. He submits that the Cabinet could have no idea whether, at the point of any future proposed decision in furtherance of the Strategy, the money required would be available. He referred to the judgment of Yip J in *WX v Northamptonshire County Council* [2018] EWHC 2178 (Admin) at paragraphs 29 – 32. In that case a local authority ran into difficulties when setting its budget when

an auditor's report concluded that its budget calculation rested on an unjustified assumption that the authority would obtain a specific sum as a capital receipt from sale of property, to fund its planned expenditure. The circumstances of the present case and of the Strategy Decision are not remotely similar.

17. My conclusion is that the Strategy Decision was not unlawful by reason of a failure to take account of the likely costs of implementing the Sports Strategy. The Strategy Decision did not commit the Council to any specific expenditure. As is apparent from paragraph 7.1 of the Officer's Report, a decision to adopt the Sports Strategy ran the risk of political embarrassment if over the 10 year period the Council lacked the resources to realise the Strategy. Yet in my view, that is an approach that the Council was entitled to take. Given that the Sports Strategy was set to endure for 10 years, it is equally reasonable to assume that anything approaching detailed costings would be either impossible or artificial given the difficulty of estimating now the cost of works that might not commence for 5, 7 or even 10 years.

18. In the premises, the second ground of challenge fails. Once the nature and substance of the Sports Strategy, as I have described it, is taken into account, it was not *Wednesbury* unlawful for the Council to adopt the Sports Strategy without information about the likely cost that its implementation might entail. Given that the Strategy Decision did not commit the Council to any specific programme of work, it was open to the Council, to proceed on the basis that information about the cost of implementation was not a material consideration at that stage, and that such financial considerations would be addressed step by step as implementing plans came forward. This ran a political risk if implementation turned out not to be possible; but that is not a matter going to the legality of the decision.

(3) Ground 3. The Strategy Decision was unlawful by reason of failures to comply with obligations under the Local Government (Wales) Measure 2009.

19. The Claimant's contention on this ground is that the Council failed to comply with obligations under sections 2 and 5, within Part 1 of the Local Government (Wales) Measure 2009 ("the 2009 Measure"). Section 2 of the 2009 Measure is in the following terms

> **"2 General duty in relation to improvement**
>
> (1) A Welsh improvement authority must make arrangements to secure continuous improvement in the exercise of its functions.
> (2) In discharging its duty under subsection (1), an authority must have regard in particular to the need to improve the exercise of its functions in terms of—
>
> (a) strategic effectiveness;
> (b) service quality;
> (c) service availability;
> (d) fairness;
> (e) sustainability;
> (f) efficiency; and

> (g) innovation.
>
> (3) For the meanings of paragraphs (a) to (g) of subsection (2), see section 4."

Mr Howells relies in particular on section 2(2)(f) – the Council's obligation to have regard to the need to improve the exercise of its functions in terms of efficiency. As to this, section 4(2)(f) of the 2009 Measure provides further explanation

> "(2) A Welsh improvement authority improves the exercise of its functions in terms of—
> …
> (f) efficiency, if there is an improvement in the efficiency with which resources are used in the provision of services or in the way in which functions are otherwise exercised; …"

Finally, section 5 of the 2009 Measure states an obligation to consult,

> **"5 Consultation about the general duty and improvement objectives**
> (1) For the purpose of deciding how to fulfil the duties under section 2(1) and 3(1) a Welsh improvement authority must consult—
>
> (a) representatives of persons resident in the authority's area;
> (b) representatives of persons liable to pay non-domestic rates in respect of any area within which the authority carries out functions;
> (c) representatives of persons who use or are likely to use services provided by the authority; and
> (d) representatives of persons appearing to the authority to have an interest in any area within which the authority carries out functions.
>
> (2) For the purposes of subsection (1) "representatives" in relation to a group of persons means persons who appear to the authority to be representative of that group."

Mr Howells submits that when taking the Strategy Decision, the Council cannot have complied with the section 2 improvement obligation as regards efficiency if it had no information about the likely cost of implementing the Sports Strategy. Similarly, he submits, the consultation that was undertaken in connection with the draft Sports Strategy was not good enough to meet the section 5 consultation obligation because the information provided for the purposes of permitting the public to respond to the consultation included no relevant financial information. Thus, those consulted were not put in a position to provide informed response to the consultation.

20. Were the duties under the 2009 Measure material to the decision to adopt the Sports Strategy, those arguments would clearly have force. However, I do not consider that the

duties under the 2009 Measure were material to that decision. The first point is the way in which the section 2(1) duty is formulated. It is not – for example, in the manner of the public sector equality duty under section 149(1) of the Equality Act 2010 – expressed in terms of an obligation to have regard to prescribed considerations whenever a decision is taken. Rather, it is an obligation to *"make arrangements to secure continuous improvement in the exercise of functions"*. This suggests that the section requires relevant authorities to put in place free-standing measures to improve decision-making processes by reference to the criteria listed at section 2(2) of the 2009 Measure. These arrangements are distinct from what a relevant authority might do in the exercise of its ordinary substantive functions; the section 2 arrangements are intended to improve the way in which those other functions are used. This conclusion is reinforced by the obligation at section 3 of the 2009 Measure for relevant authorities, each year, to set improvement objectives in respect of the exercise of their functions; the obligation at section 13 to make arrangements to collect information to permit assessment of whether the improvement objectives have been met; the provisions at section 18 for the Auditor General for Wales to assess the compliance of each relevant authority with the requirements of Part 1 of the 2009 Measure (including section 2); and the power under section 21 for the Auditor General to carry out inspections of a relevant authority's compliance with the Part 1 obligations. Taken together these provisions are a pragmatic framework for assessing compliance with the section 2 improvement duty.

21. None of this is to say that the section 2 duty is not enforceable through judicial proceedings. However, it does indicate that section 2 is aimed at matters which are in their nature arrangements for the improvement of the exercise of functions; this is something discrete from a relevant authority's "ordinary" executive decision-making. My conclusion is that neither the section 2 duty, nor the section 5 obligation to consult is a criterion for the legality of the Strategy Decision, because that decision was not in the manner of a decision to make improvement arrangements, and for that reason was not a decision within the scope of section 2 of the 2009 Measure.

22. Second, this conclusion is not affected by the judgment of Underhill LJ in *R(Nash) v Barnet London Borough Council* [2013] EWHC 1067 (Admin). In that case, the defendant council had decided to contract out performance of an overwhelming majority of its functions. In part, the challenge to that decision rested on alleged non-compliance with section 3 of the Local Government Act 1999 ("the 1999 Act"), which applies to English local authorities and which is materially similar to sections 2 and 5 of the 2009 Measure. Strictly speaking, Underhill LJ's conclusions on the application in that case of the obligations under the 1999 Act are *obiter* since he dismissed the claim on the basis that it had been commenced out of time (see his judgment at paragraphs 33 – 59). However, I will address Mr Howells' reliance on the judgment in *Nash* without reference to that.

23. Mr Howells relies on paragraph 69 of the judgment, where the judge considered both the substance of the obligation under section 3 of the 1999 Act, and its application to the contracting-out decision in that case.

> "69. I start with sub-section (1), which establishes the substantive best value duty. I would analyse it as follows:

> (1) The core subject-matter is "the way in which" the authority's functions are exercised. That is very general language. It could in a different context cover almost any choice about anything that the authority does. But in this context it seems to me clear that it connotes high-level choices about how, as a matter of principle and approach, an authority goes about performing its functions. I do not say that the choice of whether, or to what extent, to outsource is the only such choice; but in the light of the legislative background outlined above the "ways" in which functions can be performed must include whether they are performed directly by the authority itself or in partnership with others: indeed that would seem to be a paradigm of the kinds of choices with which section 3 (1) is concerned.
>
> (2) The duty is aimed at securing "improvements" in the way in which the authority's functions are exercised. That inevitably means change, where the authority judges that change would be for the better having regard to the specified criteria.
>
> (3) The actual duty is not formulated as a duty to secure improvements simpliciter but as a duty to "make arrangements" to do so. I am not sure why this formula was adopted. I do not think that the draftsman was concerned with administrative "arrangements". It may have been thought that to impose a duty simply "to secure improvements" would expose authorities to legal challenges from those who contended that particular decisions were for the worse, or that authorities were wrong in failing to take particular steps which it was asserted would make things better: the reference to "making arrangements" would make it clear that the duty was concerned with intentions rather than outcome. It may also be that the draftsman wanted to emphasise the need to build the fulfilment of the best value duty into authorities' plans and procedures. Or perhaps it is just circumlocution. But, whatever the explanation, the important point for present purposes is what the arrangements are aimed at, namely securing improvements in the way in which authorities perform their functions.
>
> It follows that one of the effects of the best value duty is to require local authorities to outsource – or, if you prefer, to make arrangements to outsource – the performance of particular functions where it considers, having regard to the specified criteria, that that would constitute an improvement."

Mr Howells submits that the Strategy Decision is an example of the sort of "high-level choices" that Underhill LJ considered to be within the scope of section 3 of the 1999

Act, and for that reason is a decision to which sections 2 and 5 of the 2009 Measure applies.

24. The conclusion in *Nash* on the application of section 3 of the 1999 Act to the decision under challenge turned on the nature of that decision. Underhill LJ's reasoning cannot be understood as meaning that every "high level" decision necessarily falls within the scope of the section 3 duty (or, for the purposes of the present case, the duty at section 2 of the 2009 Measure). Rather, given the way in which the duty is formulated (both under the 1999 Act and under the 2009 Measure) the issue must be whether the decision taken was by its nature, a decision on the arrangements to be made by the authority to secure improvement in the exercise of its functions. The decision under challenge in *Nash* clearly was of this nature since it entailed wholesale contracting-out of functions. That contracting-out was an arrangement aimed at improving the delivery of services.

25. Not every strategic decision will be of this nature. In fact it is more than likely that the majority of such decisions will not. This stems from the fact that the improvement obligation is free-standing of the exercise of functions *per se*. This is underlined by the various provisions directed to securing compliance with the improvement obligation. So far as concerns the 2009 Measure I have referred to them above; so far as concerns the 1999 Act, sections 10 – 15 of that Act establish a system for inspection of compliance and give the Secretary of state powers of direction in instances where there is a failure to comply with obligations under Part 1 of the 1999 Act. This structure is material since it displaces any incentive to construe or apply the obligations under section 3 of the 1999 Act or section 2 of the 2009 Measure as if they attach to all, or any class of, instances of decision-making.

26. Turning to the Strategy Decision, the Sports Strategy was in the nature of a plan for the future exercise of functions under section 19 of the Local Government (Miscellaneous Provisions) Act 1976. That decision is qualitatively different to the contracting-out decision in *Nash*. The Strategy Decision was not in the nature of an arrangement to secure continuous improvement in the exercise of functions. It was a strategy for the steps the Council wanted to take in respect of its provision of recreational facilities. It would be wrong to construe section 2 of the 2009 Measure as applying to any/every strategic decision. That would be an artificial application of section 2 of the 2009 Measure. It would also have the unwarranted consequence of creating – via section 5 of the 2009 Measure – a statutory obligation to consult in respect of any proposed strategic decision. While it may be a matter of good practice that strategic decisions should be the subject of consultation, applying the section 5 obligation to all such decisions would be a step too far, absent an express statutory provision to that effect.

27. For these reasons, the challenge to the Strategy Decision based on the 2009 Measure fails. The proposal to adopt the Sports Strategy was not an arrangement falling within the scope of section 2(1) of the 2009 Measure; in consequence the section 5(1) obligation to consult did not arise.

28. Before leaving this ground I must comment on a submission made by the Council to the effect that section 2 of the 2009 Measure, and in substance the whole of Part 1 of the 2009 Measure had *"fallen into desuetude"* following the enactment of the Well-Being of Future Generations (Wales) Act 2015 ("the 2015 Act"). That Act requires specified public bodies in Wales (including local authorities) to *"carry out sustainable*

development" – see section 3 of the 2015 Act. Section 2 of the 2015 Act defines sustainable development as meaning

> **"2. Sustainable development**
> In this Act, "sustainable development" means the process of improving the economic, social, environmental and cultural well-being of Wales by taking action, in accordance with the sustainable development principle (see section 5), aimed at achieving the well-being goals (see section 4)."

Section 5(1) of the Act defines acting in accordance with the sustainable development principle as

> **"5.— The sustainable development principle**
> (1) In this Act, any reference to a public body doing something "in accordance with the sustainable development principle" means that the body must act in a manner which seeks to ensure that the needs of the present are met without compromising the ability of future generations to meet their own needs."

And section 5(2) provides that to act in that manner a local authority must take account of various matters including its own *"well-being objectives"*, which are set in accordance with section 7 of the 2015 Act.

29. The Council's submission was to the effect that following enactment of the 2015 Act, Part 1 of the 2009 Measure was redundant, and for that reason the obligations under Part 1 no longer fell to be complied with. The Council suggested that the approach now taken by the Auditor General for Wales was not to require local authorities to report information relevant to the 2009 Measure.

30. These contentions are wrong. The 2009 Measure remains in force. It has not been expressly repealed. The Council pointed to the statement of intent by the Welsh Government in a January 2017 consultation document, which proposed repeal of Part 1 of the 2009 Measure and invited response to that proposal. But an intention to appeal falls materially short of actual repeal. The suggestion that Part 1 of the 2009 Measure has lapsed by desuetude – disuse – is wrong. No such principle forms any part of the law of England and Wales. Moreover, the suggestion of disuse is at odds with the guidance issued by the Auditor General for Wales in January 2019 *"A Guide to Welsh Public Audit Legislation"*. This guidance rests on the premise that the obligations in Part 1 of the 2009 Measure remain relevant, and are to be complied with. The guidance does suggest that local authorities may use a single document to comply with the reporting obligations under the 2009 Measure and the 2015 Act, but that is not to say that the obligations under the 2009 Measure have ceased to apply. I further note that after the conclusion of this hearing, the Council provided further information in support of its submission, which included the certificate of compliance issued to the Council by the Auditor General in May 2018. That certificate confirms (if confirmation were necessary) that the Auditor General continues to monitor the compliance by local authorities with the obligations under Part 1 of the 2009 Measure. Finally, any contention that enactment of the 2015 Act has resulted in an implied repeal of the obligations in Part 1 of the 2009 Measure could not succeed because there is no

inconsistency between the obligations under the respective statutes. The obligations are not in conflict. Considerations of sustainability are an aspect of the improvement duty under section 2 of the 2009 Measure; moreover the improvement duty extends significantly beyond considerations of sustainability and well-being.

(4) Ground 4. The public sector equality duty

31. This ground of challenge is directed to the decision taken by the Council's Cabinet at its meeting on 10 April 2019 that the Pontllanfraith Leisure Centre should close with effect from 30 June 2019. The Claimant's contention is that when taking the Closure Decision the Council did not meet its obligations under section 149(1) of the Equality Act 2010 ("the 2010 Act") – the public sector equality duty. Section 149(1) of the 2010 Act requires public authorities in the exercise of their functions to have *"... due regard to the need to – (a) eliminate discrimination ... prohibited by or under [the 2010 Act]; (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; [and] (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it"*. Section 149(3) and (4) further explain the nature of due regard for the advancement of equality of opportunity.

> "(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
>
> > (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
> > (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
> > (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.
>
> (4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities."

32. The case law on the public sector equality duty is legion. In *R(Law Centres Federation Limited) v Lord Chancellor* [2018] EWHC 1588 (Admin) Andrews J summarised the matter as follows at paragraphs 96 – 97.

> 96. The relevant principles relating to the exercise of the PSED are adumbrated by McCombe LJ in *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 at [25]-[26] and were endorsed by Lord Neuberger in *Hotak v Southwark LBC* [2016]

> UKSC 30 [2016] AC 811 at [73]. The duty is personal to the decision maker, who must consciously direct his or her mind to the obligations; the exercise is a matter of substance which must be undertaken with rigour, so that there is a proper and conscious focus on the statutory criteria and proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them. Whilst there is no obligation to carry out an EIA, if such an assessment is not carried out it may be more difficult to demonstrate compliance with the duty. On the other hand, the mere fact that an EIA has been carried out will not necessarily suffice to demonstrate compliance.
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> 97. As to the proper approach to be taken by the court, a useful and elegant summary is to be found in the earlier judgment of Elias LJ in *R(Hurley) v Secretary of State for Business Innovation and Skills* [2012] EWHC 201 (Admin) at [78], a passage that was expressly approved in Bracking. As he concluded:
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> *"the concept of "due regard" requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria... the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognize the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors."*

I have also well in mind the observations of McCombe LJ at paragraph 44 of his judgment in *Powell v Dacorum Council* [2019] EWCA Civ 23 to the effect that when deciding whether or not a public authority has complied with the section 149(1) obligation there is no one-size-fits-all answer. The context and substance of the decision in hand is important, and the issue for the court is always whether, in the context before it, there is evidence that the decision-making process was informed by the required due regard.

33. In this case the Council accepts that there is no evidence of compliance in the form of an equality impact assessment of the proposal to close Pontllanfraith Leisure Centre. The Officer's Report (of 26 March 2019) prepared in anticipation of the Cabinet meeting stated that an equalities impact assessment had been completed, and referred to an attached document. However the document referred to is the assessment undertaken for the purposes of the Strategy Decision that had been taken in November 2018.

34. The Council's case as put at the hearing relies on that document and one other, an equalities impact assessment undertaken in 2017 at the time of an earlier proposal to close Pontllanfraith Leisure Centre. That proposal had been the subject of public consultation in October and November 2017; the Cabinet took a closure decision at a meeting on 13 December 2017; but following reconsideration at the request of the Scrutiny Committee, the Cabinet further decided, on 28 March 2018 to defer closure of the leisure centre pending the decision on whether or not to adopt the Sports Strategy, and following that decision to look at the matter again. The Council contends that, notwithstanding the absence of any further formal assessment in 2019, by the time that decision was taken the members of the Cabinet had the benefit of sufficient information

in the form of the two assessment documents, the results of the 2017 consultation on the previous proposal, and the commentary in the Officer's Report prepared for the 10 April 2019 Cabinet meeting, either that it can be inferred that the due regard required by section 149(1) was had, or that it is safe to conclude that any further consideration of the section 149(1) criteria would have made no difference to the Closure Decision.

35. After the hearing, and without permission, the Council filed a further witness statement from Councillor David Poole, the Leader of the Council. In that statement he says (a) that the decision not to undertake further formal assessment of the likely impact of the Closure Decision was a conscious decision following advice that the assessment undertaken for the purposes of the Strategy Decision was sufficient; (b) that at the meeting on 10 April 2019, the Cabinet considered how the information in the assessment prepared in relation to the Strategy Decision related to the proposal to close Pontllanfraith Leisure Centre; and (c) that when considering the information in the Officer's Report for the 10 April 2019 meeting the Cabinet considered the impact of closure on persons with protected characteristics. The Claimant objected to this statement being admitted. Having heard submissions from both parties, I decided to admit the witness statement.

36. My conclusion is that when taking the decision to close the Pontllanfraith Leisure Centre the Council did not comply with the requirements of section 149(1) of the 2010 Act. The issue is not whether a formal equality impact assessment was undertaken; the issue is the question of substance – was there proper and conscious consideration of the public sector equality duty criteria. This cannot be made out from the evidence of the assessment made in 2017. In his statement, Councillor Poole accepts that that assessment was *"wholly inadequate"*. Nor can evidence of compliance with the public sector equality duty be made out from the assessment undertaken for the purposes of the Strategy Decision. That decision was directed to materially different matters. The fact that the Closure Decision was a step consistent with the Strategy Decision does not come close to making good the Council's argument in this case. The Strategy Decision was a decision on generic matters. It did not, and did not purport to engage with the possible consequences of the closure of Pontllanfraith Leisure Centre. Next, I do not consider that the information contained in the Officers' Report is sufficient evidence of the required due regard. I have paid particular attention to paragraphs 5.12 – 5.17 of the Report. Those paragraphs focus on the availability of alternative provision and the distance between that provision and the Pontllanfraith Leisure Centre. Clearly that information is relevant to the due regard required by section 149(1) of the 2010 Act. It is agreed between the parties that in the context of the Closure Decision the most pertinent protected characteristics would be age and disability, and the most likely disadvantage would arise from the greater difficulties that some older or disabled persons would be likely to face when trying to get to the alternative facilities. However, paragraphs 5.12 – 5.17 of the Officer's Report do not address the significance of the new travelling distances from that perspective. They are not evidence of the required conscious and careful consideration of the public sector equality duty criteria. The position does not alter if the material part of the Officer's Report is read together with the minutes of the Cabinet meeting. The minutes do not support the suggestion now made in Councillor Poole's statement that the Cabinet considered the information before it from the point of view of the likely impact on elderly or disabled persons, were the Leisure Centre to close. The minutes refer only to the impact of closure on "users" of the Leisure Centre. That was, of course, a relevant consideration. But it is not the same

as the focussed consideration required by the section 149(1) criteria as to the likely effect of the proposed closure on the elderly and the disabled. Given the admitted inadequacy of the attempt to comply with the public sector equality duty at the time of the proposed closure in 2017, it is striking that in 2019, the position of elderly and disabled persons was not addressed in terms. Overall, I am not satisfied on the evidence, that the Council discharged its section 149(1) due regard obligation.

37. Nor do I accept the Council's no difference submission. The present case is not one where that no difference submission is supported by an after the event assessment: compare *R(Hottak) v Secretary of State for Foreign and Commonwealth Affairs* [2016] 1 WLR 3791 per Sir Colin Rimer at paragraphs 87 – 108, in particular at paragraphs 92 and 107 – 108. I do not consider there is any secure basis on which I could reach a no difference conclusion. The public sector equality duty is directed to the decision-making process. The premise of the duty is that process is important because it is capable of affecting substantive outcomes. In the present case there is nothing that gives me sufficient confidence that compliance with the public sector equality duty would be without purpose.

38. For these reasons, Ground 4 of the challenge succeeds.

(5) Ground 5. The Closure Decision was unlawful because the Council failed to consider the option of a community asset transfer of the leisure centre.

39. The Claimant's submission rests on the principles that public authorities should (a) take decisions having regard to relevant considerations; and (b) before taking a decision should conscientiously consider the responses to any consultation process. The Claimant contends that the possibility of a community asset transfer of the Pontllanfraith Leisure Centre, as a going concern, to a community group, had been raised, and ought to have been further considered. The failure to do so was either a failure to take account of a relevant consideration or a failure to pay proper regard to consultation responses.

40. The relevant consultation was that relating to the 2017 proposal to close Pontllanfraith Leisure Centre. The relevant response was the one provided by Blackwood Town Council, which included the following at paragraph 7.9

> " … Blackwood Town Council is of the view that any decision on closure *should be seen* in the context of this overall County Borough Strategy *once* agreed by the *Council and the ability (and responsibility)* ***to actively engage and empower the local community towards possible asset transfer and community ownership options*** and not as a convenient opportunity to asset-strip through demolition and land-sale a successful Leisure Centre with the apparent primary objective of maximising capital receipts."
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> [italics and bold type, as in the original]

I note that it was agreed by counsel before me that notwithstanding the reference to "responsibility", the Council was under no legal obligation to consider community asset transfer.

41. When, on 26 March 2019, the Strategy Committee considered the proposed closure, members of that committee discussed the possibility of transferring the site to some sort of community ownership. The Committee was told there had been no expressions of interest. One councillor suggested delaying closure until expressions of interest had been sought. The Scrutiny Committee's final decision was not to support the Officer's recommendation to Cabinet that the Leisure Centre should close. The minutes of the Scrutiny Committee meeting were provided to Cabinet members for the purpose of their meeting on 10 April 2019.

42. At the Cabinet meeting, Councillor Etheridge, one of the members for the Blackwood Ward, addressed the meeting and drew attention to what had happened at the Scrutiny Committee meeting. The minutes of the Cabinet meeting record officers informing Cabinet members that during the 2017 consultation process the option of community asset transfer was not raised in any of the consultation responses.

43. I have assessed all these matters but I do not consider that the Claimant's case on this ground of challenge is made out. The fact that the possibility of community asset transfer of the Pontllanfraith Leisure Centre was raised in the consultation response from Blackwood Town Council did not oblige the Council to take that possibility further. The fact that the Council did not take it further does not make good a contention that there was a failure properly to consider the responses to consultation. The statement recorded as being made by officers at the 10 April 2019 Cabinet meeting that the responses to consultation had not made mention of community asset transfer was wrong. That was unfortunate, but not in my view material. This part of the Blackwood Town Council response fell well short of anything that could reasonably be understood as an expression of interest in a community asset transfer. Regardless of the officers' comment, Cabinet members were on notice of the community asset transfer option from what had been said at the Scrutiny Committee meeting. The fact that the Council did not pursue the possibility of community asset transfer did not render the Closure Decision unlawful by reason of failure to have regard to a relevant consideration. For the purposes of the proposal before the Council, it was for the Council, subject to the bounds of *Wednesbury* reasonableness, to decide whether this was a relevant consideration. The statutory framework for the Cabinet decision on the proposed closure was that provided by section 19 of the Local Government (Miscellaneous Provisions) Act 1976. There is nothing in section 19 that required consideration of community asset transfer. The failure to consider community asset transfer was not unreasonable. There was some dispute before me as to the realisable value of the leisure centre site, but put at its lowest its value was in the order of £250,000. Pursuing community asset transfer would have required the Council to forgo that benefit – and depending on the terms of the transfer might have required the Council to take on new obligations to the new operator of the site. The Closure Decision cannot be characterised as unlawful on the basis pursued in this ground of challenge.

C. Conclusion

44. For the reasons set out above (a) the Claimant's challenge to the Strategy Decision fails; but (b) the challenge to the Closure Decision succeeds on Ground 4 (public sector equality duty). To that extent, the application for judicial review is allowed.