



Neutral Citation Number: [2012] EWHC 867 (QB)

Case No: CO/511/2012

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 03/04/2012

**Before :**

**MR JUSTICE WILKIE**

**The Queen on the Application of**

**(1) Lucy Williams  
(2) Nicholas Dorrington**

**Claimants**

**and  
Surrey County Council**

**Defendant**

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**Helen Mountfield QC, Rachel Logan** (instructed by **Public Interest Lawyers**)  
for the **Claimants**

**Elisabeth Laing QC, Patrick Halliday** (instructed by **Surrey County Council Legal Services**) for the **Defendant**

Hearing dates: 19 & 20 March 2012  
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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....  
THE HONOURABLE MR JUSTICE WILKIE

**Mr Justice Wilkie:**

**Introduction/Brief Chronology**

1.The Claimants challenge a decision of the Defendant initially taken on the 27 September 2011 that libraries provision, in 10 identified areas, be delivered via the Community Partnership model (“CPLs”).

2.The challenge is exclusively on the basis that it is said that the Defendant, in making that decision, failed to comply with Section 149 of the Equality Act 2010, to give “due regard” to three identified statutory equality needs (the Public Sector Equality Duty or PSED). The brief history of the events giving rise to this decision and challenge is as follows.

3.The Defendant is a local authority, one of whose functions is the provision of public libraries. Section 7(1) of the Public Libraries and Museums Act 1964 imposes a duty upon the Defendant to provide a comprehensive and efficient library service for all persons desiring to make use thereof.

4.The Defendant currently operates its library services through 52 branch libraries. The library branches are staffed by professional library managers and library assistants, none of whom are qualified professional librarians. Since 2005 the Defendant has been introducing self-service computer terminals used by the public to borrow books in all of its libraries.

5.In common with all local authorities the Defendant is under intense pressure to reduce spending. In the financial year 2011-2012 it was required to find £59.3m savings despite an increasing demand for its services. The Defendant’s medium term financial plan for 2010 – 2014, adopted in February 2010, required its library service to save £195,000 a year. Since then further budgetary pressures have required additional savings.

6.In response to the need continually to improve its services and to respond to these financial pressures, in 2009 the Defendant adopted a programme of Capital Public Value Reviews (PVRs), looking at all of its services over a three year period.

7.Between May 2010 and January 2011 it conducted a PVR of its library service. That culminated in a report provided to the Defendant’s cabinet on 1<sup>st</sup> February 2011 (The February Report).

8.That report included a consideration of a cost effective branch network. The PVR recommended that the Defendant concentrate its resources on maintaining a core branch network, reflecting patterns of usage, and consult about designing a CPL approach at selected libraries. The cabinet resolved on 1<sup>st</sup> February 2011:

“to work with parish councils, local charities, community groups and organisations with the aim of inviting interest to establish community partnerships at selected libraries, and co-designing and developing a Surrey model for locally managed and partnered libraries, and that a progress report be submitted to cabinet following the consultation period”

and

“that local communities lead in driving the community partnering approach for libraries forward”.

9.The PVR had, through a process of scoring all 52 branch libraries in accordance with thirteen objective criteria, identified 11 of the lowest scoring libraries to be considered for the proposed CPL approach.

10.The cabinet decision was “called in” for reconsideration by the relevant council “select committee” because, amongst other things, it was felt that local councillors had not been properly consulted. However, after the decision had been passed back to the cabinet for reconsideration, the cabinet, on 1 March 2011, retook the decision in the same terms.

11.The officers then embarked upon a process of consultation with two focuses:

i)exploring community interest in providing CPLs and communicating with community groups in order to develop plans for CPLs, and

ii)holding meetings on the subject of the PVR report with Disability Empowerment Boards (DEBs), which are representative bodies for disabled persons, as well as with the Defendant’s Equalities External Advisory Group (EEAG).

12.That consultation period ran from March until September 2011, at the end of which the Defendant’s cabinet, on 27 September, considered a report described as “a progress update” and which provided the cabinet with;

“a position statement on the implementation of the key library Public Value Review recommendations. It outlines the current position with the establishment of community partnered libraries...”

13.That report recommended that the cabinet “agree library provision in 10 identified areas be delivered via the community partnership model.” The cabinet decided in accordance with that recommendation. Consideration was given by the “select committee”, to “call in” that decision but, on the 18 October 2011, it decided not to do so. Accordingly, on that date, the decision came into effect.

### **The statutory scheme and relevant law**

14.The Equality Act 2010 includes, amongst its stated purposes in its long title, the following:

**(1) to reform and harmonise equality law and restate the greater part of the enactments relating to discrimination ... related to certain characteristics,**

**(2) to require the exercise of certain functions to be with regard to the need to eliminate discrimination and other prohibited conduct,**

**(3) to increase equality of opportunity.**

15.Section 149 provides for the Public Sector Equality Duty (PSED) in the following terms:

- (1) A public authority must, in the exercise of its functions, have due regard to the need to—**
- (a) eliminate discrimination ... that is prohibited by or under this Act,**
  - (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it,**
  - (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it,**
- ...
- (3) Having due regard to the need to advance equality of opportunity ... involves having due regard, in particular, to the need to—**
- (a) remove or minimise disadvantages suffered ...**
  - (b) take steps to meet the needs of persons ...**
  - (c) encourage persons ... 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.**
- (5) Having due regard to the need to foster good relations ... involves having due regard, in particular, to the need to—**
- (a) tackle prejudice**
  - (b) promote understanding**
- (6) Compliance with the duties in this section may involve treating some persons more favourably than others ...**
- (7) The relevant protected characteristics are—**
- (There are then set out 8 specific protected characteristics)**

16. These provisions and their predecessors have been the subject of considerable judicial consideration both at first instance and, in a small number of cases, at appellate level. Save for one particular issue, to which I return below, there appears to be little dispute between the parties as to the approach the Court should take in considering the question of “due regard”. They have been brought together conveniently in paragraph 31 of the decision of Mr Justice Blake in the case of *R(Rahman) v Birmingham City Council [2011] EWHC 944 (Admin)*. I summarise them briefly below:

i) Due regard requires more than simply giving consideration to the issue and councillors should be aware of the special duties a council owes to the disabled before they take a decision *R(Chavda) v LB Harrow [2007] EWHC 3064 (Admin)*.

ii) “Due regard” is the regard that is appropriate, in all the particular circumstances in which the public authority concerned is carrying out its function as a public authority. The public authority must also pay regard to any countervailing factors. The weight to be given to the countervailing factors is a matter for the public authority concerned rather than the Court, unless the assessment by the public authority is unreasonable or irrational. (Dyson LJ (as he then was) in *R(Baker) v SS Communities and Local Government [2008] LGR 239* and *R(Brown) v SS Work and Pensions [2008] EWHC 3158 (Admin)*).

iii) No duty is imposed to take certain steps or to achieve certain results. The duty is only to have due regard to the need to take the relevant steps. The Court will only interfere if the local authority has acted out with the scope of any reasonable public authority in the circumstances. The public authority will need to take steps to gather all the relevant information (*Brown*).

iv) The law does not impose a statutory duty on public authorities requiring them to carry out a formal disability equality impact assessment (EIA) when carrying out their functions. At the most it imposes a duty on a public authority to consider undertaking an EIA along with other means of gathering information (*Brown*).

v) The due regard duty must be fulfilled before and at the time that a particular policy, which will or might affect disabled people, is being considered by the public authority. It involves a conscious approach and state of mind. It must be exercised in substance, with rigour and with an open mind. It is not a question of ticking boxes (*Brown*).

vi) The duty imposed on the public authority is non delegable. It remains on the public authority charged with it (*Brown*).

vii) The duty is a continuing one (*Brown*).

viii) It is good practice for those exercising public functions in public authorities to keep an adequate record, showing they had actually considered their disability equality duties. If records are not kept it may make it more difficult evidentially for a public authority to persuade a Court that it has fulfilled the duty imposed (*Brown*).

ix) Some of these principles have been drawn together as follows. There is no statutory duty to carry out a formal EIA. The duty is to have due regard, not to achieve certain results. Due regard does not exclude having regard to countervailing factors but is “the regard that is appropriate in all the circumstances”. The test of whether a decision maker has had due regard is a test of substance and not of mere form or box ticking. The duty must be

performed with rigour and with an open mind and is non delegable. Members are heavily reliant on officers for advice in taking these decisions. That makes it doubly important for officers not simply to tell members what they want to hear but to be rigorous in both enquiring and reporting to them ***R (Domb and others) v LB Hammersmith and Fulham [2009] EWCA 941 Civ.***

x)The clear purpose of (Section 149) is to require public bodies to give advance consideration to the issue of (race) discrimination before making any policy decisions that may be effected by such an issue. This is a salutary requirement which must be seen as an integral part of the mechanisms for ensuring the fulfillment and aims of anti discrimination legislation. It is not possible to take the view that non compliance is not a very important matter. [Section 149] has a significant role to play ***R(Elias) v SS for Defence [2006] EWCA Civ 1293.***

xi)Due regard must be an essential preliminary to any important policy decision, not a rearguard action following a concluded decision ***R(Bapio Action Ltd) v SSHD 2007 EWCA Civ 1139.***

xii)Consideration of the duties must be an integral part of the proposed policy not justification for its adoption ***R(Kaur and Others) v London Borough of Ealing [2008] EWHC 2062 (Admin)***

xiii)The Section 149 duty must be kept in mind by decision makers throughout the decision making process. It should be embedded in the process but can have no fixed content bearing in mind the range of potential factors and situations. What observance of that duty requires of decision makers is fact sensitive and varies considerably from situation to situation and from time to time and from stage to stage ***R (Bailey) v LB Brent [2011] EWCA Civ 1586 para 83.***

xiv)The importance of complying with Section 149 is not to be understated, nevertheless, in a case where the council was fully appraised of its duty and had the benefit of a most careful report and EIA an air of unreality may descend. Councils cannot be expected to speculate, or to investigate, or to explore, such matters ad infinitum, nor can they be expected to apply, indeed they are to be discouraged from applying, the degree of forensic analysis for the purpose of an EIA and of consideration of their duties under Section 149 which a QC might deploy in Court. The outcome of such cases is ultimately of course fact specific (***Bailey para 102*** Davis LJ).

17.An extremely helpful and concise summary of many of the above statements on the appropriate approach for the Courts in considering whether or not there has been due regard to Section 149 is to be found in ***R (on the application of JM and others) v Isle of Wight Council [2011] EWHC 2911 (Admin)***, Mrs. Justice Lang at paragraphs 95 -108).

18.The one legal issue upon which there has been a dispute is whether the question whether the Defendant has had “due regard” is a matter to be determined by the Court deciding what amounts to “due regard”, or whether that is a matter for the Defendant to determine, subject only to a challenge on the “***Wednesbury***” grounds.

19. There have been a number of expressions of judicial view at first instance on this question. It is fair to say that the preponderance of those views has been in favour of the former rather than the latter approach. The first decision which grappled with this issue was that of Mr Justice Davis (as he then was) in *R(Meany) v Harlow District Council [2009] EWHC 559(Admin)* in a passage that runs from paragraph 72 - 85.

20. In my judgment, a proper reading of his judgment is that he was expressing the view that the question whether there has been “due regard” is a matter for the Court to determine. By way of contrast, once there has been due regard, the question whether the decision ultimately taken is lawful, having regard to the weight to be given to that factor as well as to any countervailing factors, is a matter which can only be determined by the Court applying the “*Wednesbury*” principles.

21. That approach has been followed in a number of first instance decisions such as *R (Boyejo) v LB Barnet [2009] EWHC 3261 (Admin)*, *R (Hajrula) v London Councils [2011] EWHC 448 (Admin)* and *JM (see above)*.

22. By way of contrast, in *R(D) v Manchester City Council [2011] EWHC 17 (Admin)*, Mr Justice Ryder decided that the question whether “due regard” has been had to the equality duty is to be determined by the Court solely on the basis of “*Wednesbury* unreasonableness”.

23. There is a very recent authority, however, of the Divisional Court (*R(Hurley & Moore) v SS for Business Innovation and Skills [2012] EWHC 201 (Admin)*) in which Lord Justice Elias says at paragraphs 77 & 78:

“77. ... I do not accept that this means that it is for the court to determine whether appropriate weight has been given to the duty. Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then, as Dyson LJ in *Baker* made clear, it is for the decision maker to decide how much weight should be given to the various factors informing the decision.

78. The concept of "due regard" requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker. In short, the decision maker must be clear precisely as to what the equality implications are when he puts them in the balance, and he must recognise 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. ...”

24. In my judgment that exposition of the two stage process of the Court considering: first whether the statutory obligation to give “due regard” has been discharged; and second, (if it is sought to review it) the decision which flows from it, involves the Court, at the first stage, deciding whether the authority has, in fact, surmounted the threshold required by the statute. That is not, on my reading of it, a *Wednesbury* based exercise. However, once the authority has surmounted the threshold of “due regard,” the lawfulness of the decision which emerges

from the consideration of those matters and all the other relevant (possibly countervailing) factors, is a matter which the Court has to approach on the *Wednesbury* basis.

25. In my judgment the approach argued for by the Claimant in the present case is correct. In the event it is not decisive of this case, as I would reach the same conclusion whether or not I was applying that approach, or the “*Wednesbury*” approach to the question whether the Defendant gave “due regard” pursuant to Section 149.

### **Evidence/Facts**

26. The Defendant submits, and I accept, that awareness of equality issues is fully integrated into its corporate culture and not bolted on as an afterthought. Since 2006 it has had a detailed action plan for an equality and diversity policy which is regularly updated. It has a single equality scheme established in 2006. It has carried out Equality Impact Assessments across the range of its functions and awareness of equality issues is embedded in its policy making processes.

27. In particular, it has compulsory equality and diversity training for all staff, and some specific, tailored, training for “customer facing” staff, for which resources are provided. Both at corporate level, and within individual services, equality issues are to the fore. Compulsory training is arranged for all new staff as part of their induction, which takes one day, and equality issues feature in individual appraisal targets.

28. The Defendant undertakes EIAs regularly on services, and policies. The process for conducting these is highly developed. I have been shown the “EIA Interim Guidance” dated November 2010, which gives detailed guidance to those who are conducting EIAs.

### **The use of EIAs by the Library Service**

29. The Defendant conducted a full EIA of its library services in March 2008. It identified the positive impacts of the service for the “equality and diversity strands”. One of the stated positive impacts in respect of the “equality strands” of age/belief/faith/disability/sexual orientation and race, was said to be that the library service provided customer care, and equality and diversity training, for all staff.

30. The library service has produced EIAs on a number of discrete areas: on IT (February 2010); resources (December 2010); information services (March 2011); inter library loans (March 2011); and virtual services (August 2011). An EIA on library refurbishment is nearing completion, and one on wi-fi in libraries has been commenced.

31. A series of EIAs was performed for the public value review. As with all EIAs it was conducted in 2 stages. Stage 1 is an initial screening, to identify whether there are any significant negative impacts for equality strands. In the event that the screening identified a likely significant negative impact a full EIA is then required (Stage 2).

32. The initial screening was conducted in April 2010. It identified, as one of the recommendations to be delivered in the short term, the retention of a core branch network, to be supported by a network of CPLs operated in partnership with local organizations where the Defendant would continue to provide stock, IT, and property, but not staffing. That recommendation was for consultation with local communities. The initial screening, for each



“equality strand” identified whether there may be a positive, negative, or no, impact. For age, disability, and carers, a number of negative impacts were identified. They were posited on the assumption of branch closures and the impact of such closures. Accordingly, a full EIA was required.

33.The full EIA was conducted in November 2010. The same recommendation was highlighted. The main “equality, accessibility and social exclusion issues” were identified under different headings. Under the heading “equality”, the issue was said to be:

“Ensuring any community partnered libraries that are introduced meet the universal ethos of the library service as well as specific equality requirements and that community partnered libraries continue to meet equality standards”.

Under the heading “accessibility” an issue was identified in the following terms

“to ensure that community partnered libraries continue to meet accessibility standards”.

34.The full EIA considered what evidence was available and had been gathered to support its views. It also identified certain gaps in the information. In particular it stated;

“Residents and equality advisory groups have not yet been consulted on the proposed approach and this will be important to inform the proposals and develop appropriate mitigating actions against negative impact and no final decision will be taken by cabinet until consultation is completed and the result analysed”.

35.The EIA also recorded which stakeholders had been involved in the assessment. The key stakeholders identified included residents and service users. It recorded that there had been meetings with voluntary community and faith sector partners. Amongst the major messages that had emerged from the focus groups were that “volunteer help” adds value and extends the activities which the library can offer. The EIA stated that the consultations on the recommendations affecting the branch network were planned to begin in February following publication of the PVR.

36.The EIA included a section entitled “analysis and assessment”. In respect of the recommendation “Engaging with local communities on establishing a community partnership at the lowest scoring libraries” a likely positive impact was identified as: “giving local communities more control of library provision and greater freedom to adapt to local needs. Reducing costs would enable the service to focus its resources on improving services at its strategic core of libraries”.

37.Likely negative impacts were identified. They included:

“If suitable community partnerships cannot be established ... between 4 and 10 % of service users have mobility issues and will find it more difficult to access an alternative library”

and,

“The development of community managed libraries and ongoing support to them requires clear standards to be in place to avoid a risk of negative impact on any of equality strands and ensure that a high quality and universal is accessible to all”.

38.The EIA identified a number of mitigating actions. There is nothing in that part of the report which referred to training on equality issues being a priority for volunteers who work in CPLs.

39.There is, however, a section headed “What can be done to reduce the effects of any negative impacts where negative impacts cannot be completely diminished, can this be justified and is it lawful”.

Certain principles for mitigating actions were set out in that section, including;

“any new arrangement should ensure that they are compliant with both the Equality Act and the current Public Sector Duty and reviewed against the new Public Sector Duty that will be introduced in April 2011. This will be an ongoing requirement”.

40.There is a section in which the main recommendations were summarized. They included the following:

“EIA required to be updated following the consultation phase and as part of the implementation plan, to consider the impact on the medium and longer term recommendations ...

Set clear standards for community managed libraries to ensure compliance with equalities legislation and Surrey values.

Consultation with users on changes to services will need to reach more vulnerable groups”.

### **The Public Value Review Report – 1<sup>st</sup> February 2011**

41.The cabinet was asked to consider the report and to approve an action plan set out in Appendix 1. It was asked to approve consultation with local community groups on the changes proposed to the management of the branch network over a three month period.

42.Under the heading “Surrey Vision” it stated:

“The Public Value Review sees the development of Community Partnered Libraries as a key opportunity for local communities to exercise greater influence and control over the development and use of libraries in small communities”.

43.The report dealt with two categories of recommendations: short term; and medium and long term. The savings to be achieved short term would not be full year savings. The medium and long term savings would be from March 2012 onwards. The savings arising from the recommendations were said to be in addition to the efficiencies required by the medium term financial plan for annual savings of £195,000 as a minimum by 2013-2014.

44. The report then set out its reasoning and conclusions for a cost effective branch network. It included the recommendation that the council concentrate its resources on maintaining a core branch network reflecting patterns of usage. It also believed that the council should establish community partnerships at selected libraries, the success of which would be dependant on the outcome of consultation and subsequent interest from parish councils, local community groups and organizations. The council would consult about a community partner approach at selected libraries, likely partners would include a broad range of local organizations, community groups and businesses, parish councils and local charities. The council would continue to provide support for these libraries through stock and IT provision as well as providing training and other support.

45. The report stated that:

“Transferring the local management of some library services to local organizations represents a complex and radical change in the means of delivering a library service in Surrey. A change of this magnitude would require skills new to the service as well as sufficient staff and management time to help establish community partnered libraries and to then support them on an ongoing basis with issues such as training”.

46. The report stated that the council would publish its key expectations for partnerships but would be flexible in negotiations so that partnerships could best be tailored to the local community. Successful partners would be those who demonstrated the capacity to offer a consistent and reliable service to the public.

47. The report recorded that the library service is already experienced in working with volunteers to deliver value added activities such as “rhyme time sessions” for young children and computer buddies. In 2009-2010 a total of nearly 590 people volunteered to work with the library service in a variety of ways and, in total, they delivered 8,000 hours of support to the service.

48. The recommendations were then set out. They included the following;

“Consulting with parish councils, local community groups and organizations on the viability of establishing a community partnership at selected libraries. Progress on this consultation will be reported back to the cabinet in June 2011 with a view to decisions being made as to the future of these libraries. Where community libraries are to be established, the council intends that discussions with interested parties are under way by September 2011. Costs savings from establishing community partnered libraries will be dependant upon the consultation process and subsequent interest from local organisations”.

49. The report contained a section entitled “Improved Quality Assurance”. It highlighted the scope for development in a number of areas including;

“Working in partnership with community bodies will require training for staff and volunteers as well as putting systems and procedures in place to monitor service quality and to evaluate the effectiveness of these community partnerships”.

“Identification of key activities, clear guidelines and the establishment of quality standards in order to ensure a professional consistent approach.”

“Use of benchmarking and regular views of service activities to evaluate an effectiveness and look for improvements and scrutiny to ensure challenge”.

The review recommended the adoption of an action plan based on those findings to develop and strengthen quality assurance arrangements.

50. The report contained a section entitled “Equalities Implications”. In particular, it recorded that the council has been mindful of its equality duties and will need to continue to be so in the on-going consultation and decision making. It refers specifically to legislative changes due to take place in April 2011 after the implementation of the Equality Act 2010 and it set out in detail the salient parts of Section 149. It also referred specifically to the EIA which had been completed and was attached to the report as an Appendix.

51. It then went on as follows:

“An initial EIA screening has been completed in respect of the impact on library services staff.”

The EIA had identified actions to mitigate negative impact including;

“Determine appropriate consultation with equality advisory groups”

and

“Set clear standards for community partnered libraries to ensure compliance with equalities legislation and Surrey values”.

52. Under the heading “Risk Management Implications” it identified as a key risk; “Unknown sustainability of community partnership will require the thorough development of an operation model and close working with estates and property management”.

53. Under the heading “Legal Implications Legislative Requirements” the report stated that the cabinet should give due regard to the council’s equality duties and to the Equality Impact Assessment annexed to the report.

54. The report recommended that the cabinet work with various groups with the aim of inviting interest to establish community partnership at selected libraries and to design and develop a Surrey model for such locally managed and partnered libraries with a progress report following consultation. It also recommended consultation with the users of the mobile library, borrowers and equality advisory groups, to co-design a sustainable and value for money service, including consideration of appropriate and affordable support to enable borrowers to continue to access library services.

55. The reasons for the recommendations were stated to be: “to move the PVR of the libraries services into the consultation and implementation phase”.

56. Under the heading “What happens next” the report included “...consultation and engagement with local community groups on the development of community partnered libraries and expressions of interest” and “...consultation with the equalities groups, service users and the wider public to begin a dialogue with interested parties in providing a libraries service at the affected libraries” and “...to identify the impact on residents and determine appropriate mitigating actions the council can take to address this”.

57. The cabinet accepted the recommendations of this report on 1<sup>st</sup> February.

58. The Safer and Stronger Communities Select Committee held a meeting on the 22 February 2011 which decided to call-in the cabinet’s decision of 1<sup>st</sup> February. The minutes of that meeting record that, amongst the concerns expressed, was the timetable. Members sought reassurance that, if communities could not develop proposals by September there would not be an instant closure. The cabinet member assured the select committee that there would be no snap decisions but she could not guarantee that libraries would remain open. It is also minuted that members wished to draw to the cabinet’s attention, amongst other things, the need for:

“full information and guidance regarding community partnerships to be provided as part of the consultation including job descriptions for volunteers and the number of volunteers and hours required”.

59. To aid the call-in process there was a further report dated 22<sup>nd</sup> February before the select committee. It set out the Surrey model for CPLs which identified what the County Council would expect to provide. That included: buildings and running costs; stock; connection to the libraries IT network; a professional development team support for libraries services and activities; training and development for the volunteer workforce; direct access to enquiries direct; dedicated management backup for service problems; and use of the council’s contact centre for queries about services.

60. It also set out what they would expect the organizations to provide including: a commitment to meet a framework of standards that includes best practice for library services, statutory duties and equalities; and a volunteer workforce, managed by the partner body, and a commitment to their training and development.

61. A decision was taken to call-in the February decision and the cabinet considered it afresh on 1<sup>st</sup> March 2011 upon receipt of a report from the select committee. The select committee recommendation was that the cabinet abandon the plans for community partnership or closure of, the 11 libraries identified, pending further analysis of alternative options to that of community partnerships. The reasons given were that members concluded that there had been insufficient consideration of alternative approaches, that the consultation process was inadequate and that the timescales involved were unfairly ambitious.

62. However, on the 1<sup>st</sup> March 2011 the original cabinet decision was reaffirmed.

### **The Consultation Process**

63. There were two streams to this consultation process. One was consultation with community groups to explore the feasibility and practicalities of changing the 11 libraries into CPL’s. Rose Wilson, the library operations manager, gives evidence about this. The

details of how CPLs would operate had not been worked out. It was only by discussing such details with community groups that they could identify problems and solutions. For example, as they discussed CPL plans with groups they learnt more about the level of training or ongoing support the groups would need to feel confident. It was partly because of that discussion that they decided to provide the CPL support team.

64. This element of the consultation resulted in two types of information. Some people were negative about the CPL. Their concerns were analysed by being divided into 16 categories, split, by reference to each proposed CPL, and recorded in a spreadsheet. The most common expression of concern was opposition to closing the library but other concerns raised included the impact on the disabled, children and the elderly. Ms Wilson says that they took on board these issues as part of their discussions with the CPL steering groups and in continually revising the heads of agreement. This enabled them to develop an offer where both the community partners and the Defendant were looking to maintain a library service which ensured adequate support for those with protected characteristics and ensured that support and training was available for the CPL steering groups and volunteers to enable this to happen.

65. The second type of information came from the completed expressions of interest forms with people offering to assist to work in CPLs as individual volunteers.

66. The spreadsheet referred to by Rose Wilson quantifies: the number of comments; their form i.e. whether email, post card or letter; the particular CPL consultation giving rise to such contributions; and a series of headings giving the general nature of the concern. The spreadsheet does not, however, provide any detail of the concerns beyond a headline categorisation.

67. Sally Parker, the library sectors manager, gives evidence of the consultations conducted with equality groups and local communities. She explains that the Defendant has established Disability Empowerment Boards (DEBs) of which there are five, geographically based. The DEBs are chaired by disabled people - at least 60% of their members have some sort of disability. The remainder of the members are carers or representatives of service providers. They meet bi-monthly. She attended each of those boards in March 2011 and again in September 2011. Initially, she identified, in broad terms, the nature of the proposed recommendations. At the September meetings, she indicated that discussions were in progress with steering groups but that no agreements had been signed. She advised them that a training programme was being prepared to include all the volunteers who would need to know about providing the service. She says that there were some initial concerns about the approach to equalities, accessibility and service delivery, but she was able to discuss the training plan with them. That highlighted how important it was for the council to make sure that all the volunteers received good training in this area and those comments fed into the Defendant's planning. She indicates that there was more interest in the recommendation to close mobile library service, so her focus in these sessions was more on that service. Her conclusion was that these meetings confirmed they were on the right track as regards CPLs and that such concerns about them, as were raised, were ones that they felt could satisfactorily be met by appropriate training and support for volunteers.

68. She also attended a meeting of the Defendant's Equalities External Advisory Group (EEAG) on 1<sup>st</sup> February 2011. This comprises representatives from groups reflecting the

range of protected characteristics in the Equality Act 2010 and officers of the Defendant. A number of concerns were expressed in relation to CPLs about the loss of professional librarians as a result of the reliance of volunteers. In fact, as she points out, there are no professional librarians employed in the CPLs, but, in any event, she emphasized that full support would be offered to the volunteers. There was also concern about the fact that residents without access to the internet or libraries could be marginalized from the democratic process, but that concern would only be relevant if there were to be closures. She was asked whether the proposed CPLs would be closed if no volunteer groups came forward. She said that, if no group came forward, the proposals would go back to cabinet for further discussion. Her view was that the comments from that group highlighted similar issues to those raised in the DEBs, namely the importance of providing adequate training and support to the volunteers and the importance of maintaining the same availability of services for users by keeping libraries open rather than closing them.

69. Mr Jacobs, from the Claimant's solicitors, exhibits to his witness statement the relevant extracts from the notes of the ten DEB meetings, from which he has extracted a series of particular exchanges which focus on professional library staff being replaced by unskilled or unpaid volunteers, particularly in the context of assistance required by those with disability. The response of the council representative was to refer to the fact that all volunteers would be trained and there would be quality control mechanisms in place but, at one meeting, Sally Parker is recorded as saying "she did not underestimate how difficult this will be. This still has to go back to cabinet".

### **The Report to Cabinet dated 27<sup>th</sup> September 2011**

70. This is described as "a PVR progress update" providing "a position statement" on the implementation of the key PVR recommendations, outlining the current position with the establishment of CPLs. It described the Defendant's work on CPLs as being at "the cutting edge" of the "local service delivery" agenda. Key areas of focus had been identified as important for enabling local service delivery. They included the provision by the library service of ongoing support, mentoring and advice to the community organizations from within current budgets, and the development of a training plan for the set up and ongoing training needs for the partnerships. The report then says:

"These issues and the work that is being undertaken to deliver this is set out in the report".

71. On CPLs the report noted that there were a number of different models adopted by other local authorities which were not working as anticipated. It was recognized that the approach taken by the Defendant was at the forefront of developing a successful and sustainable model for developing a front line service with the local community.

72. It stated, "a three month engagement process began in local communities to identify whether there was the will and capacity in local communities to... manage and develop their own local library..... All the communities were at different stages... and a position statement on each one is set out at Appendix 1" to the report. Appendix 1 is a single page document which gives a thumbnail sketch of progress and the current state of play in respect of each of the 11 initial CPLs.

73. The report goes on to state, "...to enable the early transfer of some of the libraries there needed to be a focus on [certain things] to allow this to happen". They included:

"The development and provision of training to the CPLs in terms of both management and service delivery".

74. The report then identifies a number of issues which needed to be addressed to allow CPLs to operate with freedom and flexibility. They included: opening hours; costs of additional opening hours; income; leases and licensing; the length of agreement; and branding.

75. The report considered the position if it became clear that a viable partnership was not in place. It stated that, in consultation with the cabinet members, a further report on the closure of such a library would be considered in December, although the aim remained not to close any libraries.

76. Looking forward to 2012, an evaluation scheme was being developed to assess the sustainability of a medium to long term future for each partnership. The partnership offer would contain provisions for either side to withdraw. It would govern the Defendant's continuing support: with advice, guidance and support for day to day issues and for continuing training and development.

77. The report also contained a section concerning consultation. It stated that consultation with groups interested in the CPLs had been going on for a number of months and would continue. There was no reference in this part to the meetings with the DEBs or the EEAG.

78. In relation to equality implications the report stated;

"A detailed Equality Impact Assessment was undertaken on the PVR and the project continues to be developed in line with this".

79. Under the heading "Legal Implication/Legislative Requirements", the same text as was in the February report is reproduced. In addition, attention was drawn to there being several legal challenges to the reorganization of public library services, in particular, on grounds such as potential failure to consider the Equality Impact Assessments and potential failure to consult adequately. Those cases were yet to be heard and officers would keep a watching brief and report back if any High Court Judgment should be taken into account by the members.

80. The recommendation in the report was for the cabinet to agree that library provision should be by means of a CPL in 10 of the 11 originally designated areas, in order to implement both the PVR recommendations and the library service strategy.

81. Under the heading "What happens next", it was stated that arrangements for the implementation for the CPLs would be developed at an individual library level.

### **The September EIA**

82. There was no further EIA placed before the cabinet on 27<sup>th</sup> September 2011. There had, however, been a further EIA prepared which expressly incorporated the earlier EIAs of March 2008 and April/November 2010. That EIA, at the screening stage, identified negative impacts in respect of certain equality streams. They focused on the fact that a failure to set up



a viable community partnership may result in a decision to close a library which would have negative implications for those within the age, disability or carer equality streams. Mitigation of that negative impact was primarily addressed through attempts not to close libraries by adopting CPLs. In respect of the equality stream of “gender reassignment”, it was said that volunteers may not be trained to provide an appropriate service. In respect of the equality stream “disability” it was said that all volunteers will be required to undertake equality training and be aware of the legal requirements of the library service.

83. A full EIA was required and was carried out. Under the heading “Evidence gathering/fact finding”, it was said that the evidence already gathered remained valid but there continued to be gaps. Under the heading “Involvement of stakeholders” reference was made to the detailed, ongoing, discussions with groups around developing proposals and discussing issues of concern. It also stated that, in the discussions with members of the 5 DEBs, initial concerns raised in respect of CPLs were around training for volunteers, accessibility and service delivery.

84. Under the heading “analysis and assessment” it was recorded that the original EIA had identified eight recommendations. Each was set out and the progress towards achievement of each described. In respect of the recommendation “Set clear standards for community managed libraries to ensure compliance with equalities legislation and Surrey values” it was stated:

“this is communicated to groups who are in discussions around providing CPLs and will be reflected in the agreements with them. Measures of success are being developed to reflect this need”.

85. Under the heading “Detailed analysis of the PVR recommendations”, in respect of the CPLs it was said:

“This is ongoing. Issues around E and D are discussed with community groups particularly around ensuring that the CPLs are promoted to and are open and accessible to all members of the community. No additional E and D issues”

86. Under the heading “Mitigating actions” it was said:

“All efforts will be made to ensuring that community partnerships are successful in order to avoid the need to close libraries. If any libraries have to be closed they will be subject to a separate EIA individually” ;

and

“In developing quality assurance systems and a marketing approach we need to ensure that all of our communities are recognized and understood”.

87. Under the heading “Recommendations” there was included a recommendation;

“(1) That a separate EIA be completed in the event that a library needs to be proposed for closure and (2) our approach to quality assurance and marketing ensures that the requirements of all our community are understood and addressed.”

88. On 20<sup>th</sup> December 2011, there was a further cabinet meeting concerning arrangements to support the CPLs. The report to that cabinet meeting recorded that the Defendant was now close to a formal agreement with many of the groups and others were actively in hand. The report focused on the need for strong support for CPLs and gave details of the structure, with brief job descriptions, of the support teams which would deliver that support. In addition, it indicated that each CPL would have “on site support” from a member of the support team for 20% of the library’s current opening hours. The purpose of the support team and the on site presence was to provide a regular point of contact and ongoing advice, guidance and help, but not to discharge the day to day service arrangements being provided by the community partnership.

### **Volunteers and training**

89. In her evidence, Rose Wilson deals with the question of volunteers and training. She describes the present level of usage of volunteers, as described in the PVR report, and the high standards of volunteers currently engaged by the Defendant.

90. She identifies the nature of the training for volunteers which is to be delivered. The Defendant will train the CPL steering group and its key volunteers. Those people in turn will cascade the training to other volunteers. The training will be modular. Volunteers will attend sessions on key topics. She provides a list of 11 topics including an enhanced session on equalities.

91. She says that the officers put together a list of training requirements, following discussions with the CPL steering groups about what would be needed. The list confirmed things that they had already been thinking about. Much of the training is about how the process will work. Equalities and diversity was second on the list of priorities identified, after health and safety. She has exhibited the training plan proposed to be delivered in a 2 hour session to a maximum of twenty at a time. It includes materials on Equalities which will include “hands on” training. In addition volunteer training will be monitored, volunteers being required to sign a document to show their attendance at the modular and hands on training sessions. The required scope of the initial training and the need for any additional training or support will be reviewed and adapted as necessary.

### **The Claimants’ Evidence**

92. A number of witnesses have made witness statements in support of the Claimants. They include Audrey Barclay, Louise Beddows, Jackie Gray, Ethel Jones, Jenny Meineck and Margaret Williams. Their evidence focuses on their belief that CPLs will be unable to provide a supply of competent, trained volunteers sensitive to the needs of, in particular, the elderly and the disabled. Some of them are concerned about the lack of continuity where a large number of volunteers are rostered to work in libraries in the place of regular staff who know their regular customers and their requirements.

### **Submissions and Conclusions**

#### **The Claimants**

93. The Claimants’ contentions are that the decision making body, the cabinet, gave no due regard to the equality implications of the decision to adopt CPLs before deciding to do so. It

did not give the rigorous or focused attention that is required, to the equality impacts of the decision to adopt CPLs and it did not address the specific factual matters and concerns arising from the consultation which was undertaken to inform the decision making process. Thus there was an absence of a rigorous and open minded consideration and a failure to discharge the statutory duty to give due regard pursuant to s149.

94. At the heart of first submission is that, on the 27<sup>th</sup> September 2011, the cabinet did not have before it any EIA subsequent to November 2010, nor did it have any summary of the consultation responses in respect of equality concerns. Thus it did not have regard to the obvious equality issue of the need for training for volunteers, other than by means of broad and obvious statements of the need to provide ongoing support, training and mentoring to the volunteers, but which contained no reference at all to the particular needs of members of equality groups.

95. The Claimants point out that the Equalities culture, which suffuses the Defendant's undertakings envisages that all its staff are compulsorily required to submit to equality training, and yet there is no reference in the 27<sup>th</sup> September report to equalities training for volunteers.

96. As a supplementary issue, and based on the witness statements in support of the claim, it is said that there is no reference in the September Report to the perceived problem of the elderly, or those with disability, being adversely affected by not being able to rely for assistance on regular members of staff who know them and their particular requirements when the library is staffed by an ever changing rota of volunteers. There is no reference to that problem or to any suggested way of mitigating it.

97. The Claimants also focus on two things which, they say, were made clear in the February documents. First, the fact that, in the February report, it was emphasized that the recommendation which they were then deciding to investigate, by undertaking consultations with possible partners and user groups, represented a complex and radical change of a magnitude which would require new skills, to be supported on an ongoing basis with training and that the need for training was repeatedly referred to in that report.

98. Second the November 2010 EIA, annexed to that report, had stated that consultation with residents and equality advisory groups would be important to inform the proposals and to develop any mitigating actions and that no factual decision would be taken by cabinet until the consultation was complete and the result analyzed.

99. They also rely on the fact that Sally Parker said to one of the DEBs that she did not underestimate the difficulty of what was being undertaken and that it still had to go back to cabinet.

100. In the light of these statements, the Claimants say that the failure to place the September EIA before the cabinet and the failure to put before the cabinet, any consideration, in whatever detail, of the scale of the training need and how it might be provided, beyond a bare assertion that there would be training, prevented the cabinet giving due regard, to that obvious equality issue

101. It is said that, although the 27<sup>th</sup> September report said that the previous consideration of the issue had identified the development of a training plan for "set up and ongoing training

needs” as a key area of focus, there is nothing in the report which identified the work being undertaken to address that key issue beyond a single sentence confirming that there needed to be a focus on developing and providing training to the CPLs for management and service delivery.

102. Finally, although there had been extensive and ongoing consultations there was nothing said in the September report about the consultations with the DEBs or the EEAG and no attempt in the report to identify or analyze the concerns expressed in that consultation.

### **Defendant’s Submissions**

103. The Defendant invites me to consider the series of cabinet decisions as a continuing process, so that the earlier decisions and materials lead on to the later ones. It also invites me to have regard to the fact that the decisions under challenge, and those leading to it, were made by a body in which equalities issues are embedded within its culture in the many ways described in its guidance and policy documents.

104. Given that context, it is said that it would be highly unlikely that the Defendant would miss a new and obvious equality issue thrown up by consultations with the DEBs and the EEAG and that the evidence, from the notes of the DEB meetings, as well as evidence in support of the Claimants, does not throw up any such new issue. That being the case, it is said that the need for the volunteers to be trained in all aspects of the delivery of library services, in particular on equalities issues, was recognized and stated repeatedly throughout the February report and, implicitly, within the November 2010 EIA.

105. In the light of that, it is submitted that there was no need for anything more to be said in the September report than it contains. The issue had been sufficiently developed in the February report against a background where the Defendant already used a substantial number of volunteers and was familiar with the need to train them. It is clear, it is said, that the Defendant has, in the course of its reports, grappled, rigorously and open mindedly, with the obvious equality issue - the need to train the volunteers.

106. Reliance is placed on what was said by the Court of Appeal in *R (on application of National Association of Health Stores) and Department of Health [2005] EWCA 154* and, in particular, the distinction between things which are so relevant that they must be taken into account, and things which, though not irrelevant, may, but are not required to be taken into account. Only a failure to take into account something in the former category is sufficient to vitiate a public law decision (see para 63). It is said that on the 27<sup>th</sup> September 2011 the cabinet had, by virtue of what is contained in the report of that date, the February report and the November 2010 EIA, sufficient material so as to enable it to have due regard to the public sector equality duties.

107. The Defendant says that nothing had happened between February and September to give a different shape or substance to the equality issues which had been identified, therefore there was no need to provide the cabinet with any fuller information than they already had. Nothing emerged from the post February process which showed that the Defendant was on the wrong track. It had identified training and support as the main equality issue and the earlier reports were sufficient to permit the cabinet to have due regard to the public sector equality duty.

## Conclusions

108. In my judgment the Claimants have succeeded in demonstrating that the Defendant, on the 27<sup>th</sup> September 2011, failed to comply with its duty under Section 149 to have due regard to the statutory equality duties identified in subsections 1(a)(b)(c).

109. In my judgment that is established, whether on the basis of the Court deciding what would amount to due regard, or applying *Wednesbury* principles in that I have concluded that the cabinet failed to have regard to a relevant consideration, failure to have regard to which rendered their decision unlawful.

110. I accept the Defendant's argument that, in considering the lawfulness of the 27<sup>th</sup> September 2011 decision, it is important to remember that this was a step in a process which had begun with the decision of the 1<sup>st</sup> February 2011 and which continued subsequently.

111. I also accept that the only obvious equality issue which arose for consideration, when taking decisions in relation to the CPLs, was the provision of training, both initial and ongoing, of those who would staff the CPLs as volunteers.

112. I also accept the contention of the Defendant that no new equality issue had arisen from the consultation exercises, following the February meeting, conducted by the Defendant with community groups and the DEBs and the EEAG.

113. In so far as Claimants have sought to rely on an argument that regular, familiar, library staff would be replaced by an ever changing cast of volunteers, in my judgment that is not an obvious issue which was thrown up by the consultations undertaken after the February meeting. The fact that some of the Claimants' witnesses have identified it as a potential equality issue in their evidence, does not, in my judgment, suffice to make it an issue which was obvious, so as to have required express consideration by the Defendant's cabinet on the 27<sup>th</sup> September 2011.

114. Where, however, in my judgment, the Defendant, through its officers, has erred in law, is to conclude, from the fact that no new equality impact issue had arisen in the course of the consultations conducted after February 2011, that it followed that the "due regard" it had given to equality issues in February 2011, when deciding, at a preliminary stage to consult upon the feasibility of pursuing the CPL option, remained sufficient, as amounting to "due regard" when considering, in September, a substantive decision to proceed with CPLs.

115. In my judgment the PVR report of 1<sup>st</sup> February 2011 contained an important statement when it described the CPL initiative as representing a complex and radical change of a magnitude which would require, amongst other things, training.

116. The importance of training on equality issues was already regarded as important. The evidence of Sally Parker is clear: embedding equality issues in the culture of the Defendant involved particular emphasis being placed on significant compulsory training of all members of management and staff, by having equality issues as individual appraisal targets for staff and by having training for managers and tailored training in particular directorates.

117. The decision taken on 1<sup>st</sup> February 2011 was a preliminary decision only. It set in train a process of consulting and working with potential local partners to co-design and develop a

Surrey model for CPLs. It envisaged a progress report to cabinet following the consultation period. It also envisaged consultation with, amongst others, equalities groups.

118. The November 2010 EIA explicitly warned that residents and equality adviser groups had not yet been consulted and that such consultation would be important to inform the proposals, and to develop mitigating actions against negative impacts. It also stated that no final decision would be taken by cabinet until that consultation had been completed and the results analyzed.

119. It may be (though I do not have to decide) that, given the preliminary nature of the decision being taken on 1<sup>st</sup> February, in advance of any consultation, the cabinet had “due regard” to the Public Sector Equality Duty on 1<sup>st</sup> February. However, as Rose Wilson says in her evidence, the consultation with community groups was designed to explore the feasibility and the practicalities of changing the 11 libraries into CPLs. The details of how they would operate had not been worked out on 1<sup>st</sup> February. It was only by discussing the details with community groups that the Defendant’s officers could identify problems and solutions.

120. In fact, they learnt more from that process about the level of training, and ongoing support, the groups would need to feel confident in operating the CPLs. Further, in her evidence, Rose Wilson stated that the officers put together a list of training requirements following their discussions with the CPLs’ steering groups about what would be needed, even though they already had significant experience in recruiting, training and managing volunteers which they were able to use in developing the CPL model and in considering how they would recruit and train their volunteers.

121. It is clear from the terms of the report to cabinet of 27<sup>th</sup> September 2011 that considerable progress had been made in discussions with the steering groups for the CPLs. That progress was encapsulated and placed before the cabinet in Appendix 1.

122. The September report also recorded that developing a plan to meet “set up and ongoing training needs” for the partnerships had previously been identified as a key area of focus. It indicated that the work undertaken to deliver on that key area would be set out in the report. However, there was nothing at all in the report about what discussions with the steering groups had revealed of the nature and extent of their perceived training needs, nor about how the officers’ thinking on that issue had developed and how it was thought that they might deliver and maintain such training.

123. It is clear from the evidence of the Defendant, in particular Rose Wilson, that there must, by September, have been a significant amount of material to report to the cabinet which would have put flesh on the bare bones of the asserted recognition, in February 2011, that a change of this magnitude, at the cutting edge of implementation of this important policy, would require significant training of the volunteers, particularly in respect of Equality issues. Yet there is nothing at all in the September report beyond a repeat of the previous bare assertion that training would need to be provided. Apparently this was because the officers considered that nothing had changed because no new equality issues had been raised in the DEB and EEAG meetings.

124. In my judgment, the officers erred in failing to recognize that, although the consultations may not have thrown up any new equality issues, it was not sufficient for the cabinet, at the September meeting, to be left in the same position as they been in February. Their failure, in

my judgment, was not to realise that, although the issue was the same – training - the process had now reached a substantially further advanced stage than in February.

125. The decisions now being proposed were to proceed with CPLs rather than merely to investigate their feasibility. The thinking about what, and how much, training volunteers would need and how it might be delivered and maintained, must, by that stage, following consultations with the community groups have developed substantially. If it had, then that material must have been germane to the discharge by the cabinet of its PSED to give such issues due regard. If it had not, then the fact that, seven months later, it had not, given the imminence of substantive decisions to be taken, needed to be communicated to the cabinet so as to enable them to give the issues due regard.

126. Accordingly, in my judgment, due regard to the obvious equality issue of training of volunteers required, at the least, a rigorous consideration by the cabinet of the officers' thinking on that issue as it had developed as a result of those consultations.

127. In my judgment, the reliance by the Defendant on the same bland assertions that training would be required and monitored, as had been contained in the February report, fell substantially short of enabling the cabinet members to give due regard to this obvious equality issue at the stage the process had reached in September.

128. As has been indicated in the authorities, it is not necessary for a local authority to consider such issues to the nth degree of detail or ad infinitum, but a summary of what, it was now anticipated, the training needs would be and how they might be met was, in my judgment, an irreducible minimum to enable the cabinet to give this issue due regard at that stage. That this would be easy to achieve in a digestible form for cabinet members, is evident from the way in which officers informed cabinet members about the progress the steering groups had made in appendix 1 to the report.

129. Thus, in my judgment, the Defendant, in taking its decision of the 27<sup>th</sup> September 2011, did fail to have due regard to the equality issues required by Section 149(1)(a)(b)(c). I have reached that conclusion both by deciding what was required for “due regard” and on *Wednesbury* grounds. The cabinet did not consider a relevant matter, namely the nature and extent of the Equality training needs of volunteers which had emerged from the consultations with the various community groups, the DEBs and the EEAG, and the way in which the Defendant's officers envisaged that such training needs might be met by the Defendant.

130. Accordingly in my judgment the Claimants have succeeded in establishing that the decision of the 27<sup>th</sup> September 2011 was unlawful.

131. I will hear, as soon as can be arranged, arguments about what, if any, relief I should give to the Claimants, having regard to the various issues of which I have been appraised and any other issues with which I may have to deal.