R (Moseley) v LB Haringey [2014] UKSC 116: Supreme Court sets out content of duty to consult

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The Supreme Court's judgment in Moseley provides the definitive word on the content of the duty to consult. The Supreme Court has taken a much more robust approach than the Court of Appeal or High Court in recent cases and has imposed rigorous requirements on public authorities in terms of the information which they may now be obliged to provide to consultees.

However there is an important question still to be answered, which is how the outcome of Moseley translates across to other consultations, for example in the commercial context, where consultees may have specialist knowledge and / or where there is no specific underpinning statutory duty to consult. The answer to this question is not assisted by the difference in emphasis between Lord Wilson and Lord Reed in their concurring judgments – or by the fact that Lady Hale and Lord Clarke agreed with both judgments. It remains to be seen whether the lower courts will treat consultations arising from different facts than Moseley differently as a result of this divergence of view between the Justices.

Introduction

Despite the explosion in the public law caseload of the House of Lords and Supreme Court in the past few decades, the question of what the duty to consult requires had not previously reached the highest court. This question has now been answered by

R (Moseley) v LB Haringey [2014] UKSC 116. The answer given may well indicate that many other current and previously completed consultations did not comply with the law, particularly in relation to the information provided to consultees. However for the reasons set out below it may not be the final answer.

Factual Background

Mrs Moseley challenged the consultation which led to a decision by Haringey to adopt a scheme for Council Tax support requiring even the poorest residents to pay around 20% of their Council Tax bill, unless they were disabled people or pensioners. The decision affected around 36,000 households.

The fundamental problem with the consultation materials, as Lord Wilson made clear in his judgment after rigorous analysis of those materials, was that they failed to recognise that Haringey had a choice to make. The materials strongly suggested that Haringey were required to pass on the shortfall in Council Tax support funding created by the abolition of the national Council Tax Benefit scheme to the poorest residents of the borough. In fact it was open to Haringey to meet the shortfall in a number of ways – for example by requiring wealthier residents to pay more or by using its reserves.

These alternative options had been considered by Haringey's officers and rejected. However the existence of these options was not made known to consultees, nor were the reasons why they had been rejected made clear. To the contrary, the consultation materials stated 'This means that the introduction of a local Council Tax Reduction Scheme in Haringey will directly affect the assistance provided to anyone below pensionable age that currently involves council tax benefit'; see judgment of Lord Wilson at [17] (emphasis added). There was no suggestion here, or in numerous other places in the materials, that Haringey were left with any choice in the matter – although around 6 in 10 local authorities made different choices.

Approach to the duty to consult

Lord Wilson gave the following general guidance as to the requirements of a lawful consultation:

- Fairness is 'a protean concept, not susceptible of much generalised enlargement'; [24].

- However importantly, what fairness requires is determined by the purposes of consultation, also [24]. Drawing on *R (Osborn) v Parole Board* [2013] UKSC 61, Lord Wilson held that there are three purposes behind consultation. Firstly, consultation should lead to better decision-making, 'by ensuring that the decision-maker receives all relevant information and that it is properly tested'. Secondly, it should avoid the 'sense of injustice' that will be created if no consultation takes place. Thirdly, consultation should reflect 'the democratic principle at the heart of our society' – an important theme in the judgment of Lord Reed, see below.

- The well-known criteria put forward by Lord Justice Sedley as counsel in the case of *R v Brent London Borough Council ex p Gunning* and then adopted by the Court of Appeal in *R v North and East Devon Health Authority ex parte Coughlan* [2001] QB 213 were approved, see [25]. This means that consultation must: (i) take place at a 'formative stage', i.e. sufficiently early in the decision making to influence the

outcome, (ii) provide 'sufficient reasons for any proposal to permit of intelligent consideration and response', (iii) allow 'adequate time' for consideration and response and (iv) ensure that the 'product' is 'conscientiously taken into account' in the final decision.

The central issue in *Moseley* was the third of these criteria – whether Haringey had given 'sufficient reasons' for its proposals, and in particular whether in the circumstances they were obliged to tell consultees about the other options which had been considered and rejected. However before determining this question Lord Wilson made three further general points, see [26]-[28]:

- Firstly, the 'degree of specificity' which fairness requires in relation to consultation materials varies according to the identity of the consultees. Members of the public may require more specific and detailed information than technical experts.

- Secondly, the demands of fairness are likely to be greater 'when an authority contemplates depriving someone of an existing benefit or advantage than when the claimant is a bare applicant for a future benefit'.

- Thirdly, and critically in Mrs Moseley's case, fairness may require that 'interested persons be consulted not only upon the preferred option but also upon arguable yet discarded alternative options'. This of course was not what Haringey had done.

Outcome of the appeal

Applying the above principles, Lord Wilson reached the inevitable conclusion that the consultation was unfair and unlawful. At [29] he explained the principle reason why:

> *Those whom Haringey was primarily consulting were the most economically disadvantaged of its residents. Their income was already at a basic level and the effect of Haringey's proposed scheme would be to reduce it even below that level and thus in all likelihood to cause real hardship, while sparing its more prosperous residents from making any contribution to the shortfall in government funding. Fairness demanded that in the consultation document brief reference should be made to other ways of absorbing the shortfall and to the reasons why (unlike 58% of local authorities in England: see para 15 above) Haringey had concluded that they were unacceptable.*

The next question was whether, as the Court of Appeal had concluded, it did not matter that the consultation materials failed to refer to other options because these were 'reasonably obvious'. Lord Wilson dismissed this argument at [31] for two reasons:

- Even if the existence of other options was reasonably obvious it was not at all obvious why Haringey had rejected them.

- The Judges below had failed to give sufficient consideration to the terms of Haringey's consultation, which 'represented, as being an accomplished fact, that the shortfall in government funding would be met by a reduction in council tax support and that the only question was how, within that parameter, the burden should be distributed'. As such any assumed knowledge of the other options could not save the consultation 'from a verdict that it was unfair and therefore unlawful'.

Approach of Lord Reed

Lord Reed gave a short concurring judgment in which he expressed agreement with Lord Wilson's conclusions but preferred to emphasise *'the statutory context and purpose of the particular duty of consultation with which we are concerned'*, see [34]. Lord Reed held at [38] that in *Moseley* the purpose of consultation was *'not to ensure procedural fairness in the treatment of persons whose legally protected interests may be adversely affected, as the common law seeks to do. The purpose of this particular statutory duty to consult must, in my opinion, be to ensure public participation in the local authority's decision-making process'*.

At [39], Lord Reed held that *'Meaningful public participation in this particular decision-making process, in a context with which the general public cannot be expected to be familiar, requires that the consultees should be provided not only with information about the draft scheme, but also with an outline of the realistic alternatives, and an indication of the main reasons for the authority's adoption of the draft scheme'*. Lord Reed's conclusion at [42], like Lord Wilson, was that these requirements were not met by Haringey.

Lord Reed's focus on the purpose of the statutory duty to consult in this case would appear to mirror the third purpose of the common law duty to consult identified by Lord Wilson, being to promote public engagement and reflect 'the democratic principle at the heart of our society'. As such Lady Hale and Lord Clarke felt able to agree with both Lord Wilson and Lord Reed, see [44].

Comment

Three important matters arise immediately from the Supreme Court's judgment.

- Firstly, nowhere in the Supreme Court's judgment is there a requirement, seen in previous case law from the lower courts, that for the consultation to be unlawful is must have gone 'clearly and radically wrong'. The question in every case is simply whether what fairness requires in that particular context has been done – or (per Lord Reed) whether the purpose of any statutory duty to consult has been properly met.

- Secondly, there is a clear need for consultation to be accessible to the people at whom it is aimed. The courts should now be less willing to accept arguments by public authorities that issues which are not addressed properly or at all in the consultation materials should be 'obvious' to consultees and therefore did not need to be included. However this requirement may be diluted where the consultees could be expected to have access to specialist advice.

- Thirdly, Lord Wilson expressly held that the requirements of consultation are more strict when what is being proposed is a reduction in services or the withdrawal of a benefit. Given the extent of the cuts still to come in public services in the next few years the courts must apply rigorous scrutiny to the consultations which will proceed them to determine if they are fair.

It remains to be seen if the approaches of Lord Wilson and Lord Reed represent a distinction without a difference, or may affect the outcome of future cases. An early opportunity for the Supreme Court to resolve this question may arise if permission to appeal is granted in *(R) United Company Rusal Plc v London Metal Exchange Trust* [2014] EWCA 1271 (Civ).

In *Rusal*, the Court of Appeal held that it was not unlawful to fail to include within the scope of consultation options which had been considered but rejected by the public authority. In *Rusal*, Arden LJ held at [84] that *'The duty to provide sufficient information does not in general extend to providing options or information about proposals which it is not making unless there are very specific reasons for doing so'*. She held further at [90] that *'it would considerably increase the burden for consultant bodies if they had to consult on all the options which they were not advancing'*. A strict reading of Lord Wilson's judgment would suggest that in most if not all cases this is precisely what is now required – in that at least the gist of all potential options should be made known to consultees. It might be thought that this is a reasonable reflection of what a fair consultation should require.

Whether this was correct may depend on whether Lord Wilson's approach under the common law or Lord Reed's approach emphasising the statutory context is followed in that case. That is of course if the Supreme Court determines that it is appropriate for it to consider the question of consultation again so quickly after *Moseley*. If it does not, then the lower courts will need to grapple with which of the two approaches in *Moseley* should be followed in future cases – and whether this makes any difference to the outcome.

Ian Wise QC acted for Mrs Moseley and the previous claimant Mrs Stirling throughout the proceedings. Steve Broach was instructed as junior counsel for Mrs Stirling in the High Court (but was unavailable for the hearing).

The comments made in this case note are wholly personal and do not reflect the views of any other members of Monckton Chambers, its tenants or clients.

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