Neutral Citation Number: [2016] EWHC 945 (Admin)

Case No: CO/613/2016

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/04/2016

Before :

MR JUSTICE GILBART

- -

Between :

THE QUEEN(on the application of DAVID DILLNER)	**Claimant**
- and -	
SHEFFIELD CITY COUNCIL	**Defendant**
-and-	
AMEY HALLAM HIGHWAYS LIMITED	**Interested Party**

Charles Streeten (instructed by **Richard Buxton, Environmental and Public Law,** Solicitors of Cambridge) for the Claimant
Richard Honey **and** ***Katherine Barnes*** (instructed by ***Director of Legal and Governance, Sheffield City Council***) for the Defendant
Tim Buley and ***Matthew Fraser***, instructed by **Allen and Overy LLP**, Solicitors of London for the Interested Party

Hearing dates: 22nd-23rd March 2016

Approved Judgment

MR JUSTICE GILBART :

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INTRODUCTION

1 Sheffield is one of the great cities of Northern England. Parts of it lie within the Peak District, which abuts its western aspect. It lies where several rivers and streams (the Rivers Don, Sheaf, Loxley, Rivelin, and Porter, Meers and Owler Brooks) flow eastwards off the Pennines. Many of its roads and streets (and especially in the suburbs running westwards and south-westwards from the City Centre) have trees planted along them, in the verges or other land within the highway. Like many of the great cities of the north of England, it suffered during the deindustrialisation of the late 20th Century and the financial stringency endured by local authorities over the last 30 years or more. The upkeep of its roads and streets were not immune to the testing climate that created for local authorities, and a backlog of maintenance developed.

2 It is in the nature of highway trees which are well established that they are intrinsically attractive (save in unusual cases), but also that, if allowed to grow unchecked, they cause problems to the proper maintenance of the roads, verges and pavements in which they sit or which they abut. Thus, the loss of a tree may be seen as regrettable in visual terms, but it may be required if the highway is to be kept in repair. The background to this case concerns the way in which Sheffield City Council ("SCC") has sought to deal with the backlog of repairs, and in particular of how it has dealt with the presence of trees on its roads and streets. I say "background" because there is a real issue on whether this challenge actually engages consideration of that issue at all.

3 This is a "rolled up" hearing into a claim by the Claimant, who seeks thereby to challenge a resolution of a full Council meeting of the Defendant SCC, which the Claimant contends was a decision not to cease the felling by the Interested Party ("Amey") of trees within the public highway, in performance of its contract with the Defendant (SCC) to maintain and repair the highways within the SCC area. Mr Dillner and many others (but none are Claimants in the action) are concerned that many trees

have been felled which add to the attractiveness of their streets and their ambiance, and have other ecological and environmental value.

4 The challenge in these proceedings is to a resolution of what is alleged by the Claimant to have been a decision of SCC of 3rd February 2016, whereby the Claimant alleges that it refused to stop the felling.

5 The amended grounds on which the challenge is made are

Ground 1: that SCC have carried out an unfair and procedurally improper consultation, having given the legitimate expectation that the people of Sheffield would be consulted before the trees were felled;

Ground 2 (a): the felling of trees in the highway requires planning permission pursuant to s 55 and 57 of the *Town and Country Planning Act 1990* ("*TCPA 1990*") and that there was a consequent requirement to apply the procedure in the *Town and Country Planning (Environmental Impact Assessment) Regulations 2011;*

Ground 2(b); that there was a failure to carry out an Environmental Impact Assessment in accordance with the requirements of the *Environmental Assessment Directive 2011/92/EU*;

Ground 3: as a matter parasitic to Ground 2(a), SCC was under a duty under s 72 of *Town and Country Planning (Listed Buildings and Conservation Areas) Act 1990 ("LBCAA 1990")* to pay special attention to the desirability of preserving and enhancing the character of conservation areas within which trees are located before granting permission for the development. That applies also to the removal of trees, in reliance on *R (McLellan) v Lambeth LBC* [2014] EWHC 1964 (Admin).

6 The relief sought is

(a) a declaration that the consultation carried out via the Independent Tree Panel is unlawful;

(b) a declaration that the felling of trees in connection with the Streets Ahead project is an operation requiring planning permission pursuant to s 57 *TCPA 1990,* or alternatively that it is a project whose likely cumulative significant effects require assessment in accordance with *Directive 2011/92/EU,* or requires a screening opinion under Article 4 of the Directive;

(c) an injunction preventing the felling of further trees until SCC have carried out a fair and proper consultation and have complied with the requirement for the grant of planning permission and an environmental impact assessment, except where an appropriately qualified independent arboricultural expert has produced a report stating that the tree presents an immediate danger to the public and must be felled.

7 SCC and Amey, its contractor to whom it has entrusted the carrying out of its duties of maintenance and repair of the highways, aver that

(a) the decision of 3rd February 2016 was not that asserted by the Claimants. It related only to trees in one part of the City, and did not seek cessation of felling in direct terms;

(b) the Council did not take any decision to refuse to cease felling;

(c) the challenge to the "decision" of 3rd February 2016 is an impermissible challenge, intended to attack decisions taken long before to enter into the Streets Ahead programme;

(d) there was no duty to consult, nor had there been a promise which created a duty to consult. A consultation scheme was set up in November 2015 which was sufficient, and of which there had been no breach;

(e) neither the works nor the felling of trees amounted to development within the meaning of s 55 of *TCPA 1990*;

(f) the felling of the trees did not and does not require screening or assessment pursuant to the domestic Regulations or the Directive;

(g) there was no breach of s 72 of the *LBCAA 1990;*

(h) (By SCC) the proceedings had not been brought promptly, and permission to proceed should be refused on the grounds of delay.

8 I shall deal with the matter under the following heads

(a) The Streets Ahead Contract and the historical context

(b) The duties and powers of SCC as highway authority

(c) The facts of the works involving trees

(d) Governance within the Council

(e) Events germane to the consultation issue

(f) The history of the proceedings, including the claim for an injunction

(g) The case for the Claimant

(h) The cases for SCC and Amey

(i) Discussion

(j) Delay

(k) Granting of Relief

(l) Conclusions

9 As will become apparent, I am concerned that this claim was brought without any proper appreciation of the law relating to the repair and maintenance of highways, and that the Claimant and those who advise him have made no meaningful attempt to explore it.

10 Nothing in this Judgment seeks to doubt the value which many residents of Sheffield place upon the trees in the various highways, nor is it a matter for any criticism by the Court that they have sought to protect them. I shall return to that topic at the end of this Judgment.

A THE STREETS AHEAD CONTRACT AND THE HISTORICAL CONTEXT

11 The starting point for considering a challenge to the carrying out of works in the public highway, including the felling of trees, must be the statutory code which imposes duties on, and gives powers to, the highway authority in question. But it is helpful also to set the scene with the historical context.

12 I received evidence from, among others, Mr David Caulfield the Director of Development Services of the City Council. As his evidence showed, Sheffield like some other cities in the industrial north which had seen their fortunes thrive from the success of the heavy industries based within them, was hit very hard by the deindustrialisation of the 1970s and 1980s, in its case as the steel industry endured a substantial decline and heavy job losses. It had many priorities to address in its use of funds. Sheffield, like many other large authorities, has found the last several years difficult financially. Its ability to spend money on its highways (as on its other statutory services) was and is affected. Whether that was caused by the settlement it received from central Government being too stringent, or because it did not manage its finances as efficiently as it might have done, or a combination of the two, or some other cause, is not a matter of relevance. What matters is that it was unable to maintain its highways as it would have wished (and it is the highway authority for all roads in its area save for trunk roads and motorways. I was not informed whether any trunk roads pass through Sheffield, and if so whether they are subject to any agency arrangements with the Highways Agency).

13 His evidence shows that there are 2000 km of highways in the City, and along them lie many highway structures or installations such as 500 traffic signals and 68,000 streetlights. There are also 36,000 trees within the highway. By 2008 the effect of the financial stringency and the long term economic downturn in an industrial city had left the highway network in a poor condition. The reputation of the City was affected by the poor condition of its roads. It is Mr Caulfield's evidence, which was unchallenged, and rings true in any event, that work had to be done which would clear the backlog of maintenance, and then maintain it thereafter. Accordingly, the Council decided in 2008 to outsource its highway maintenance programme. As I shall set out in due course SCC was under a statutory duty under s 41 of the *Highways Act 1980* ("*HA 1980"*), enforceable in the courts, to maintain its highways.

14 In 2009 it entered into a PFI contract with the Interested Party Amey for the carrying out of its maintenance duties. That is a contract covering a 25 year term, by which Amey has assumed the majority of operational, legal and financial risks relating to highway maintenance. The contract is financed by the Department of Transport of HM Government, and by SCC through funding sourced from financial institutions. Although there were some parts of the Claimant's case which referred to points taken by those who support his cause about the matter being dealt with by a PFI contract with the private sector, it was no part of the case as argued before me that there was anything unlawful about the arrangement.

15 The contract and the programme it created, are called "Streets Ahead". Its purpose is to maintain the highway network so that it complies with the Council's statutory obligations, meets users' need for safety, cleanliness and general appearance, facilitates the use of all forms of transport links and improves customer satisfaction. It deals both with aspects of maintenance, and in some instances, schemes of improvement. I shall return to the history of the contract after identifying the statutory and common law context for the maintenance of highways.

B THE DUTIES AND POWERS OF SHEFFIELD CITY COUNCIL AS HIGHWAY AUTHORITY

16 I turn now to identifying the nature of the obligations resting on SCC as highway authority. *HA 1980* is a comprehensive code dealing with the role of highway authorities. It is most unfortunate that the Claimant's case never addressed this issue at all. The Claimant's case was lacking in any consideration of the legal concept of a highway, and of the relevant parts of the *HA 1980*, and some aspects of the common law which in my judgment are essential to understanding the legal issues at play.

17 A highway's purpose is to allow passage and repassage by the public; see for example Cairns LJ in *Rangeley v Midland Railway Co* [1868] 3 Ch. App 306, who called a highway

> "a dedication to the public of the occupation of the surface of the land for the purpose of passing and repassing."

It is thus unsurprising that the relevant legislation deals with the maintenance of the fabric of highways so that that role can be performed.

18 It is important to note the distinction between the maintenance of a highway, which is imposed as a duty on a highway authority, and its improvement, which is the subject of a power. The duty to "maintain" appears in section 41 of *HA 1980*:

> "41 (1) The authority who are for the time being the highway authority for a highway maintainable at the public expense are under a duty,……., to maintain the highway."

19 That is of course the modern day version of the duty traditionally cast on parishes to maintain the highways within them. At common law the inhabitants of a parish were bound to repair the highways within their area unless it could be shown that responsibility had attached to an individual or a corporate body by reason of tenure, inclosure or prescription (See *Halsbury's Laws of England* Vol 55 at [250]).

20 There is also a power to "improve" highways in section 62:

> "62 General power of improvement.
>
> (1)The provisions of this Part of this Act have effect for the purpose of empowering or requiring highway authorities and other persons to improve highways.

> (2)Without prejudice to the powers of improvement specifically conferred on highway authorities by the following provisions of this Part of this Act, any such authority may, subject to subsection (3) below, carry out, in relation to a highway maintainable at the public expense by them, any work (including the provision of equipment) for the improvement of the highway.
>
> (3)Notwithstanding subsection (2) above, but without prejudice to any enactment not contained in this Part of this Act, work of any of the following descriptions shall be carried out only under the powers specifically conferred by the following provisions of this Part of this Act, and not under this section—
>
> (a) the division of carriageways, provision of roundabouts and variation of the relative widths of carriageways and footways;
>
> (b) the construction of cycle tracks;
>
> (c) the provision of subways, refuges, pillars, walls, barriers, rails, fences or posts for the use or protection of persons using a highway;
>
> (d) the construction and reconstruction of bridges and alteration of level of highways;
>
> (e) the planting of trees, shrubs and other vegetation and laying out of grass verges;
>
> (f) the provision, maintenance, alteration, improvement or other dealing with cattle-grids, by-passes, gates and other works for use in connection with cattle-grids;
>
> (ff) the construction, maintenance and removal of road humps;
>
> (fg)the construction and removal of such traffic calming works as may be specially authorised by the Secretary of State under section 90G…..or prescribed by regulations made by him under section 90H……;
>
> (g) the execution of works for the purpose of draining a highway or of otherwise preventing surface water from flowing on to it;
>
> (h) the provision of barriers or other works for the purpose of affording to a highway protection against hazards of nature."

21 Sections 63-105 inclusive deal with specific types of improvement. Neither section 62 nor sections 63 to 105 identify restoration of the highway fabric as a work of improvement.

22 By section 328, "highway" is defined as follows

> "In this Act, except where the context otherwise requires, "highway" means the whole or a part of a highway other than a ferry or waterway."

23 By section 329, "maintenance" is defined thus:

> "maintenance" includes repair, and "maintain" and "maintainable" are to be construed accordingly"

whereas "improvement" is defined as

> "the doing of any act under powers conferred by Part V of this Act" (ss 62-105) "and includes the erection, maintenance, alteration and removal of traffic signs, and the freeing of a highway or road-ferry from tolls."

24 The trees in issue here, and any works associated with their removal, are within the highway, which includes its pavements and verges. It follows that, if a tree is a source of danger, or constitutes an obstruction to traffic (be it vehicular or pedestrian) or requires removal to enable repair to take place, the Highway Authority is under a duty to take measures to remove the source of danger or obstruction as a matter of statutory obligation. The importance of keeping the highway open to safe and unobstructed use can be seen from the existence of Part IX of the 1980 Act, which deals with "Lawful and Unlawful Interference with Highways and Streets," which is concerned to control the activities of others. It is helpful to note the powers given to a highway authority to remove trees under s 154:

> (1) Where a hedge, tree or shrub overhangs a highway or any other road or footpath to which the public has access so as to endanger or obstruct the passage of vehicles or pedestrians, or obstructs or interferes with the view of drivers of vehicles or the light from a public lamp, [or overhangs a highway so as to endanger or obstruct the passage of horse-riders,] a competent authority may, by notice either to the owner of the hedge, tree or shrub or to the occupier of the land on which it is growing, require him within 14 days from the date of service of the notice so to lop or cut it as to remove the cause of the danger, obstruction or interference……and "hedge, tree or shrub" includes vegetation of any description.
>
> (1A) ……..
>
> (2) Where it appears to a competent authority for any highway, or for any other road or footpath to which the public has access—
>
> (a) that any hedge, tree or shrub is dead, diseased, damaged or insecurely rooted, and
>
> (b) that by reason of its condition it, or part of it, is likely to cause danger by falling on the highway, road or footpath,
>
> the authority may, by notice either to the owner of the hedge, tree or shrub or to the occupier of the land on which it is situated, require him within 14 days from the date of service of the notice so to cut or fell it as to remove the likelihood of danger.
>
> (3) A person aggrieved by a requirement under subsection (1) or (2) above may appeal to a magistrates' court.
>
> (4) Subject to any order made on appeal, if a person on whom a notice is served under subsection (1) or (2) above fails to comply with it within the period specified in those subsections, the authority who served the notice may carry out the work required by the notice and recover the expenses reasonably incurred by them in so doing from the person in default."

25 The obstruction of the highway by a tree which adjoins it constitutes a public nuisance, which amounts to a cause of action at common law by anyone suffering injury or damage as a result: see *Clerk and Lindsell on Torts 21st Ed* [20-186] - [20-190]. There is a duty to take reasonable care with regard to the safety of users of the highway. If a highway authority plants (or retains) a tree which interferes with visibility for drivers, it is liable in damages for injuries caused as a result; see *Yetkin v Newham LBC* [2010] EWCA Civ 776 [2011] QB 827 at [33] per Smith LJ.

26 There are also sanctions enforceable by the courts against a highway authority that does not keep the highway properly maintained (and therefore in good repair given the terms of s 329 of *HA 1980).* If a highway is "out of repair" a member of the public can insist on its repair by way of a complaint to the magistrates' court under s 56 of the Act. Until the *Highways Act 1959* (which preceded *HA 1980*) that duty had been enforceable on indictment. Once the lack of repair is established, the highway authority must put the highway in good repair. The section sets out a procedure for determining the timescale for the works. It is not a defence open to a Highway Authority that the trees have landscape, aesthetic or ecological value. It has long been the law that the advantage to the neighbourhood or otherwise of the obstruction to a highway does not constitute a defence: see *AG v. Wilcox* [1938] Ch 934 at 940. It is no defence to show that, although the act complained of is a nuisance with regard to the highway, it is in other respects beneficial to the public. It is wrong to seek to balance real or supposed advantages against encroachments upon public rights: see Fletcher Moulton LJ in *Denaby and Cadeby Main Collieries Ltd v Anson* [1911] 1 KB 171 at 205 (a case about waterways, but the principles on this issue are the same).

27 If the Claimant shows that the effect of the disrepair was to cause a danger, then by s 58(1) of the Act (formerly contained in the *Highways (Miscellaneous Provisions) Act 1961*) the burden is on the authority to show that it

> (a) "had taken such care as in all the circumstances was reasonably required to secure that the part of the highway to which the action relates was not dangerous for traffic"

28 In dealing with that issue, section 58(2) sets out the relevant matters:

> "(2) For the purposes of a defence under subsection (1) above, the court shall in particular have regard to the following matters:—
> (b) the character of the highway, and the traffic which was reasonably to be expected to use it;
> (c) the standard of maintenance appropriate for a highway of that character and used by such traffic;
> (d) the state of repair in which a reasonable person would have expected to find the highway;
> (e) whether the highway authority knew, or could reasonably have been expected to know, that the condition of the part of the highway to which the action relates was likely to cause danger to users of the highway;
> (f) where the highway authority could not reasonably have been expected to repair that part of the highway before the cause of action arose, what warning notices of its condition had been displayed."

29 It will be noted that s 58(2) does not provide a defence that removal of the danger would harm the visual appearance of the highway in question. That reflects a point of importance in these proceedings. These streets are highways, and the starting point for considering whether a tree within a highway should be retained or removed is its effect or otherwise on the role of that street as a highway – i.e. to facilitate passage and repassage, not to facilitate the creation, preservation or enhancement of an attractive environment.

30 Lastly in this context, it is worth reflecting on the reasons why there is a duty to repair, as opposed to a power to improve. The issue of repair can only arise in the case of highways that already exist, whereas the power to improve involves creating that which does not already exist. Given the fact that a highway is for the passage and repassage of users, it is right that a duty exists to see to it that what exists on the ground can be used safely. A highway authority can choose whether to carry out works of improvement, but it cannot choose whether or not to carry out repairs.

C THE FACTS OF THE WORKS INVOLVING TREES

31 Having set the scene for the nature of the obligations which fall upon the SCC as highway authority, I return to the contract and its history. As Mr Caulfield records, the typical backlog maintenance

> "comprise (d), as necessary and appropriate in every location, resurfacing parts of footways and carriageways, repairs to highways structures, replacing streetlights and some traffic signals and signs, and backlog maintenance of highway trees including removing and replacing a small proportion of the highway tree stock where strictly necessary……..routine maintenance of the highway network will continue, including the routine pruning and other maintenance of highway trees." [23].

32 Mr Caulfield's evidence was that the routine maintenance of trees would require the replacement of some on a 5 year cycle. His view is that from a highway stock of some 36,000, some would die or become diseased each year and require replacement. About 75% of the trees are mature or over mature (a figure established by a 2007 survey by Consultants), thus leading to an estimate that about 200 will die each year, which will have to be removed and replaced. Some of the trees on the highways would be pruned, crown-lifted or otherwise maintained, but some will die and require replacement. The contract requires replacement of such trees as are removed. Some will be removed where required to carry out works of highway maintenance.

33 Mr Caulfield referred to a set of 6 criteria against which the trees were to be assessed, known as the "6 Ds". Those criteria are

(a) Dangerous; i.e. that it has a structural fault which means that it is likely to fall or fail;

(b) Dead, and therefore likely to fall into the road or on to private property;

(c) Diseased; i.e. as assessed by a qualified arboriculturalist as having a specific and identified disease that will lead to its death in a short period of time. The effect on safety would be addressed;

(d) Dying; i.e. that it has a fatal disease or has suffered vehicle strike;

(e) Damaging: i.e. that as assessed by Amey and verified by surveyors and highway engineers from SCC, it causes significant damage to a footway, the road surface or underground cables or pipes, private property, or is pushing kerbs out into the road, which causes hazard to motorists or cyclists. The damage must be such that it cannot be rectified by using reasonably practicable engineering solutions such as flexible paving materials, root removal, raising the footpath level or the use of thinner and/or smaller kerbs;

(f) Discriminatory: i.e. as assessed by Amey and verified by surveyors and highway engineers from SCC, it obstructs the footway so as to prevent reasonable usage by all footway users including the disabled, the visually impaired, and those with pushchairs. A width of 1500 mm is the minimum acceptable under most circumstances. The absolute minimum is 1000 mm measured at all points between footway level and a point 2.3 m above it.

34 According to Mr Caulfield, a tree would only be identified for removal if there was no alternative to doing so. Some trees would fail more than one criterion. Any removal had to be approved by the Council.

35 Some concern has been expressed by objectors to the scheme that, in some cases, a street has lost all of its trees. Some realism is required. Trees are not immortal, and they have a life cycle. It cannot be surprising that trees of the same species and of similar ages on a street will reach the point at which they may require felling at about the same time.

36 The replacement trees were and will be extra heavy standards, of around 8-10 years in age, with a girth of 14-16 cm and 3 metres tall depending on species. Mr Caulfield explained that if they were any smaller, they would be more likely to be damaged by weather or vandalism, and if any larger, they would struggle to thrive and root quickly. Although it was part of Mr Dillner's case (and that of his witnesses) to complain that the replacement trees were not replacement of "like for like" such a course is plainly unrealistic, and is not supported by the Claimant's own expert witness Mr Crane who offers no criticism of the choice of trees used for replacement. As a general rule, the replacement trees were put back in the same spot, so that old roots have to be ground out to provide the room. Sometimes a tree may have to be placed nearby because of the presence of roots, or statutory undertakers' equipment or the need to avoid the spread of disease, or because the street is too cluttered.

37 There was no challenge before me to any of the criteria as such, although Mr Streeten suggested that they could be more rounded, and that there was concern about their application. However it must be noted that those 6 criteria set tests which deal with the issues obviously arising in the context of a duty to maintain the highway, including as it does the keeping of the highway in repair in the context of a policy to avoid the felling of trees where possible.

38 Given the claims by the Claimant and other objectors that SCC and Amey had not addressed important questions about the use of alternative solutions to save trees, and about the topics of ecology, air pollution and the environment, it is necessary to refer to an exhibit produced by the claimant (DD8), which is the Five Year Tree Management

Strategy produced by SCC and Amey for the Streets Ahead programme. Although produced by the Claimant, that was only for the purposes of considering what it said about the age profile of trees in Sheffield. The Claimant did not, but should have, drawn the Court's attention to the rest of the document, because it sets out the SCC/Amey approach to many important issues, including some where the case for the Claimant is that they had had no regard to them. It is also to be noted that the Claimant and his Counsel, in developing their case on what they said were the lacunae in the SCC/Amey approach never referred me to it. It is an important document which requires consideration.

39 It described the approach of Streets Ahead to delivering the Tree Management Service. It included [1.0 Introduction] as its "strategic goals" (I have numbered them so as to make subsequent reference easier);

1) maximise potential canopy cover through species selection, good establishment and good arboricultural management;

2) establish a sustainable tree stock through improved planting design and appropriate management;

3) minimise future maintenance costs through species selection and appropriate management;

4) establish a resilient tree stock through species diversity and species selection;

5) maintain Sheffield's tree heritage by protecting and conserving where appropriate;

6) increase biodiversity through species selection and protection of habitats ensure a safe tree stock through good management and protection;

7) improve compatibility with environment through holistic highway design and management;

8) improve public relationship with highway trees through positive engagement and good management;

9) improve understanding of benefits of urban trees through communications and events;

10) improve function of highway trees through innovative design strategy."

40 It records as an aim [1.2]

> "to ensure the street tree population is maintained and improved throughout the contract term to create a legacy of healthy diverse tree stock in terms of age, profile and species, reducing the risk of monoculture whilst ensuring the safety of the highway user and adjacent properties….."

41 At [2.0]-[2.7] it sets out its proposals for Street Tree Maintenance, including inspections, planned operational activities, reactive operational activities (which relate to trees reports as dangerous or requiring treatment and trees constituting a hazard),

street tree treatments (i.e. to maintain them and keep them in good health), including pruning, crown lifting, crown thinning, crown reduction, pollarding, general pruning, young tree maintenance, epicormic removal (i.e. shoots growing out from under the bark), disease control, frequency of data collection, and data storage.

42 At [3.0] – [3.6] it deals with Tree Replacements. Having set out the 6 Ds criteria, it goes on:

> "Where a street tree meets one or more criteria a further assessment is carried out to decide whether the tree should be removed and replaced.
>
> All of the trees that are identified as meeting one or more…criteria are initially assess by tree inspectors from Amey. This is then reviewed to decide whether a tree can remain in situ or needs to be recommended for replacement.
>
> Factors in coming to a recommendation include the impact of disease on the future health of a tree and whether sensitive engineering solutions can rectify damage to a footway or carriageway....."

43 At [3.2] it set out "Engineering Solutions," stating that

> "as part of our commitment to only removing a street tree as a last resort, whenever a tree is found to be either damaging or discriminatory, we consider a list of engineering solutions to establish whether any of these can be employed to retain the tree in situ. Approval……..must be sought from the Council.
>
> These solutions may include
>
> <u>Engineering Solutions</u>
>
> (It then listed 6 potential solutions, including the use of thinner profile kerbs, excavation for root examination, ramping/reprofiling, flexible paving/surfacing, removal of displaced kerbs and filling in of pavement cracks.)
>
> <u>Alternative Solutions</u>
>
> (It then listed 8 potential solutions, including root pruning, root shaving, root barriers and guidance panels, tree growth retardant, the creation of larger tree pits, heavy tree crown reduction or pollarding to stunt tree growth, and retention of dead, dying, dangerous and diseased trees for their habitat value.)
>
> <u>Other solutions</u>"

(It listed 11 others, which related to the altering of line markings, the carriageway kerb lines, footpath deviations, geogrids, use of fill instead of a sealed surface, reduction in road widths and conversion of footways to verges, road closures, changes to contract specifications, creation of new footways or the closure of old ones. However these other solutions would require funding outside the contract. It will be noted that in most cases they involved changes to the highway line, or closure of parts of the highway either altogether or to types of user.)

44 At [3.4] it addressed the choice of tree species, which would be chosen so as to ensure that a newly planted tree could thrive in its new location and reach maturity, as that would be key to maximising environmental benefits such as carbon sequestration and pollution control. All species had been chosen with suitability and sustainability in mind and to minimise conflict with structures and people. It listed primary species (16) for narrow verges and tree pits, 8 native species for wide grass verges where root and crown development are not restricted, and 9 Arboretum/Specimen species where those wide grass verges would be in a prominent position.

45 At [3.5] it addressed Air Quality and the contribution trees make in terms of carbon sequestration, particulate pollution capture and other environmental benefits. It cited academic studies on the contribution by trees to management of PM_{10} levels, concluding that while they made a contribution, other measures in terms of an Air Quality Action Plan were required.

46 At [3.6] it dealt with the protection of nesting birds and other wildlife or protected species. Staff would receive ecological awareness training, including that relating to bats and to arboriculture. No works would be permitted to proceed where protected species had been identified, save for cases where the appropriate licences and permits had been obtained after consultation with the Wildlife Trust and Natural England.

47 According to Mr Caulfield's evidence, SCC has always taken the view that the Streets Ahead work would not have significant adverse environmental effects. But that is not to say that SCC did not address the topic. As the extracts from the document above show, environmental impact (to use a broad term) was a matter taken into account in the Programme. The Department of Transport (i.e. the national Ministry) required the Council to conduct a Cost benefit appraisal called a NATA (New Approach to Appraisal). That included a standard table for completion in which various aspects of the proposal, including effects on the environment, were assessed. In addition, the part of the contract dealing with environmental management required that appropriately qualified expert staff from Amey should undertake what was called an "Environmental Scoping Assessment" ("ESA") for each of the 108 zones of work, which then formed part of Amey's Environmental Management Plan.

48 Those ESAs provided a systematic consideration of the potential environmental effects of the work, including that in relation to trees, and also considered whether a screening opinion under the EIA Regulations (of which more below) was required. The Court was provided with an example of an assessment. It is a very thorough document, which I need not recite in full here. However its contents can be summarised.

(a) It described the works as

- "Street lighting repairs, maintenance and the installation of new equipment
- Drainage repairs and maintenance
- Repairs to kerbs, edgings and channels
- Footway and carriageway repairs (including re-surfacing works)
- De-vegetation (potentially including tree removals)"

(b) It included maps showing the location of the zone, and plans showing which streets were affected.

(c) It dealt with the identification of potential environmental effects, in the form of

(i) Air Quality

(ii) Archaeology and Cultural Heritage

(iii) Landscape

(iv) Ecology and Nature Conservation

(v) Geology, Soils and Contaminated Land

(vi) Materials Use

(vii) Noise and Vibration

(viii) Effects on All Travellers

(ix) Effects on the Community and Private Assets

(x) Drainage and the Water Environment

(xi) Energy and Lighting

49 Under each of the above headings, it set out

(i) The assessment methodology

(ii) The key baseline conditions

(iii) The key construction activities

(iv) The temporary effects

(v) The permanent effects

(vi) The mitigation or control measures

(vii) Whether further action or assessment was required

50 The "key baseline conditions" sections included lists of relevant existing features. Thus in the case of Archaeology and Cultural Heritage it listed all the listed buildings within 300 metres of the zone, in the case of Ecology and Nature Conservation it showed all ecologically designated sites, and recorded all known records of bats, water voles and newts within 2 kilometres of the zone.

51 The Ecology and Nature Conservation Section noted under "temporary effects" that habitats may experience temporary disruption during the works period, and noted as a permanent effect that there was a potential for loss of biodiversity if all mitigation measures were not adhered to. That section devoted considerable space to the mitigation and control measures, relating to

(a) Restricting vegetation clearance (including tree removals) to outside of the bird nesting season of March to August. If not possible, the vegetation was to be thoroughly examined before removals commenced. If any nesting birds were found, work was to stop immediately, and advice taken.

(b) Every tree removed was to be replaced. The arboriculturalist team should advise on the most appropriate species and location for replanting;

(c) Tree Preservation Orders should be checked before any felling commenced;

(d) Precautions were to be taken to deal with invasive species;

(e) If any protected species were identified during construction, work must cease immediately;

(f) Staff were to be instructed on precautions to deal with invasive and protected species;

(g) An environmental site visit was to be undertaken before works commenced to ensure that all environmental measures had been identified and mitigated for appropriately. That site visit was to include the inspection of all trees to be felled, and an assessment of their bat roost potential. If a bat roost was discovered, there would be further survey works and mitigation measures. Bat survey works could not normally be conducted before mid-April or after September, when temperatures are consistently above 8 degrees C. No works could commence until the environmental team confirmed that it was safe to do so.

52 The assessment allowed for the assessor to say whether or not the project required a Screening Opinion under the EIA Regulations.

53 I have noted that Mr Caulfield's evidence is that the view of SCC was and is that the Streets Ahead work would not be likely to have significant adverse environmental effects.

54 Works under the Streets Ahead contract started in August 2012. Works of repair have been carried out at various locations in the City. While it is correct that the works carried out by Amey have included some improvements in some locations, in the sense used in s 62-105 of the *HA* 1980, there was no evidence placed before me that any trees in issue had been affected by anything other than those works properly described as works of repair. What was said by Mr Streeten for the Claimant was that a repair may be so substantial as to amount to an improvement. For example in that context I was asked to consider a schedule of works in Ladysmith Avenue and Edgebrook Road, which were cited by the Claimant as an example of the works and removal of trees to which objection was taken, which the Claimant gave as an example of works of improvement. In each case, a tree is described in the schedule prepared by Amey and SCC as "damaging". The damage is described, consisting in each case of damage to kerbs or rooting into the carriageway. In each case where removal is recommended, that decision is made after consideration of whether the damage can be repaired without removal of the tree, and then the replacement planting is identified. In each case, the removal of the tree is justified by reasons relating to the need to repair the highway. None of it amounts to an "improvement" in the sense used in the *HA 1980*.

55 As is apparent from the terms of s 329 of *HA 1980*, it is impossible to regard those works as anything other than works of maintenance as defined in the Act. If there be an issue, it is only on whether there are differing views on (a) whether the highway needs repair and (b) whether it was necessary for the purposes of maintenance or repair to remove the tree in question.

56 As at February 2016, 3670 trees had been replaced, and another 1194 had been identified as requiring replacement. Mr Caulfield's estimate is that another 750 to 1800 trees require replacement. The 2007 survey had also found that of the 36,000 trees, only 5% were classified as being in a young age group. 10,000 required intervention, and it reported that if a programme of sustainable replacement did not commence, then there would be a catastrophic decline in tree numbers.

57 In some cases, it is said by the Claimant, with some force, that the numbers of trees had a substantial visual and environmental impact on a street, if all or a significant number of its trees were reduced or felled.

58 I have no doubt whatever that the removal of trees was a matter of concern to local residents. A tree which is mature, or over mature, and is required for removal for a proper purpose related to repair, can still be a most attractive tree which adds to the ambiance of the locality, and to the pleasure which its residents take in the area's appearance. But of course, if one is considering the effect of its removal, one must also take into account the effect of its replacement (if any).

59 I have evidence from a number of residents which takes objection to felling on the grounds that (in summary)

(a) the tree or trees concerned are or were attractive, and their loss detracted from the amenities of the area;

(b) the tree or trees concerned was valuable environmentally because it is contended that trees assist in reducing levels of airborne pollutants;

(c) the replacement tree or trees were far smaller than that or those which had been removed;

(d) in some cases, that the trees were not unhealthy or dangerous;

(e) in some cases that other methods short of felling could have been used.

60 Looking at the objections raised, they are of differing relevance in the context of the duties placed on the Highway Authority under *HA 1980*. In the case of (a) (attractiveness) (b) (ecological or environmental value) and (c) (the inadequacy of the replacement), none are relevant to the tests in the Act, nor detract from any of the 6 "D" criteria. In the case of (d) and (e), they were relevant to the decisions about whether to cut down particular trees, but not to the principle of the Streets Ahead scheme, nor are they capable of calling it into question. In the case of (c) the Highway Authority was not under a duty to replace any trees, but it had elected to do so. In the real world, replacements were bound to be much smaller than any mature trees which had to be removed.

61 Given the nature of the statutory duty imposed on SCC by the *HA 1980,* it is necessary to consider the categories of evidence put before the Court by the Claimant about the merits of the works and of the removal of trees in particular;

(a) there was a great deal of evidence which complained that trees were removed, which had an adverse effect on the characteristics of the highways concerned and of their areas;

(b) there were complaints that SCC had failed to consider the advantages in ecological, visual, public health and similar terms of tree removal, in the sense that there was a complaint that the removal of trees should not have been contemplated in the generality;

(c) there was evidence suggesting that there are techniques to save trees, such as the use of flexible paving, or the use of less invasive tools when carrying out works;

(d) there was evidence that the replacement trees were, as a generality, too small;

(e) there was some evidence challenging the removal of particular trees.

62 I shall now seek to summarise the relevant evidence on those matters. However in doing so, I do not intend to give more than the briefest summary of evidence which is addressed to the proposition that it is unacceptable in principle to consider the removal of trees from the highway, which is in truth an approach which cannot be reconciled with the nature of the statutory duty imposed on SCC by *HA 1980*. I shall also not spend time at this point on evidence which sought to assert that the EIA Directive applied. Save only for the question of whether the scheme for removal and replacement would have significant adverse environmental effects, which is a matter of law to which I shall turn in due course, and is not a matter for evidence.

63 Evidence concerning the issue of consultation will be dealt with in another section of this Judgment.

64 An arboriculturalist, Mr Brian Crane, Ch Arbor, Ch Hort, was instructed by the Sheffield Trees Action Group. His evidence was as follows;

(a) trees were of landscape and environmental value. They also assisted in the storage of carbon, in the sequestration of carbon, the removal of various toxic pollutants (such as PM_{10} s, $PM_{2.5}$ s, ozone, carbon monoxide, nitrogen dioxide and sulphur dioxide, and they assisted in restricting storm water runoff;

(b) trees had health, sustainability and ecology benefits, and helped reduce energy use in buildings;

(c) the Streets Ahead programme failed to address those matters. It had failed to address the loss of the eco-system and of the spiritual enrichment (sic) which trees provide. It was also wrong to regard maturity as an indicator that removal should occur;

(d) he inspected 44 trees. In his judgment, any kerb disturbances could be rectified by minor works. He saw comparatively little disruption to

> footpaths, and no damage which would justify removal of the trees he saw. The trees which he inspected were safe and had useful life expectancies. The programme of SCC and Amey was likely to result in the unnecessary removal of street trees with long safe useful life expectancies.

65 Albeit at greater length, his approach to trees was echoed by a resident, Mr Robin Ridley, although much of his evidence is taken up with whether the contract involved "improvement" which went beyond "maintenance," although his evidence does not do so in the context of the use of those terms in the *HA* 1980. He correctly pointed out that some of the contract works did involve improvement but that does not help on whether those parts which involved the works relating to trees did so. He also addressed the issue of the need for an environmental assessment. He did give some evidence about one tree, to which I shall return below.

66 Mr Crane's evidence about the life expectancies of trees and the extent of damage in the 44 trees he saw, is of course relevant to issues arising under the Act, but not to the existence or nature of the duty under s 41 *HA 1980*. As to the other matters he raised, it goes without saying that the removal of trees will have environmental effects, and no one seriously disputed that in very many cases the environmental effects of removal would be adverse until the replacement trees became established. (That leaves the issue of whether the effects were "significant") But the concerns he raised about such matters cannot affect the issues germane to the scope or exercise of the duty under the *HA 1980*. In the context of this case, they are only relevant if the Claimant is right in his contention that works of "maintenance" as defined in *HA 1980* do not include repairs of the kind carried out here.

67 Mr Crane offered no evidence or opinion on the question of whether the replacement trees were adequate or inadequate.

68 A great deal of evidence was called by the Claimant to establish the propositions set out at paragraphs 59(a) to (d) above. As I have already indicated, I accept that the loss of trees in many streets was felt keenly, and that in some cases it will have had an adverse environmental effect, subject of course to consideration of the effect of the replacement. I accept also that the Claimant and others who support his case hold to the strong view that the maintenance of the streets should not include the removal of well established trees, save possibly for cases where there is an imminent and obvious danger. There was also evidence before me (e.g. from Ms Ann Anderson of Dore) that some found the loss of trees to felling very upsetting.

69 It is right that I should refer to some streets where the felling of trees has been discussed in more detail. Mr Dillner's evidence refers to the trees felled in Humphrey Road, Greenhill in southern Sheffield. 13 trees were removed from this residential street. In each case, the reason given was that there was "damage to surface." A photograph shows that the effect of the removal had a substantial adverse effect on the appearance of the street. However there is no evidence before the court from the Claimant which deals with whether the removal was required or not, nor with whether the contention that there was damage to the surface was justified. It must also be noted that the adverse effect of the removal will be tempered, albeit not vitiated in the eyes of objectors, when the replacement trees have been planted and become established. But I accept that for a period of at least a few years, the effect will be adverse.

70 In the case of Rustlings Road, Endcliffe which lies in the south-western part of the City, it was proposed to remove 11 Lime Trees on the basis that they caused damage to adjoining structures, out of 30 trees in all. SCC informed residents that it would be planting replacements, plus another 9 trees to replace others which had been removed before but not replaced. The letter sent to residents identified the process by which the trees had been assessed, and the consideration given to engineering solutions which would avoid the felling of trees. Although the witness Dr Shetty complains that the trees were healthy, her evidence never addresses the issue of whether the proposed reason was justified. Ms Jill Seed, a resident of Rustlings Road, gives evidence about her concerns. While she does not address that issue herself, she refers to material put out by a campaign group called SORT (Save Our Rustlings Trees) in late June 2015, after a petition signed by more than 8.000 people had been submitted to SCC objecting to the felling of trees. That material contains a great deal of material about the principle of felling trees, and about the need for an overall strategy, and about alternative solutions in the generality, but very little about the trees in Rustlings Road. However it did say that one sycamore had been inspected, and that it showed no signs of disease, was not dying and was structurally sound.

71 Mr Caulfield's evidence for the City Council is that after the representations and objections had been made, the excavations carried out in connection with the works showed that 3 of the 11 could be retained. However of the other 8, one was affected by honey fungus to a degree which prevents the tree being safely retained in the highway, one is leaning into the highway and has suffered at least one vehicle strike and is considered dangerous. As to the other 6, his evidence is that the damage to the highway or surrounding third party infrastructure cannot be repaired within the scope of legislation and guidance on accessibility.

72 Professor Fionn Stevenson, who is Head of the School of Architecture at the University of Sheffield, gives evidence for the Claimant. She has of course much expertise in buildings and development. She did not claim expertise in either arboriculture or highway engineering. She was concerned at first about felling in Carfield Road, Heeley which is a little to the east of the Endcliffe Area. She sent an email to her local Councillors which objected to the proposed removal of trees on the grounds that they either caused damage or an obstruction. She disagreed with that assessment, considering that where tree roots had lifted the pavement, the matter could be dealt with by tarmacadam, and disagreed that damage had been caused. She also considered that there remained room for people to pass by. She also took points on the health benefits of retaining trees. She received a response that trees would only be removed if they were damaged, diseased, malformed or causing an obstruction, and that every tree would be inspected by a tree specialist before any recommendation was made. Professor Stevenson was also concerned more widely about trees in the Meerbrook Area.

73 In the case of Devonshire Road, Dore which lies in the south west, Ms Anderson raised issues about the classification of its trees. She complains that a tree taken down in December was not dead but decaying, and that others were also reclassified to being "dangerous." (She also raises points about assurances given, and the conducting of a survey, to which that point is very relevant).

74 Mr Robin Ridley, who lives in Crookes to the west of the City Centre, refers to a tree in Western Road, Crookes. He says that an arboriculturalist was instructed by him and

others in connection with the tree in question. He reported that the tree, while it had been maintained until the 1960s, "presented a management challenge." It had suffered wind damage, which led to a moderate sized limb being detached from the crown which had the potential to cause major harm had it fallen and hit someone. He thought that it was unnecessary to remove the tree, and that it could be retained were it to be pruned by 3 metres all round (i.e. by the technique of crown reduction), which would be a cheaper option than removal and felling. He considered that it had a life expectancy of over 40 years. Mr Caulfield for SCC gives evidence that the tree in question was not regarded as healthy by the Amey arboricultural officers. It had lost limbs in the past because of their dangerous condition. On 9th January 2015 the Police had reported that it was in a dangerous condition. The limb failures then apparent were large enough to destabilise the tree. Crown reduction had been carried out on 29th February 2016, and the condition of the tree would continue to be monitored. It follows that in the case of this tree, SCC had done as had been suggested, and had reduced the crown. It was not currently being removed, but would be monitored. This evidence thus shows that SCC had second thoughts when it considered the arboriculturalist's report, and carried out the works he recommended. It is thus an example of the acceptance by Mr Ridley's arboriculturalist that work had to be done to the tree, and also of SCC responding to concerns about particular trees where the evidence permitted a different course.

75 There is a great deal of evidence (including that from Dr Shetty) that many people in parts of Sheffield were very concerned about the removal of trees. I reiterate that it is quite clear that the effect of the Streets Ahead programme has had and will have adverse environmental effects where a number of mature trees have been removed from a street (again subject to the effect of replacement). But while the Claimant's case is strong on pointing out the extent of those effects, on the benefits which trees bring, and on the importance of avoiding removal if possible, including the use of alternative techniques of paving, it is much less substantial on challenging the factual and evidential basis for felling the trees in question. I suspect that is because some of those mounting and advising the campaign against removal had not got to grips with the effect of the duties under the *HA 1980,* and saw the idea of the removal of trees as inherently objectionable, and as unlawful.

76 But there is some evidence brought forward by Ms Seed and Professor Stevenson that I shall treat as showing that there were genuine admissible objections to the removal of trees which required consideration by SCC. Ms Anderson's evidence does not show that the removals were unjustified, but questions whether the classifications were done in good faith. I did not discern any evidence in the other witnesses' evidence which grappled with the actuality of the task in hand. Mr Ridley's evidence, and that of his arboriculturalist, give evidence which actually supports the carrying out of substantial works to the tree involved. Where they differed from the Amey approach was that initially Amey proposed removal altogether. That evidence cannot undercut the existence of the Streets Ahead programme, or the use of the 6 Ds criteria- indeed if anything it suggests that the criteria were appropriate. Its relevance is that it suggests that some decisions were being made to remove trees when a lesser step would have been sufficient.

77 No-one challenged the requirement of SCC to make arrangements for the maintenance of its highways, although as noted above the Claimant and his advisers seem not to have addressed the scope or effects of that duty. What matters in the context of the

relevant statutory code is how the programme of maintenance devised was and is translated on the ground into decisions about the retention of particular trees or groups of trees. Broad generalisations, or, as in Mr Ridley's case, quotations culled from the internet or academic papers, did not advance the case for the Claimant at all on that issue. For considerations of the intrinsic value of trees, while important in considering the value of the retention or planting of trees, do not assist in addressing the scope or performance of the duty to maintain (and therefore repair) under the 1980 Act. A great deal of the evidence for the Claimant, and in particular much of that of Mr Ridley and of Mr Crane, was irrelevant for that reason.

78 By contrast Mr Caulfield gave evidence both about the general approach to considerations relating to trees, but also about the specifics of the particular trees referred to in evidence by those supporting the Claimant.

79 I accept that arguments on whether the test in the *HA 1980* was being properly applied, or on the application of the 6 criteria, were proper matters for objection to SCC. However it is not for this Court to intervene where SCC has formed a different view from an objector about the merits of removing a tree or a number of trees, provided that SCC applied its mind to the appropriate tests. It is not the function of this court to substitute its own view of the merits for that of the decision maker. There is also the issue of law as to whether the removal and replacement of trees required an assessment under the EIA Directive, and/or required the grant of planning permission. It is to be noted also that the Claimant argues that there has been a failure to carry out or adhere to the consultation that it is contended was either required or promised by SCC.

80 I shall also address the history of the dealings between SCC and the public in the affected areas. But it is necessary first to understand the governance of the City Council.

D GOVERNANCE WITHIN THE COUNCIL

81 Stephen George Eccleston, who is Assistant Director of Legal Services for SCC, gave evidence explaining the governance at SCC. Inevitably, part of it included accounts of the legal framework.

82 The traditional model of local government, regulated by the *Local Government Act 1972* and related legislation was of a full Council having the power to delegate decisions to Committees, and in some cases to designated officers. Provisions usually existed for members to require that a matter not be delegated, but be dealt with by the relevant Committee, or by the full Council. In some cases there were provisions providing for review of delegated decisions being made at the level of the relevant Committee or of the full Council. The Leader of the Council (i.e. s/he whose party held the majority of seats, or if there was no majority, s/he who obtained sufficient support from a coalition of parties or members to act as Leader). The membership of Committees, and the allegiances of their Chairmen/women reflected the numbers of Councillors elected for particular parties.

83 Under that model, the power to make a decision rested with the full Council unless delegated expressly.

84 However there have now been substantial changes. *The Local Government Act 2000* ("*LGA 2000*"), and now the Localism *Act 2011* ("*LA 2011*") have effected change. By section 21 of *LA 2011*, which section is entitled "New arrangements with respect to governance of English local authorities" Schedule 2 (new Part 1A of, including Schedule A1 to *LGA 2000*) has effect. I shall therefore refer to the *LGA 2000* in its amended form.

85 Section 9B of *LGA 2000* provides:

"9B Permitted forms of governance for local authorities in England

(1) A local authority must operate—
(a) executive arrangements,
(b) a committee system, or
(c) prescribed arrangements.

(2) Executive arrangements must conform with any provisions made by or under this Part which relate to such arrangements (see, in particular, Chapter 2)"
(3)……..
(4)……..
"executive arrangements" means arrangements by a local authority—
(a) for and in connection with the creation and operation of an executive of the authority, and
(b) under which certain functions of the authority are the responsibility of the executive
……."

86 SCC has elected to follow the "executive arrangements" route. By s 9C of *LGA 2000*, any function of the local authority which is not specified in regulations under subsection (3) is to be the responsibility of an executive of the authority under executive arrangements. An executive can consist of either a Mayor and cabinet executive (an elected mayor and two or more councillors appointed by the elected mayor), or two or more councillors appointed by the executive leader: see section 9C (1) and (3) *LGA 2000*. Sheffield has opted for the latter course, which is described in the Act as "a leader and cabinet executive."

87 The effect of sections 9DA (2) and (3) is that it is the executive who discharges the function of the Council in a relevant matter, and that any function which is the responsibility of an executive of a local authority under executive arrangements may not be discharged by the authority.

88 The Act requires a Council to prepare and keep up a constitution (see s 9P *LGA 2000*). It is a matter for the executive whether meetings are held in private or in public (see s 9G *LGA 2000*). By Section 9E of *LGA 2000* where one has the "leader and cabinet executive" model,

"(1) Subject to any provision made under section 9EA or 9EB, any functions which, under executive arrangements, are the responsibility of—
(a) a mayor and cabinet executive, or
(b) a leader and cabinet executive (England),
are to be discharged in accordance with this section.

(2)The senior executive member—
(a) may discharge any of those functions, or
(b) may arrange for the discharge of any of those functions—
(i) by the executive,
(ii) by another member of the executive,
(iii) by a committee of the executive,
(iv) by an area committee, or
(v) by an officer of the authority."

89 The Constitution requires the Leader to make a scheme of delegation. The Leader's Scheme allocates the power to make executive decisions to one or more Cabinet members. The entering into a contract, the establishment of a policy relating to highway works or tree felling fall within that scheme. It follows, says SCC, that the full Council has and had no power in relation to these matters.

90 As to petitions, SCC has a section of standing orders dealing with petitions. If a petition has more than 5000 signatures it will trigger a public debate by Full Council. However the power of the full Council is to take action "if it is within the Council's remit to do so." (Standing Order 13.1.b). The Highways Committee, which is a sub-committee of Cabinet, has decision making powers in connection with the Streets Ahead contract delegated to it.

91 The evidence of Mr Eccleston is that the full council has no power to decide that felling should cease, nor how the programme of works to highways should be carried out. He points out also that as the work is being done under a contract, a change in the contract to require the cessation of tree felling would have costly consequences. The risk for highway claims currently falls on Amey under the contract. If tasks necessary to achieve proper repair and maintenance could not be undertaken, then the risks would be passed back on to the Council, with serious consequences for its budget. Mr Eccleston contends that the full Council does have the power to refer a matter to the Scrutiny Committee, or it can refer the matter to the Cabinet or to the member of the Cabinet concerned.

92 The member of the Cabinet with responsibility for highways is and was Councillor Terry Fox.

E EVENTS GERMANE TO THE CONSULTATION ISSUE

93 This evidence falls into the following parts

(a) Steps taken by SCC and Amey before the summer of 2015;

(b) The response of the City Council to objections being made in the summer of 2015;

(c) Events in the autumn of 2015, including the establishment of the Independent Tree Panel ("ITP") process;

(d) Events leading up to the issue of proceedings in February 2016.

94 Before embarking on it, a word of caution is necessary. This Court is exercising jurisdiction as a court of judicial review. It is not an appellate tribunal with the power to

take different views on the merits from the decision making body. It is not for this Court to determine whether a decision to fell or not to fell was wrong on the merits. It may form a view on the process by which it was decided, or on whether the decision was made within the parameters of the relevant legal principles, but save for the exceptional case where a decision could be said to be irrational, this Court has no power to intervene in the decisions of a democratically elected decision maker for which is answerable at the ballot box.

95 Similarly, the choice of criteria against which a decision to fell was or is made, is only a matter for judicial review insofar as they do not reflect the appropriate tests in law. Disagreements on the inclusion, exclusion or wording of tests, where the issue depends upon the view of the decision maker on the merits, are only challengeable if some error of law was made, or a plainly material matter was not had regard to. The fact that the Claimant and those who support his cause take a different view is not a ground of challenge.

96 Mr Caulfield gave evidence of the measures which have been in place since the contract began in 2012:

(a) a roadshow would be held in each zone (a subdivision of a ward) in advance of the works being carried out. At first they were held three months beforehand, but after representations, that was changed to one month beforehand. Each household and business received a leaflet inviting residents and those in businesses to the roadshow. Each household or business would be sent written information about the work proposed, and the timescale anticipated. At the roadshow maps would be available of the trees which it proposed would be replaced (an example was exhibited by him). Information was also placed on the Council's website. That set out the list of all the trees to be replaced, the reason for each tree's removal and the replacement tree proposed. A notice would also be placed on the street at least two weeks before the work started setting out the same information, and giving a contact number to call in the event of questions or queries (an example was exhibited by him);

(b) in very rare cases, where inspection showed an immediate significant risk of danger, a tree would be removed without following that standard procedure;

(c) residents of houses close to a tree being replaced would receive a letter telling them of the work planned, with details of contacts (exhibited by him) should a resident wish to raise any questions or queries;

(d) 7 full time community stewards work for the Streets Ahead programme, to inform communities in advance of any tree works in an area. Mr Caulfield exhibited a schedule covering some 17 pages showing the stewards' activities, which if my calculation is correct shows just short of 1000 meetings, including large numbers with members of the public and community organisations. Some were with other SCC officers;

(e) in June 2013 a "Tree Event" was held at the Ecclesall Saw Mill to provide information. Among others there to give information were ecological and environmental specialists. Demonstrations were given of how trees were examined;

(f) on 9th October 2013, a presentation was made to a meeting of the Green Party;

(g) on 9th April 2014 the Economic and Environmental Well Being Scrutiny and Policy Committee of SCC met in public, and considered the Streets Ahead programme. It noted that there was a conflict in public opinion about the felling of tress, and that all trees removed had been replaced;

(h) in some areas where it was thought necessary, or where the community or local councillors had requested it, a "tree walk" was held, at which the Amey/SCC arboricultural experts could meet residents and discuss the individual trees proposed for removal and replacement, and the reasons for it. Mr Caulfield's evidence is that at first this worked very well, but those at Rustlings Road on 27th May 2015 and at Abbeydale Park Rise (in the southwest of the City near Dore) on 8th September 2015 became fraught and heated, with staff being subjected to abuse and shouting by some of those present. Senior Officers took the decision that their staff should not be put in a position where they would be subjected to aggressive or abusive behaviour, and the tree walks were brought to an end;

(i) in March 2015, a briefing was given to the political reporter of the Sheffield Star newspaper.

97 I shall turn now to the response of the City Council to objections being made in the summer of 2015.

98 Dr Shetty, an active campaigner against the loss of trees had written to the Council to complain that the programme involved what she regarded as the wholesale felling of trees. She received a letter on 23rd March 2015 from Mr Wain, a SCC Environmental Maintenance Technical Officer, referring to the Tree Walks, and describing them as

> "a good format for giving residents the platform to discuss the decision making process, have their input and raise concerns with the key decision makers."

99 Dr Shetty says that she took that inter alia, as providing to her

> "the expectation that the Council would engage in a full and comprehensive community consultation through these "tree walks" before any further tree works were conducted in my area and elsewhere in the City."

100 On 9th May 2015 Dr Shetty complained that notices had been placed in Rustlings Road giving two weeks' notice of tree works, which she took to be a breach of what she said she had been promised. After complaints to the City Council by both herself and others, a Tree Walk was organised for 27th May 2015. It was attended by 6 officers from SCC and Amey, about 30 residents, and representatives of the media, who were filming and taking notes. According to Dr Shetty the Tree Walk was not possible, because the exchanges had become heated. Another was organised for the following day, attended by one SCC officer and about 20 residents. There was another Tree Walk on 5th June 2015, attended by, among others, the Member of Parliament the Rt Hon Mr Nicholas Clegg MP.

101 I have already referred to what occurred at Carfield Road (Prof Stevenson). The tree event there had resulted in changes. Mr Streeten's case was that Mr Dillner, the

Claimant, was aware of these matters. He may have been, but there is nothing in his evidence to the effect that he relied on anything said by SCC in terms of promising consultation. It was emphasised to me by Mr Streeten when the issue of delay was being addressed, that this was Mr Dillner's claim, and that knowledge gained by others in the summer of 2015 could not be relied on by SCC and Amey to show that Mr Dillner had delayed in the bringing of his claim, because while Dr Shetty and the many other objectors supported his case, he was not acting for them or with them. There is no evidence before me that the Claimant relied on what had happened between Dr Shetty and the City Council.

102 By June 2015, SCC had received a very substantial number of objections. The proposed fellings in Rustlings Road had attracted a petition with 10,000 signatures. (Rustlings Road is not just a residential road: it is a long road adjoining open space on one side). There were objections relating to other localities as well.

103 On 3rd June 2015, a meeting of the Full Council took place, at which questions were raised by members of the public on the issue of the felling of trees. The Minutes record that Councillor Terry Fox, who is the SCC Cabinet member responsible for highways (of which more appears below) invited the questioners and campaigners to a meeting on 8th June 2015, where issues could be discussed and the Council could listen to the people's views. He said that there were serious hurdles to be overcome, and that the Council's statutory duties and liabilities and requirements concerning footways had to be properly considered.

104 On 1st July 2015 the full Council met again. The Minutes were put in evidence by SCC. Several questions were raised about the trees issue. Further, a petition with 10,000 signatures was received objecting to the felling of 12 limes on Rustlings Road. It sought sensitive engineering solutions to enable the long term retention of the trees. The Council was asked to refer the matter to a Scrutiny Committee. In responding Council Fox set out detailed reasons for the Streets Ahead programme. He set out the arguments for the proposals in some detail. He referred to the Tree Walks programme. He said that in the case of Rustlings Road, he said that 11 trees had been identified as requiring to be felled, and another 19 had been retained through the use of sensitive engineering solutions. He said that the work at Rustlings Road had been suspended pending the Council meeting.

105 He suggested the establishment of a Highway Tree Forum. Its purpose was described by him as

"so that people including residents, lobby groups and specialist groups could have discussions and the Council was able to consult people about policy."

106 A discussion then took place at Full Council. After an adjournment, a resolution was proposed by Councillor Fox (and seconded) which, inter alia, proposed that

> "(c) this Council confirms that the policy of removing trees that are dead, damaged, dying, diseased, dangerous or discriminatory is a long standing policy, and is in place to maintain a Sheffield standards and ensure the safety of local residents;

(d) notes that the Cabinet Member for Environment and Transport has held numerous meetings with local Councillors and officers, to explore any new engineering solutions, but none were, or have been raised;

(g) welcomes that the Administration has asked officers to set up a "Highways Tree Forum" so we can have strategic conversations with representative bodies, also allowing residents to have a say in their own neighbourhoods;

(h) welcomes that works were paused to listen to the concerns of the objectors;

(i) however, regrets that a moratorium would have a major impact on the scheme, including risks to zonal works, confidence from the lenders and the major refinancing work going on for the budget, it is not possible to make any further delays to the programme, and, therefore, the programme will continue as planned."

107 That motion was carried. A motion proposed by the opposition that the petition be referred to the Scrutiny Committee was put to the vote, and was "negatived" (sic). I take that as meaning that it was not carried.

108 The Highways Tree Forum (HATF) met on 23rd July 2015 and on 2nd September 2015. The Minutes of the first meeting have been agreed, but not those of the second. The September 2015 was chaired by Councillor Fox. It was attended by representatives of SCC and Amey, and by objectors or those representing them (for example a Dr Nigel Dunnett of the University Department of Landscape represented Professor Stevenson). Others present included Dr Shetty, and representatives of bodies concerned with trees. The meeting focussed on the criteria known as the 6 Ds. It was decided to defer other matters, such as engineering solutions, to future meetings. The Minute then records 41 questions which were raised. They included a challenge to the 6 Ds policy, questions about engineering solutions, arguments about the wildlife health and ecological benefits of trees and may other issues. A debate took place, at which the objectors' concerns and objections were raised.

109 This HTAF has not met since September. Mr Honey told me that it still existed, but that a meeting had not been called since then. One was to have been held in the New Year, but it was decided to postpone it until these proceedings had been heard.

110 In August 2015 a meeting took place between the Streets Ahead officers and the Access Liaison Group, which addresses issues relating to access for the disabled. According to Mr Caulfield's evidence that group endorsed the use of the criteria in national guidance ("Inclusive Mobility") in addressing the "Discriminatory" criterion.

111 On 7th October 2015 there was a further Council meeting at which the question of the felling was raised again, as was the establishment of HTAF. Eventually a resolution was passed that

"Resolved: That this Council

(a) recalls that, following the submission of a petition of over 10,000 signatures to the full Council meeting on July 1st, the Cabinet Member for Environment

and Transport established a 'Tree Forum' to discuss issues around street trees in Sheffield;

(b) further, recalls that the petition that was presented cited the signatories' concerns:

(i) over the management of trees in the course of the Streets Ahead contract with highways contractor Amey, especially as it related to the felling of mature, healthy street trees and planting of new tree sapling programme, and;

(ii) that there had been insufficient public consultation around the tree felling and replacement programme, including its implementation on individual streets;

(c) therefore regards the establishment of the Tree Forum as a potential first step in restoring public faith and trust in Sheffield City Council's management of the City's tree stock, including street trees;

(d) notes that the Highway Tree Advisory Forum provides a platform for an open discussion about the issues that affect highway trees and to open the Council to public scrutiny over decisions relating to highway trees;

(e) further notes that it has provided over 200 members of the public over two meetings with an opportunity to convey their points of view and to hold the Council to account over the highway trees stock, including the Council's 'six Ds' criteria for tree felling and sensitive engineering solutions; and

(f) remains committed to working with residents and communities to deliver this transformational project, Streets Ahead."

112 Mr Andrew Walshaw, BA, Dip TP, M.A., Performance and Research Manager of SCC gives evidence that from November 2015 he was involved in the support of a body called the "Independent Tree Panel" ("ITP"). It appears from his evidence that in October 2015 the Chief Executive of SCC, Councillor Terry Fox and another senior Council Officer had decided to set up an ITP, which was to consist of a panel of impartial people who would advise the Council on issues relating to highway trees. On 4th November 2015 a public statement was made, and issued on to the media and on the Council's newsroom website, as follows

> "Independent tree panel established
>
> An independent panel is to be set up in Sheffield to look at the issue of highway trees across the city.
>
> Sheffield City Council has taken steps to set up the panel following concerns around the future of a number of trees in the city.
>
> The panel, which will be chaired by Andy Buck, will consist of a team of impartial experts who will give their advice on issues relating to highway trees.
>
> As part of the Streets Ahead project, when upgrading works which affect trees are identified, the residents who live on streets with trees on them will be sent a survey. This survey will establish the residents' views about the proposals for individual tree lined streets. If more than half of the residents responding to the survey about their street raise objections about the proposals for the trees, then the proposals for works will be referred to the Independent Tree Panel.

> The panel will convene and take into account all the available evidence, including the views of residents and then provide advice to the Council about the proposals for work.
>
> Cllr Terry Fox, Cabinet Member for Environment and Transport, said: "People are rightly passionate about trees across the city and we recognise this. We only ever recommend taking out dead, dying, dangerous, diseased or damaging and obstructing trees. The independent panel will provide impartial advice to the Council having taken account of all the evidence, including the views of local residents, which I hope will reassure people. The council will listen carefully to the advice of the panel before making any final decision. We are prepared for them to tell us that we might need to think again.
>
> "We have always said we want to put people's views at the heart of our decision making and the establishment of this independent panel we hope will ease any concerns people may have.
>
> "We are committed to Sheffield as a green, outdoor city and work hard to retain as many street trees as possible. I am delighted that Andy Buck has agreed to chair this panel."
>
> The focus of much of the trees campaign has been Rustlings Road trees. These trees will be considered by the Independent Tree Panel; however a date for this has not been set.
>
> Andy Buck, new Chair of the Independent Tree Panel, added: "I am pleased to have been asked to chair this Independent Tree Panel.
>
> "I hope that this Independent Panel can help with the debate being had across the city about trees and that we can really get to hear residents' views about this. I hope people will recognise our independence and impartiality and that this goes a long way to helping ease any concerns."
>
> Further details of the Independent Tree Panel will be confirmed in the coming weeks."

113 The membership of that ITP was announced in January 2016. Apart from the Chairman Mr Buck, who is Chair of the local Citizens Advice Bureau, it consists of an independent arboriculturalist, an independent Health and Safety Adviser, an independent Highways Engineer and a lay member.

114 The terms of reference of the ITP (including its footnotes) are

> "Independent Tree Panel for Sheffield
>
> Terms of reference
>
> 1. Objectives

- To provide independent, impartial and expert advice on issues relating to the retention, replacement or treatment of roadside trees as part of the Streets Ahead programme as requested[1]
- To act as a critical friend
- To take into account all available evidence, including the views of local residents, City Council Officers, Amey contractors and others as required, on proposals for the treatment of trees in individual streets as part of the Streets Ahead programme
- To provide advice to Sheffield City Council about potential changes to proposals, as necessary.

2. Membership

• Chair:	Andy Buck
• Arboricultural consultant/professional:	Andy Bagshaw
• Independent Health & Safety Advisor:	Phillip Duckett
• Highways engineer	David Graham
• Lay member:	Jacquie Stubbs

3. Relationship of the Panel with Sheffield City Council

Sheffield City Council will be responsible for identifying suitable experienced and, as necessary, qualified Panel members, in consultation with the chair. The panel members will be independent of the Council, and so will not be Council employees or members.

Sheffield City Council will provide sufficient resources and support for the Panel to be able to undertake its duties.

Neither Sheffield City Council nor Amey will play any part in the deliberations of the Panel.

4. Responsibilities

The Panel will act objectively and conscientiously having proper regard for the information and evidence placed before it.

The Panel will give advice to Sheffield City Council about the management of highway trees as part of the Streets Ahead programme when asked to do so. The Council will not be bound to act on the advice but have committed to conscientiously take it into account in their decision making.

All formal legal responsibilities for the maintenance of and safety on the highway (including pavements) remains with the Council and/or Amey as determined by the agreements entered into by them. Nothing in these terms of reference shall be taken to imply that either Amey or the Council have delegated their responsibilities nor that any advice from the panel will be binding upon them.

[1] https://www.sheffield.gov.uk/roads/works/schemes/streetsaheadproject.html

5. Referral mechanism and process

The Panel will review proposals developed for individual streets, when the following conditions are met:

- A majority of the households[2] on a street are not in favour of our tree plans. This will be determined by a confidential survey sent to those residents;
  OR
- Sheffield City Council asks for a particular proposal to be reviewed.

The Panel may only consider streets that have not yet been upgraded as part of the Streets Ahead programme (i.e. it has no retrospective role), and it can only consider whole streets (i.e. it cannot look at individual trees in isolation). For the avoidance of doubt, there is no other mechanism for an individual or group of individuals to refer a proposal to the Panel.

The Panel will determine what evidence it needs. This may include:

- Results of the survey of households
- Reports on individual trees
- Oral evidence from residents of the street affected – the Panel will determine whether it wishes to receive oral evidence, although this will only be permissible from residents of the street(s) affected, and if so how it wishes to receive this evidence
- Oral or written evidence from Sheffield City Council and/or Amey

The Panel will provide its advice to Sheffield City Council, who will then determine what action to take in response. The Panel's advice will be placed on the Council's website, alongside the Council's response to that advice.

The Panel will not give advice about other aspects of the Streets Ahead programme, except insofar as advice about a tree or trees impacts on another aspect of a scheme's design.

6. Frequency of Meetings

The Panel will meet as often as is required, depending on how many proposals are referred to the Panel. The Panel will seek to provide advice within four weeks of a proposal being referred to it."

115 SCC also published information about the process, which stated

[2] For these purposes, household is defined as any property with an address on the street/s in question. A majority means a majority of the surveys returned, not a majority of the surveys issued. There will be one survey per household."

> "The process
>
> Those residents living on streets where tree works are proposed will be sent a survey letter.
>
> This letter will detail the works that are planned and to go online to complete the survey to inform us about whether they agree with the proposals or not. If residents do not have internet access, there will be details in the letter of how to get a paper copy.
>
> All residents will have 2 weeks from the survey opening to complete them, with the closing date stated clearly in the letter.
>
> Once that particular survey has closed, all those completed surveys will be analysed and if 50% or more of the responses do not agree with the proposals, then these streets will be referred to the panel.
>
> The panel will then receive all the information about the proposals, the survey results and residents comments.
>
> The panel will then discuss all the relevant information and compile a report of their advice and provide this back to ourselves.
>
> No timescales have been set as to how long the panel can or should take to assess all the details.
>
> All the reports that are produced for each street that is referred will be published below." (as they were conducted the website attached pdf copies of 3 sets of tree survey results)

116 I turn now to the events which led up to the issue of proceedings.

117 Mr Walshaw's evidence is that in November 2015 the survey process started under ITP. SCC had distributed copies of a survey questionnaire. It centred on the question of whether the respondent agreed or disagreed with the proposal for the trees on his/her street/road. If a respondent could not deal with the matter online, a telephone number was provided to get a paper copy as it would have related to a particular road. The Court was provided with a paper copy. It included the following:

(a) the survey set out the proposals for the street in question, including a map showing the trees to be removed, and the reasons why SCC said it should be removed, and details of the proposed replacement tree;

(b) it asked the Respondent to rate the street on a grid with answers "Very Good", Good", "Poor", "Very Poor", and "No Opinion" relating to the current state of the trees, the current standard of the road surface, the current standards of the pavement surfaces, and the current overall appearance of the street;

(c) it asked if the respondent agree with the proposals with Yes and No tick boxes;

(d) if the answer was No, it asked why the proposals were not supported, and gave room for a reply;

(e) it also provided another space for "other comments about the proposals for trees on your street;"

(f) if a Respondent wished to do so, s/he could provide their name, email address and telephone number. It also attached an optional questionnaire on age, gender, ethnic or cultural background and employment status, disability and whether the Respondent was a carer.

118 Although the standard response period was 14 days, 21 days was allowed over the Christmas period. There were also 146 telephone calls of which 75 sought a paper copy. Each provided an email address, to which SCC sent a survey form. The relevant links were also posted on to the Sheffield Tree Action Group Facebook page. Periods for response were reopened or extended again. In the event the range was from 19 to 42 days. There were some teething problems over matters such as the rather lengthy internet address being mistyped. A shorter address was then used. There was also an internal error at SCC which failed to forward 146 replies. However that was picked up and each of those respondents were contacted individually by email. I am satisfied from Mr Walshaw's evidence that all the teething problems were addressed. Significantly there is no evidence at all of anyone who wished to participate in the exercise but was unable to do so.

119 Mr Walshaw's evidence is that thus far, the ITP has received the results of the first of three phases. The ITP has started its programme of inspections, and has included visits to and discussions with residents. Some other written representations have been received by SCC, which have been passed to the ITP.

120 The ITP has written to SCC on three occasions

(a) On 29th December 2015 to enquire whether the trigger level for referral was 50% of responses or of households (it is of responses)

(b) On 9th February 2016 it proposed immediate action in connection with a tree on health and safety grounds;

(c) On 16th February 2016 it sought information, and a meeting with SCC officers and Amey personnel to discuss alternative engineering solutions in three roads in Dore, including Abbeydale Park Rise.

121 Mr Walshaw also gave evidence that written representations made to Councillor Fox were reported to the ITP.

122 The Claimant makes complaint about aspects of the ITP process:

(a) the choice of members being made by SCC;

(b) he asserts that members of campaign groups should have been involved;

(c) no-one on the panel is concerned with environmental or health issues;

(d) it is unclear how the panel will make its recommendations, over what timescale, or whether its ad vice is binding;

(e) an FOI request as to how residents could have an input has not been answered;

(f) so far as the survey is concerned, he complains that sometimes the internet links did not work;

(g) he contends that the survey did not allow those who agreed with the proposals to say why;

(h) if the threshold of 50% is reached, the views of others would not be considered at all;

(i) he identified the confusion about whether the 50% related to households or respondents;

(j) he objected to the inclusion of the diversity etc questionnaire.

123 Mr Dillner points out that of 80 street surveys completed by 19th January 2016, 42 had been referred to the ITP. The response rate was low, with 40% below 20% and 40% below 10%. But one must also note that in fact, in two of the phases (Dore and the area west of the City Centre including Fulwood) the majority of streets surveyed had majorities against the proposals.

124 On 2nd January 2016 felling was resumed, in streets where the 50% threshold had not been reached. None of the evidence filed in this claim is given by any residents of those streets.

125 On 3rd February 2016 there was a full Council meeting, at which was presented a petition signed by 6,500 signatures opposed to felling in Nether Edge. Given the way in which the claim is put, it is important to note the wording of the petition. Its opening paragraph read as follows:

> "We, the undersigned, refute the assertion that the felling of trees in Nether Edge Sheffield is necessary. Instead we demand, and believe it imperative, that sensitive engineering solutions be adopted and implemented to enable the long term retention of these trees."

Subsequent paragraphs gave the reasons for that demand. It expressed the view that sensitive engineering solutions presented a sustainable solution. It drew attention to what it saw as the effect on the ecology and biodiversity. It complained that the saplings which were a replacement could not amount to a proper replacement. It contended that:

> "Much of Nether Edge is deemed (sic) a Conservation Area, these trees are an irreplaceable part of Sheffield's heritage and cannot be allowed to be destroyed."

126 It follows that SCC was not being asked by the petition to do anything about the felling of any trees other than those in Nether Edge. Nor does the petition ask that the felling of trees cease, albeit that that is the effect of the observations that are made. Further, the petition raised no issue about consultation.

127 There were also questions from the public about the felling of trees. Councillor Fox spoke on behalf of the City Council, and the presenter of the petition, Ms Mountain, exercised her right to respond. The Full Council rejected a motion to refer the petition to the Scrutiny Committee and resolved:

> "That this Council:-
>
> (a) is working towards a strategy to maintain and replace the city's street tree stock to maintain our green status;
> (b) notes that the trees that are now being replaced have been subject to consultation surveys with local residents and trees are only being replaced where the majority of local residents have indicated support for the proposals;
> (c) notes that where residents have objected to the proposals they have been referred to the independent tree panel which will provide advice to the Council;
> (d) commits to being open and transparent with the Sheffield public ensuring all relevant information is available in the public domain; and
> (e) is committed to delivering the Streets Ahead programme which is improving Sheffield's highway network for future generations."

F THE HISTORY OF THE PROCEEDINGS, INCLUDING THE CLAIM FOR AN INJUNCTION

128 No letter before action was sent, nor any letter complying with the pre action protocol. An application was made on the day after the Full Council had met, whereby the Claimant sought to challenge what it said was

> "the decision of the Sheffield City Council refusing to cease to fell trees in connection with the Streets Ahead Project taken at a full council meeting."

129 The Claimant sought urgent consideration by an application of 5th February 2016, and sought an interim injunction preventing the felling of trees. Dove J granted that application on 5th February 2016, at which point SCC had not been able to make any submissions or file any Acknowledgement of Service. Dove J recorded that he was granting an interim injunction in the short term pending further investigation of its chances of success. He noted also that if the trees were felled, the substance of the claimant's case would have been substantially undermined. He granted the injunction, with the saving that a tree could be felled if an appropriately qualified independent arboricultural report has recommended in writing that a tree presents an immediate danger to health and safety.

G THE CASE FOR THE CLAIMANT

130 The Claimant's starting point is that SCC has failed to act, when there was a challenge to its decision to fell trees, which it declined to accept at the Council meeting of 3rd February 2016. He says that a refusal to revoke an unlawful policy or practice is amenable to judicial review, and cites *R (McCarthy and Stone) v Richmond BC* [1992] 2 AC 48. SCC whether by itself or through the cabinet member Councillor Fox had the

power to cease the felling of trees in response to the petition seeking the cessation of felling.

131 Mr Streeten says that in any event each act of felling represents a new decision which is challengeable; see *Hammerton v London Underground Ltd* [2002] EWHC 2307 (Admin) at [196]-[197].

132 His first ground of challenge to the felling of trees is based on what he says was a breach of SCC's duty to consult residents before felling took place. He submits that

(a) the duty arose out of a legitimate expectation given by SCC that it would consult before felling. It arose from

(i) what was said about the Tree Walks. One such walk resulted in a tree not being felled;

(ii) the calling of the meeting on 8th June 2015, which was called to listen to people's views;

(iii) the establishment of HTAF, which was both to consider policy and to help discuss and consult with people in relation to highway trees;

(iv) The resolution passed at the meeting of 7th October 2015 recited above.

(b) The HTAF has not met since September. The subsequent ITP statement of November 2015 cannot satisfy the legitimate expectation created earlier;

(c) SCC has held itself out since then as engaging in consultation. Its Executive Director described it as an "extensive consultation on trees" (letter 4th February 2016);

(d) the scope of the duty is to be found in the "*Gunning"* or "*Sedley"* criteria set out in *R(Moseley) v LB Haringey* [2014] UKSC 56 at[24]-[25].

133 The consultation exercise (the ITP) failed to meet the required standard because

(a) if the 50% threshold were met, none of the qualitative responses would be considered whereas they remained a qualitative consideration;

(b) the time for consultation was "woefully" short. At least 12 weeks should have been allowed;

(c) the survey was presented as a *fait accompli* as to whether the trees were dead, dying or diseased, when other engineering solutions existed to save trees.

(d) it allowed only one vote per household, whereas there could be disagreement within those resident at an address;

(e) it was wrong to look only at the number in a particular street. One had to look at the whole area;

(f) the survey was badly organised, with some residents not receiving letters, website problems and references to deadlines missed in earlier letters;

(g) the low turnout showed that it was inadequate. Mr Streeten summarised this as saying that for ordinary people it was "too much of a hassle."

134 On his second main ground, he said that

(a) the works amounted to an engineering operation that would normally require planning permission. Tree felling could amount to an engineering operation. Whether it did so was a matter of fact and degree. Re-tarmacking or repaving could constitute an engineering operation: see *R.F.W.Coppen etc v K.J.Bruce-Smith* (CA) [1998] JPL 1077;

(b) the words "exclusively for the maintenance" (in s 55(2) (b) *TCPA 1990* must be construed harmoniously with Annex II para 13(a) of the EIA Directive, which refers to "any change." There is a conceptual difference between "refurbishment" and "maintenance"- see *C 142/07 Ecologistas en Accion- CODA v Ayuntamiento de Madrid* [2008] ECR 1-6097;

(c) the Streets Ahead contract refers itself to "improvements" and "rehabilitation" as does other publicity by Amey;

(d) Mr Caulfield's evidence for SCC refers to "bringing the standard of the carriageway up to a good standard."

135 By virtue of the *Town and Country Planning (Environmental Impact Assessment) Regulations 2011* ("*TCPA (EIA) Regs*") Reg 3, there is a prohibition on the grant of planning permission for "EIA development" without consideration of environmental information. EIA development is land falling within the descriptions in Schedule 1 or which is likely to have significant effects on the environment by virtue of factors such as its nature size or location. The table in Schedule 2 contains "any change or extension of development listed in paragraphs 1-12 of this table, where that development is already…..executed……. where the development as changed or extended may have significant adverse effects on the environment". The construction of a road of over 1 hectare falls into paragraph 10. Mr Streeten submitted that these works constituted such a change or extension, and the change or extension may have significant adverse effects on the environment.

136 Provision exists in the Regulations (see Regs 4-6) for screening opinions to be sought from the local planning authority or the Secretary of State.

137 He continued that

(a) the question was whether there was a real risk of adverse environmental effects. The "Environmental Scoping Opinion" put forward was inadequate because it failed to refer to the effect of trees on air quality and human health, did not treat trees as community assets, and did not refer to trees in the context of drainage. It was also wrong to refer to only temporary disruption of habitats during the work period, and to regard the replacement trees as ensuring that there would be no net loss;

(b) he said that the screening opinion was inadequate because it failed to look at indirect, secondary or cumulative effects. The effect of the replacement trees would not be compensatory because they would take 15 to 40 years to provide meaningful benefits: that the saplings had been misdescribed as extra heavy standards; that some trees would fail to take; and that the expert evidence was that it took a replacement programme of between 5 and 17 trees planted to 1 felled to achieve neutrality;

(c) he held out Mr Crane's approach as a proper assessment of the risk of harm;

(d) he argued that a tree's contribution to the setting of a Conservation Area is a material consideration- relying on *R(McLellan} v LB Lambeth* [2014] EWHC 1964;

(e) he submitted that the intensity of review is higher in *Aarhus* cases, relying for that proposition on obiter dicta in R *(McMorn) v NE* [2015] EWHC 3297 per Ouseley J**.**

138 As to the EIA Directive, he submitted that:

(a) the felling of trees fell within it, and it had direct effect. However he accepted in Reply, after the submissions of Mr Honey and Mr Buley, that it only applied if the tree was felled as a result of works;

(b) one should apply the precautionary principle (Recital 2) and ensure that development consents for projects which are likely to have significant effects on the environment should only gain consent after an assessment of those effects;

(c) The wording of Article 2(1) plainly imposes a requirement for development consent. The purpose of the Directive would otherwise be undermined: see C2/07 *Abraham v Wallonia* [2008] Env LR 32;

(d) SCC and Amey are wrong to contend that it is only new construction of a road that requires consent: see *C 142/07 Ecologistas en Accion- CODA v Ayuntamiento de Madrid* [2008] ECR 1-6097**.** A change to a construction project, which this amounts to, or a change made by physical interventions that alter the physical reality of the space is enough to amount to a project: see the opinion of the Advocate General in C-275/09 *Brussels Hoofdstedelijk* at [21]. This is an example of unusually disruptive work, as per Commission Guidance at page 58.

139 If ground 2(a) succeeds there has also been a failure to have regard to the duty under s 72 *LBCAA 1990* , which states

"General duty as respects conservation areas in exercise of planning functions

(1) In the exercise, with respect to any buildings or other land in a conservation area, of any functions under or by virtue of any of the provisions mentioned in subsection (2), special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area.

(2) The provisions referred to in subsection (1) are the Planning Acts and……

(3) ……"

H THE CASES FOR SHEFFIELD CITY COUNCIL AND AMEY

140 SCC through Mr Honey argues that:

(a) this is not a challenge to the Streets Ahead programme, which had been under way for over 3 years, or to the lack of an EIA, but to an alleged refusal to cease to fell trees;

(b) what is said at a Council meeting, including resolutions, does not constitute a decision by SCC on the topic of highways. He referred to the code for decision making now in force as a result of the amendments made by the *LA 2011*;

(c) in the context of Streets Ahead, the oral contributions of a Cabinet member during a debate at a full Council meeting or public meeting cannot bind the Council, and it is not reasonable or legitimate to rely on them;

(d) the ITP was not intended to stand in the place of HTAF. The two bodies have different functions. HTAF was not established to consider individual trees, but matters of policy and approach. Nothing was said which could lead to the legitimate expectation that it would be a mechanism for considering the felling of individual trees;

(e) the Claimant cannot satisfy the requirement that the representation must be clear, unambiguous and unqualified, and that it was reasonable and legitimate to rely upon it;

(f) there was no legitimate expectation of a full, qualitative consultation. The ambit of what SCC said it would do is contained in the statement of 4th November 2015. Nothing else said in a meeting, by an officer or in an email can support the existence of the legitimate expectation which the Claimant alleges.

141 SCC through Mr Honey further contends that

(a) the *Gunning* principles (set out in *R(Mosely) v Haringey LB* [2014] UKSC 56 at [25]) do not apply if the ITP survey process was not a formal consultation process of the type which attracts them;

(b) there is no evidence at all that anyone was unable to respond to the survey;

(c) any glitches in the survey process were ironed out;

(d) sufficient time was given for responses to be made.

(e) comments on the survey forms are given to the ITP where a reference is made. No resident has complained of any inability to answer because of time constraints;

(f) there is nothing in the survey forms which presents the proposals as a *fait accompli*;

(g) the material provided relating to the proposals gave ample materials and reasoning to show why the proposals were made.

142 So far as the Environmental Assessment point is concerned, Mr Honey

(a) set out the matters relating to the *HA 1980* set out above. He then submitted that s 55(2)(b) *TCPA 1990* meant that only works which went beyond pure maintenance, and which would have significant adverse effects on the environment, amounted to development;

(b) argued that it is not for the Court to determine whether there would be such significant adverse effects, but that it is for the relevant authority to determine;

(c) in *Jackson v Norfolk CC* [2014] EWHC 332 (Admin) it was held that an EIA was not required where the works were improvement and the authority had decided that there were no significant adverse environmental effects, because of the effect of s 55 (1)(b) of *TCPA 1990*. The deputy judge in that case rejected an argument that there should be a purposive reading so that an EIA was required*;*

(d) in *R (LTDA) v Transport for London* [2016] EWHC 233 (Admin) Patterson J emphasised that the issue of whether there are significant adverse environmental effects in the context of improvements under s 55(2) (b) is a matter for the decision making authority is a matter of planning judgment for the authority concerned, only reviewable on the basis of an error of law or irrationality (see [63]). It is not one to be determined by the Court, whose task is one of considering that the conclusion was irrational, or reviewing the process;

(e) the Claimant has exaggerated the extent of felling which will be required. The figure of 10,000 to which the Claimant refers is the number of trees removed over 25 years, and takes no account of the number replaced, nor that most street trees will be retained, nor of the increase in numbers which Streets Ahead will effect, nor the total number of trees in the City of about 2 million;

(f) as to the EIA Directive, it cannot create a requirement for consent where none exists in domestic law;

(g) there is no consent here in the sense used in the Directive. Streets Ahead is a contractual programme. The removal of a tree or any change in the road as a result of maintenance and repair cannot amount to a project for the purposes of Annex II of the Directive;

(h) s 72 *LBCAA 1990* has no application as there is no exercise of planning function involved. In any event there is no evidence whatever that SCC have left Conservation Areas out of account.

143 For Amey, Mr Buley argued by way of introduction that:

(a) the challenge of the Claimant to the decision to refusal to fell trees was a disingenuous attempt to disguise the fact that the real attack was on the PFI contract. But the principle of that contract was not open for discussion at that meeting;

(b) on the first Ground (Consultation) there was no duty to consult shown to exist. There is nothing wrong with the use of a plebiscite as a means of checking a proposal to fell a particular tree, to act as a trigger for independent review;

(c) as to the EIA/development consent issue, he argued that there was no need for an EIA as there was no development consent, and because what happened was not a project within the meaning of Annex II of the EIA Directive;

(d) so far as the "improvement" argument is concerned, it rested on the fundamental but mistaken assumption that the felling of trees or other works of repair constituted development under s 55(2) (b) of *TCPA 1990;*

(e) Ground 3 (the claimed breach of s 72 *LBCAA 1990*) depends on the Council exercising a planning function, which it was not.

144 He then enlarged on those arguments:

(a) the claim is being made almost 4 years after the project started. Even if it were arguable that an EIA or consultation should have been carried out at the beginning of the project, it would be wrong to conduct one now simply because SCC had been invited to do so. Compare the example of *R(on the application of Noble Organisation Limited) v Thanet DC* [2005] EWCA Civ 782, where the Claimant sought to say that an EIA should be ordered at the reserved matters stage of a consent, when the target of the challenge was the original consent. The Court regarded that as a collateral challenge and would not permit it. It would be wrong to permit a similar collateral challenge;

(b) in fact the petition before the Council on 3rd February 2016 was not as described by the Claimant. The petition only related to the Nether Edge district, and sought not the cessation of felling, but the use of "sensitive engineering solutions." That cannot be construed as calling for an EIA. In any event the full Council had no power to alter the carrying out of the contract;

(c) the Council had no power at that meeting to decide to cease felling;

(d) the question of consultation was not raised in the petition. It was raised at the meeting only by a questioner from the floor (Ms Carly Mountain) who asked if felling would cease until there had been "a proper and fair consultation with the people of Sheffield." But that was to ask for a consultation which would be distinct from the ITP process, which was directed towards the conditions in particular streets, which was a different kind of exercise. The question of what fairness requires in a decision is intuitive- see Lord Mustill in *R v SSHD ex p Moody* [1994] 1 AC 531. The Court was not being asked to conclude that the decision to fell a particular tree or trees was unfair because of the role the surveys played in that decision.

145 Mr Buley referred me to the synthesis of the law on consultation which appears in *R(Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 [2015] 3 All ER 261(QB) at [97]-[98]

"97 A duty to consult may arise by statute or at Common Law. When a statute imposes a duty to consult, the statute tends to define precisely the subject matter of the consultation and the group(s) to be consulted. The Common Law recognises a duty to consult, but only in certain circumstances.

98 The following general principles can be derived from the authorities:

(1) There is no general duty to consult at Common Law. The government of the country would grind to a halt if every decision-maker were required in every case to consult everyone who might be affected by his decision. *Harrow Community Support Limited) v. The Secretary of State for Defence* [2012] EWHC 1921 (Admin) at paragraph [29], *per* Haddon-Cave J).

(2) There are four main circumstances where a duty to consult may arise. First, where there is a statutory duty to consult. Second, where there has been a promise to consult. Third, where there has been an established practice of consultation. Fourth, where, in exceptional cases, a failure to consult would lead to conspicuous unfairness. Absent these factors, there will be no obligation on a public body to consult (*R (Cheshire East Borough Council) v. Secretary of State for Environment, Food and Rural Affairs* [2011] EWHC 1975 (Admin) at paragraphs [68-82], especially at [72]).

(3) The Common Law will be slow to require a public body to engage in consultation where there has been no assurance, either of consultation (procedural expectation), or as to the continuance of a policy to consult (substantive expectation) (*(R Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755, at paragraphs [41] and [48], *per* Laws LJ).

(4) A duty to consult, *i.e.* in relation to measures which may adversely affect an identified interest group or sector of society, is not open-ended. The duty must have defined limits which hold good for all such measures (*R (BAPIO Ltd) v Secretary of State for the Home Department* [2007] EWCA Civ 1139 at paragraphs [43]-[44], *per* Sedley LJ).

(5) The Common Law will not require consultation as a condition of the exercise of a statutory function where a duty to consult would require a specificity which the courts cannot furnish without assuming the role of a legislator (*R (BAPIO Ltd) (supra)* at paragraph [47], *per* Sedley LJ)

(6) The courts should not add a burden of consultation which the democratically elected body decided not to impose (*R (London Borough of Hillingdon) v. The Lord Chancellor* [2008] EWHC 2683 (QB)).

(7) The Common Law will, however, supply the omissions of the legislature by importing Common Law principles of fairness, good faith and consultation where it is necessary to do, *e.g.* in sparse Victoria statutes (*Board of Education v Rice* [1911] AC 179, at page 182, *per* Lord Loreburn LC) (see further above).

(8) Where a public authority charged with a duty of making a decision promises to follow a certain procedure before reaching that decision, good administration requires that it should be bound by its undertaking as to procedure provided that this does not conflict with the authority's statutory duty (*Attorney-General for Hong Kong v Ng Yuen Shiu* [1983] AC 629, especially at page 638 G).

(9) The doctrine of legitimate expectation does not embrace expectations arising (merely) from the scale or context of particular decisions, since

> otherwise the duty of consultation would be entirely open-ended and no public authority could tell with any confidence in which circumstances a duty of consultation was be cast upon them (*In Re Westminster City Council* [1986] AC 668, HL, at 692, *per* Lord Bridge).
> (10) A legitimate expectation may be created by an express representation that there will be consultation (*R (Nadarajah) v Secretary of State for the Home Department* [2003] EWCA 1768 Civ), or a practice of the requisite clarity, unequivocality and unconditionality (*R (Davies) v HMRC* [2011] 1 WLR 2625 at paragraphs [49] and [58], *per* Lord Wilson).
> (11) Even where a requisite legitimate expectation is created, it must further be shown that there would be unfairness amounting to an abuse of power for the public authority not to be held to its promise (*R(Coughlan) v. North and East Devon Health Authority* [2001] 1 QB 213 at paragraph [89] *per* Lord Woolf MR)."

146 In this case there was no duty to consult by operation of the relevant statutory code. If a public body chooses to consult, while it must do so fairly, it does not follow that the full "*Gunning"* principles are imported; see *R (APIL) v Secretary of State for Justice* [2013] EWHC 158 (Admin).

147 There is nothing unlawful about the ITP process:

(a) the 50% figure is not determinative in favour of the felling of a tree. It acts as a filter. Trees may be referred notwithstanding the 50% figure not being met;

(b) the survey form is simple and straightforward, with a comments box where any difference of views within the household can be aired;

(c) it is onerous and impractical to survey those living outside the street.

148 On the issue of s 55 *TCPA 1990*, Mr Buley followed Mr Honey. In addition he submitted that in applying s 55(2)(b) of *TCPA 1990*, one has four questions to ask

(a) do the works constitute development under s 55(1)?

(b) are the works to be carried out on land within the boundaries of a road by a highway authority?

(c) are the works, at least in part, for the improvement of that road?

(d) may the works have a significant adverse effects on the environment?

It is only if the answer to all 4 questions is "Yes" that the works constitute development. He submitted that the Claimant's case had ignored questions (a) to (c).

149 The textbook *Moore and Purdue "A Practical Approach to Planning Law" (12th Ed 2012)* at [26.01] says that the cutting down of a tree does not appear to be development within the 1990 Act. That explains the use of Tree Preservation Orders, which would not be required if such works required planning permission and were thus acts of development.

150 S 72 *LBCAA 1990* is irrelevant unless a decision is being made under the Planning Acts. The Claimant has also overlooked Regulation 15 of the *Town and Country Planning (Tree Preservation) (England) Regulations 2012*).

I DISCUSSION

151 In my judgment the starting point must be SCC's duties and powers as a Highway Authority. I shall then consider Grounds 2 and 3, before returning to Ground 1.

Duties and Powers of SCC as Highway Authority

152 It was a perhaps surprising feature of the cases as argued before me (and especially that of the Claimant) that the nature and objectives of the duties cast on a highway authority were not addressed in any detail. I have set them out at an earlier stage of this Judgment. There was a similar lacuna in the Claimant's case addressing the law relating to the protection of trees in the Planning Code (by which I mean the statutory code applied to planning matters, contained in the various Planning Acts).

153 In my judgment, the nature of those duties is important, as are their effect. They set the context for considering the existence, nature and extent of the SCC obligation to execute the works in question. The statutory context is also of particular importance on the issue of the meaning of "improvement" in the *Town and Country Planning Act 1990* and in the interpretation and application of the EU Directive on environmental assessment. It is also very relevant to considering the effect of domestic law in the Planning Code on the preservation of trees.

Grounds 2 and 3: Issues relating to the need for planning permission, EIA issues and Conservation Area consent

154 I shall now turn to the provisions of *TCPA 1990.* It is important to remember that the Planning Acts form a comprehensive code. It is worth recalling the words of Lord Scarman in *Pioneer Aggregates (UK) Ltd v The Secretary of State for the Environment* [1985] 1 AC 132 HL, where the issue before the House of Lords was whether it was possible for a planning permission to be abandoned by conduct. Lord Scarman (with whom the other members of the Appellate Committee agreed) held that there was no such general principle of abandonment in planning law. At page 140 Lord Scarman said this:

> Planning control is the creature of statute. It is an imposition in the public interest of restrictions upon private rights of ownership of land. The public character of the law relating to planning control has been recognised by the House in *Newbury District Council v. Secretary of State for the Environment* [1981] A.C. 578. It is a field of law in which the courts should not introduce principles or rules derived from private law unless it be expressly authorised by Parliament or necessary in order to give effect to the purpose of the legislation. The planning law, though a comprehensive code imposed in the public interest, is, of course, based on the land law. Where the code is silent or ambiguous, resort to the principles of the private law (especially property and contract law) may be necessary so that the courts may resolve difficulties by application of common law or equitable principles. But such cases will be exceptional. And, if the statute law covers the situation, it will be an impermissible exercise of the judicial function to go beyond the statutory provision by applying such principles merely

because they may appear to achieve a fairer solution to the problem being considered. As ever in the field of statute law it is the duty of the courts to give effect to the intention of Parliament as evinced by the statute, or statutory code, considered as a whole.
Parliament has provided a comprehensive code of planning control."

155 In that context I turn now to section 55 of the *TCPA 1990* which defines "development" in the context of planning control. It is only acts of development that require the grant of planning permission (s 57 *TCPA* 1990). The relevant development consent is the planning permission given as a result of s 57. The relevant parts of s 55 in its amended form are:

"55 Meaning of "development" and "new development".

(1) Subject to the following provisions of this section, in this Act, except where the context otherwise requires, "development," means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.

(1A)For the purposes of this Act "building operations" includes—

(a) demolition of buildings;

(b) rebuilding;

(c) structural alterations of or additions to buildings; and

(d) other operations normally undertaken by a person carrying on business as a builder.

(2)The following operations or uses of land shall not be taken for the purposes of this Act to involve development of the land—

(a) ……

(b) the carrying out on land within the boundaries of a road by a highway authority of any works required for the maintenance or improvement of the road, *but, in the case of any such works which are not exclusively for the maintenance of the road, not including any works which may have significant adverse effects on the environment*" (My italics)

156 The words in italics were added by regulation 35 of the *Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999*, which brought into domestic effect the predecessor to the current EIA Directive.

157 As Mr Honey pointed out, the Planning Code uses the same meaning for "improvement" as does the Highways Code in *HA 1980*, as can be seen from the interpretation section (s 336) in *TCPA 1990:*

" "highway" has the same meaning as in the Highways Act 1980;

> "improvement", in relation to a highway, has the same meaning as in the Highways Act 1980"

158 Mr Streeten, without ever addressing the definition of "improvement" in the two Acts, contended that "maintenance" in section 55(2) (b) cannot include substantial repairs, which he contends would amount to improvement. Had he addressed the definition of "improvement" this argument could never have been advanced. In my judgment his argument cannot be right. To interpret "maintenance" thus requires one to adopt a quite different meaning from that given in the *HA 1980* and *TCPA 1990*. It also requires one to insert additional words into s 55 (2) (b) to the effect that there is a limit on the scale of works of maintenance, and that those on a large scale which have significant adverse effects constitute development. It is plain from the words of s 55(2) (b) that the question of whether significant adverse effects would be caused only arises where the works are not exclusively for the maintenance of the road. It is of course significant that this subsection is that intended to transpose the requirements of the Directive into domestic law.

159 Nothing turns on the use of "road" rather than "highway" in section 55. "Road" is not defined as such in either statute, but it has been addressed otherwise. It was stated in *Sadiku v DPP* [2000] RTR 151 at 163D per Tuckey LJ that "the concept is one of a thoroughfare or a way of communication ordinarily to be thought of as a way." Albeit that the judgment was strictly deciding it as a matter of fact, it was held by the Divisional Court in *Alun Griffiths (Contractors) Ltd v Driver and Vehicle Licensing Agency* [2009] EWHC 3132 (Admin) [2010] RTR 7 that where the verges are maintained by the highway authority, they are part of the "road" for the purposes of Road Traffic legislation. That common sense approach must apply in the case we are dealing with here. In every case drawn to my attention, one is dealing with a common form of urban road consisting of a carriageway (for vehicle users) and pavements or footways (for pedestrian users) separated by verges.

160 The Claimant's case also overlooked the important matter of law that if a tree adjoining a highway is a source of danger, or obstructs traffic, that would constitute a public nuisance which could be removed by complaint to the magistrates' court or by action in the civil courts. The fact that the tree, or a number of them, are attractive is not a defence to such an action. It is likewise the duty of the highway authority, again enforceable in the Magistrates Court, or by action for damages in the event of damage or injury, if a highway tree causes danger or obstructs traffic, for it too would then be a public nuisance. It is no defence to a complaint or action that the tree or trees are visually attractive or of potential or actual ecological or other environmental value. Nor is it a defence to a complaint or action based on want of maintenance or repair that the relevant works could not be carried out because they would disturb a tree or trees that were attractive or otherwise valuable.

161 Mr Streeten argued that if a road was in poor repair and needed substantial works, such as relaying the base course and the tarmac, that amounted to an "improvement" and not maintenance. His case was that if the road had been left unattended to for some time, and needed substantial works to restore the fabric of the highway, that would amount to an "improvement." In my judgment that is unsustainable, and had attention been given to the relevant statutory provisions, it could not have been argued. For the definition of "maintenance" in the *HA 1980* expressly includes repair. A repair is still a repair even if

the works involved are more substantial because there has been inadequate maintenance in the interim. It would be an astonishing result of this litigation if it transpired that no highway authority could carry out substantial works to repair a road (even in an emergency situation) unless, if they had significant adverse environmental effects, it went through the process of an environmental assessment, and then if it did, then had to seek and obtain planning permission. That is the consequence of Mr Streeten's argument.

162 One notes also that both the *HA 1980* and the *TCPA 1990* in the passages cited above, but again not referred to in the Claimant's submissions before me, draw a clear distinction between maintenance (including repair) which it is the authority's duty to perform, and improvement, which it has the power to carry out. That is a common sense distinction. No-one rational would or could expect that a road would never need repair, nor that a tree within a highway could never become obstructive or dangerous to pedestrian or vehicular traffic. A body entrusted with the repair of highways should be under an obligation to keep in repair that which is there, whereas one electing to carry out new works of improvement must rightly go through the proper processes to see if its proposal is acceptable. The maintenance of the highway in good repair, and its being kept clear of anything which was a source of danger or obstruction, is what anyone would expect to occur, and indeed complain about if not carried out, which is why the common law did, and now the *HA 1980* does, provide for remedies if the authority does not do so, whether by complaint to the Magistrates' Court, or by action in the event of injury or damage.

163 The duty to maintain and keep in repair relates to the fabric of the highway, serving the purposes of the highway, of passage and repassage. That duty does not extend to maintaining or retaining the trees growing within it.

164 It is otherwise in the case of changes to the line or nature of the highway, or enlargement of the built or engineered works within them, where what is provided is not the replacement of what was there before. Section 62 and its successors in *HA 1980* provide for changes which amount to improvements. To take an example I raised in argument, one might have an area within the highway, and which often contains trees, which the authority wished to use to provide extra capacity or visibility at a junction, or to widen the carriageway or pavements. That would be an improvement, which would alter the width and extent of the carriageway, and would be an improvement both as a matter of common sense, but also as a result of the statute and the terms of section 62 of *HA 1980*. That is to be contrasted with the situation of replacing that which existed before and whose state of repair required its replacement.

165 There can of course be some acts of repair which involve a change to the appearance of the highway: they may consist of works (e.g. the new kerbs or manholes are of a different design because kerbstones and manholes of the original designs are no longer available) or of the removal of something which has become a source of danger or an obstruction to the free safe passage of traffic, such as a tree which is diseased, or overhanging branches. Their removal will be an obvious visual change, but it cannot be said that they would amount to an improvement in the sense used in the statute.

166 In that context, what is the position with regard to the felling of trees in the context of the EIA Regulations? Mr Honey says, rightly, that the act of felling a tree does not amount to an act of development under s 55 of *TCPA* 1990. As already noted, it is not a

building, engineering or other operation. It is necessary also to consider the provisions of the Planning Code insofar as it relates to the felling or lopping of trees. That is not treated as an act of development under s 55, and the felling of trees is not something to which the sections of the Act dealing with the grant of planning permission for development (Part III) are addressed. The provisions relating to trees are a "special control" under Part VIII. As a general rule (but to which there is an important exception relevant here) , express consent is required for the felling or lopping of trees, if, and if only, they are protected by a Tree Preservation Order ("TPO") (see s 202C *TCPA 1990*) or lie within a Conservation Area (see s 211 *TCPA 1990*).

167 It is not suggested here that any of the highway trees in this case are covered by a TPO. It was suggested that some may fall within a Conservation Area. However I was not taken by Mr Streeten or by any part of the Claimant's case to the relevant provisions, which are important. The felling or lopping of trees is permitted in a Conservation Area if (inter alia) the tree is dead, or is carried out in compliance with any obligation imposed by or under an Act of Parliament or so far as may be necessary for the prevention or abatement of a nuisance (see Regulations 13-14 of the *Town and Country Planning (Tree Preservation) (England) Regulations 2012*). This is another part of the relevant Code never cited or referred to in the Claimant's case.

168 It follows that provided the felling or lopping of the tree is carried out in pursuance of the duty to maintain (and thus repair) already identified, there is no requirement for consent to fell the tree. (It will of course be remembered that an interference with the highway amounts to a public nuisance).The authority cited by Mr Streeten (the first instance decision by a deputy judge in *R (McLellan) v London Borough of Lambeth* [2014] EWHC 1964) does not hold that the duty in s 72 of the *LBCAA 1990* applies to a decision by a local authority to fell a tree in a Conservation Area. It holds the opposite, which was inevitable as a decision to fell a tree is not an exercise of a power to which s 72 applies. But the deputy judge went on to hold that the fact that the tree was in a Conservation Area made it a material consideration in the taking of the decision to fell the tree. But the context in that case was quite different. The tree in question was not a highway tree, and it was proposed to be felled by the Defendant Council as planning authority. It was sited next to a listed building, where its landscape value was obviously important. It was not necessary for the deputy judge to consider the relevant legislation on highways and obstructions within them. Regulations 13-14 of the *Town and Country Planning (Tree Preservation) (England) Regulations 2012* did not apply to that tree (it came under Regulation 15, which is to different effect). There is nothing in *McLellan* which suggests that consent is required to fell trees, and especially not given the terms of those Regulations. But in any event in this case, I was not directed in the evidence to any trees within a Conservation Area of whose felling complaint was made, although it was asserted in the 3rd February 2016 that some in Nether Edge fell within a Conservation Area. Further, as the documents set out above describe, Amey and SCC were having regard to the presence of trees in Conservation Areas. But even then, as already noted, and even assuming that consent is required in a Conservation Area to fell highway trees, if the repair of the highway cannot be achieved without felling them, there will be a strong case for the felling to proceed.

169 It must also be noted that while there is a requirement in those domestic Regulations which apply the EU Directives for environmental assessment in the case of trees, it only applies to projects of deforestation on sites of at least 1 hectare in size (0.5 ha in a

National Park); see *Environmental Impact Assessment (Forestry) (England and Wales) Regulations 1999* Schedule 2 paragraph 2. This project cannot be called deforestation.

170 It follows from the above that:

(a) the execution of works in the highway to repair it does not constitute development and therefore requires no planning permission;

(b) the removal or lopping of trees requires no planning permission in any event;

(c) the removal or lopping of highway trees in a Conservation Area requires no consent under s 211 *TCPA 1990* if carried out in pursuance of the duty of the highway authority to maintain the highway, keep it in repair, and free of sources of danger or causes of obstruction;

(d) there is therefore no question of a development consent being required for the works;

(e) no planning function arises relevant to s 72 *LBCAA 1990;*

(f) at most, the fact that a tree could contribute to the appearance and character of a Conservation Area could be a material consideration. There is no evidence at all that Amey and SCC failed to take it into account.

171 It follows in my judgment that the Claimant's case on the requirements of domestic law was fundamentally misconceived, and wholly overlooked the relevant statutory provisions. It is most unfortunate that an application was advanced for urgent consideration, let alone at the permission stage, in which important parts of the statutory codes were never addressed.

172 I turn to consider whether the carrying out of such works of repair, or the removal of trees, requires assessment under the EU Directive. The claimant's case is that the former does so, because the works being carried out constitute an "improvement." (Mr Streeten conceded that the felling of trees per se under these circumstances falls outwith the Directive). The Directive applies (Article 2(1)) to projects "before consent is given."

173 Assuming that the Directive has direct effect, Mr Streeten then argued that, as the words of paragraph 13 of Annex II are "any change or extension of projects listed in Annex I or this Annex, already…….executed……which may have significant adverse effects on the environment (change or extension not included in Annex I)" then these are works to change or extend roads which would fall within Annex II paragraph 10(e).

174 In my judgment, that is not directed at works of maintenance or repair in the sense apposite to what occurred here, but at the replacement of a feature of the road by something different. In the case of maintenance (including repair) nothing need have changed from what was originally envisaged. The fact that it may produce something different in fact is not material, provided that it constitutes works of maintenance (including repair). For no-one could ever expect that a road, once built, would never require maintenance or repair, nor that such maintenance or repair could not involve the replacement of worn out or damaged parts of the highway, be they kerbs, tarmac,

drains, base course or other features of a road and its pavements. Nor would anyone rational expect that when the time comes round for repair, that the same kind of constituent parts e.g. culverts, drains, kerbstones etc., would still be available in unchanged form and appearance, or that some innovation had not altered the specification to be used.

175 Further, no one could sensibly argue that a highway would be "changed" in the sense used in the Directive if a tree within the highway had become diseased or elderly and required removal or replacement, or that a tree which was a source of danger or obstruction should be removed, or that one which prevented the repair or maintenance of the fabric of the highway would be removed. None of the works in issue in this case involve any change or extension to those roads, in the sense there used.

176 I was directed to the European Commission's "Interpretation of definitions of project categories of Annex I and II of the EIA Directive" which at pages 57-9 says this:

"Annex II (13)

"(*a) Any change or extension of projects listed in Annex I or Annex II, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment*.

Directive 85/337/EEC did not explicitly cover modifications of existing projects, with the exception of 'Modifications to development projects included in Annex I and projects in Annex I undertaken exclusively or mainly for the development and testing of new methods or products and not used for more than one year' (Annex 11(12)).

Directive 97/11/EC amended Directive 85/337/EEC so as to include modifications of existing Annex I and Annex II projects in Annex II (13): 'any change or extension of projects listed in Annex I or Annex II, already authorised, executed or in the process of being executed, which may have adverse effects on the environment'.

Directive 2003/35/EC, which amended Directive 85/337/EEC, among others, and Annex II (13) came into effect on 25 June 2005, introduced a new Annex 1(22)80 category including changes or extensions of projects listed in Annex I where such a change or extension in itself meets the thresholds, if any, set out in Annex I. These project modifications therefore need to undergo an environmental impact assessment according to Article 4(1) of the Directive. Changes or extensions of existing projects not included in Annex 1(22) fall within Annex 11(13) (See Box 1).

The evolution over time of the wording of the EIA Directive concerning project modifications reflects the case law of the Court on this subject. On a number of occasions, the Court has dealt with the issue of whether a project should be interpreted as a new project or a modification of an existing one, and how the project is then covered by the requirements of Articles 4(1) and 4(2) of the Directive.

'Already authorised' in the sense of Annex II (13) means projects for which development consent has been given.

In Case C-2/07, Abraham and Others, the Court concluded that point 12 of Annex II, read in conjunction with point 7 of Annex I, to the EIA Directive (in their original version), must be regarded as also including works to modify an existing airport. Therefore, works to modify an airport with a runway length of 2100 metres or more thus comprise not only works to extend the runway, but all works relating to the buildings, installations or equipment of that airport where they may be regarded, in particular because of their nature, extent and characteristics, as a modification of the

airport itself. That is the case in particular for works aimed at significantly increasing the activity of the airport and air traffic.82

In Case C-72/95, *Kraaijeveld and others*, the Court found that the expression canalisation and flood-relief works referred to in point 10(e) of Annex II to Directive 85/337/EEC (before amendments by Directive 97/11/EC) should be interpreted as including not only construction of a new dyke, but also modification of an existing dyke involving its relocation, reinforcement or widening, and replacement of a dyke by constructing a new dyke in situ, whether or not the new dyke is stronger or wider than the old one, or a combination of such works (paragraph 42). It should be noted that, at the time when the Court delivered its judgment, Annex 11 (13) was not in the EIA Directive. Therefore, the Court interpreted this modification in the context of the main project category, i.e. Annex 11 (10) (e).83

In the context of Annex II (13), a question may arise on how to interpret rehabilitation works and whether such rehabilitation schemes would fall under this Annex II (13) category of projects. Rehabilitation schemes could fall into two categories.

The first category comprises those cases in which rehabilitation is no more than renewal of worn or decayed parts. It might be thought of as large-scale maintenance. When the project has been rehabilitated, it is as good as if it was newly built but it is not different from or more extensive than the original project. Subject to two caveats, this type of rehabilitation is not considered to come within the Directive's scope.

(i) The first caveat is that rehabilitation may include the use of new materials to replace the original ones even though the capacity of the network remains unchanged. For example, cement or plastic pipes might be used instead of iron, copper or clay ones. Strictly speaking, this should be considered as a change to the original project.

(ii) The second caveat arises if the works needed to carry out the rehabilitation project will themselves be unusually disruptive (in terms of the screening criteria in Annex Ill). For example, it might be necessary to destroy a protected habitat in order to gain access to buried installations such as pipework. Where the Habitats Directive is concerned, it would be possible to rely on the Article 6 assessment. Habitats protected under national law might be in a weaker position and here, too, the EIA Directive could be invoked if there is indeed a change to the original project (e.g. different types of pipes).

The second category of rehabilitation may include some repair or maintenance (as above) but its main characteristic is that it changes or extends the project in some way. For example, a sewerage system might be made more extensive, or have pumping stations added, or its capacity might be increased. This would amount to a change or extension and so the project would fall within the Directive's scope and screening would be necessary. That does not mean that a full environmental impact assessment would necessarily be required. This would depend on the individual case and would need to be considered in the light of the Annex II screening criteria."

177 I note what is said immediately before caveat (i). It coincides with the interpretation I have endeavoured to set out in the earlier paragraphs. I am bound to say that I find what is said at caveat (i) very difficult to accept, and it does not flow from the principles set out in the two cases cited. A change from an iron pipe to a black plastic one cannot, in any sensible world, take what is being done out of the scope of maintenance and into change. Further, the European case law relating to roads does not establish the proposition contended for. In C142/07 *Ecologistas en Accion-CODA v Ayuntiamento de*

Madrid [2008] ECR 1-6097, the Third Chamber of the CJEU was considering the proposal to reroute the Madrid urban ring road by the construction of tunnels. Various arguments were advanced by the Madrid Ayuntiamento that the proposal was not subject to the requirement for environmental assessment, including the argument that it was exempt because it did not amount to "construction" of a road, being works for refurbishment or improvement. Unsurprisingly that rather bold submission was rejected. The Court held [36] that

> "A project for refurbishment of a road which would be equivalent, by its size and the manner in which it is carried out, to construction may be regarded as a construction project for the purposes of that annex" (in that case Annex 1) "(see to that effect, Case C-227/01 *Commission v Spain* [2004] ECR I-8253, paragraph 46, and *Abraham and others,* paragraph 32)."

It follows that the example of the pipes relied on by the Commission is not an appropriate one. The question is not whether the materials used are different, but whether, looked at as a whole, the refurbishment would amount to a material change such that it would be equivalent to a construction project. The fact of the difference may be relevant, but it is not the determinative question. In that case, the Court was dealing with a substantial road being put underground into sections of tunnel. I do not accept that the replacement of kerbstones, or resurfacing the existing carriageway or footway amounts to a construction project of the kind there described. In any event in this case, I have not been given any evidence of some feature of the repaired *highway structures* being significantly different from those in the pre-existing highway. Indeed, it is the claimant and those who object to the works who have been asking that different methods of engineering the road should be deployed.

178 Whatever may be the case with some projects, it cannot seriously be argued in this case that a change in, for example, the choice of kerbstones or finishing course, has significant environmental effects, nor were any suggested to me. This case is not about such changes, but the fact that works of repair involved the loss of trees, or that trees were removed for other reasons. There is a further reason why this issue does not take this case further: what is complained about is not about the choice of finish or material, but the loss of the trees. The fact that trees are felled or lost does not make this a more substantial *construction* project.

179 I therefore see no reason to adopt a different approach to the word "change."

180 It is thus instructive to look again at the list of works in Ladysmith Avenue and Edgebrook Road, which were cited by the claimant as an example of the works and removal of trees to which objection was taken, which the claimant gave as an example of works of "improvement." In each case, a tree is described in the schedule prepared by Amey and SCC as "damaging". The damage is described, consisting in each case of damage to kerbs or rooting into the carriageway. In each case where removal is recommended, that decision is made after consideration of whether the damage can be repaired without removal of the tree, and then the replacement planting is identified.

181 That schedule shows why the Claimant's case on this ground is unsustainable. In each case, the removal of the tree is justified by reasons relating to the need to repair the highway. While the Claimant and others may not agree with the reasons given, it cannot be said that the reasons given, if they are true, do not justify the removal of the

tree in accordance with the relevant statutory provisions. In that and other cases, points are taken by the claimant and others who object to the trees' removal about the visual merits of the trees, ecological issues and the contribution of the trees to vitiating air pollution. In the context of the statutory duties imposed on SCC as highway authority, and in the context of the Planning Code, none of those points are relevant. The only points raised which are relevant in that context relate to the requirement or otherwise to carry out the works or remove the tree on maintenance grounds, which as noted above includes repair.

182 It follows that a decision to carry out works of maintenance (including repair), whether or not they have adverse environmental effects, is not and was not unlawful. It was not an act of development, did not require planning permission, did not require Conservation Area consent, and did not amount to a change for the purposes of the Directive.

183 The fact that Amey produced documents which seemed to take the form of scoping assessments cannot amount to a reason for interpreting and applying the law otherwise. But consideration of the processes engaged in by Amey, and set out above at paragraphs 46-51 above, shows that in fact Amey and SCC have considered the potential environmental effects with great thoroughness, albeit that their assessment is not accepted by the Claimant and those who have objected to the removal of the trees.

184 Even then, the objections on the grounds of environmental effect are only relevant in a judicial review context if the Claimant can show that the decisions to fell were irrational in a *Wednesbury* sense. Some effort was made by Mr Streeten to argue that the nature of the test was different in an environmental case. He relied on the approach of Ouseley J in *R(McMorn) v Natural England & Anor* [2015] EWHC 3297 at[204]-[205]

> 204 Mr Maurici accepted that the relevant standard of review for environmental decisions was the *Wednesbury* standard; *Smyth v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174. But that was because Beatson LJ had recognised [37] that the *Wednesbury* standard permitted variations in the intensity of review to reflect the nature of the interests affected. This was by way of answer to the concerns of the Aarhus Compliance Committee that *Wednesbury* did not meet the required standard of review for substantive and procedural illegality. An intense form of review was required here because, Aarhus claim or not, the decisions of NE affected the Claimant's livelihood directly, without right of appeal, and NE's policy required that licences should not be unreasonably withheld. But Mr Maurici also contended that even on an orthodox *Wednesbury* approach, NE's decision was irrational. Mr Tromans did not accept that this was an Aarhus claim, nor indeed that any EU point was in play.
>
> 205 I have concluded that this is an Aarhus claim, and that a more intensive form of scrutiny is justified, for reasons I come to in dealing with costs. But whether it is or is not an Aarhus case, the facts mean that the lawfulness of the decision warrants close examination."

185 I regret that I must differ from Ouseley J, albeit with no little diffidence. For if one goes to *Smyth* what one finds is a Judgment from Sales LJ, which contains this passage at [80]-[81]

"80 I do not accept these submissions. In the similar context of review of screening assessments for the purposes of the Environmental Impact Assessment (EIA) Directive and Regulations, this Court has held that the relevant standard of review is the *Wednesbury* standard, which is substantially the same as the relevant standard of review of "manifest error of assessment" applied by the CJEU in equivalent contexts: see *R (Evans) v Secretary of State for Communities and Local Government* [2013] EWCA Civ 114; [2013] JPL 1027, [32]-[43], in which particular reference is made to Case C-508/03, *Commission of the European Communities v United Kingdom* [2006] QB 764, at paras. [88]- [92] of the judgment, as well as to the *Waddenzee* case. Although the requirements of Article 6(3) are different from those in the EIA Directive, the multi-factorial and technical nature of the assessment called for is very similar. There is no material difference in the planning context in which both instruments fall to be applied. There is no sound reason to think that there should be any difference as regards the relevant standard of review to be applied by a national court in reviewing the lawfulness of what the relevant competent authority has done in both contexts. Like this Court in the *Evans* case (see para. [43]), I consider that the position is clear and I can see no proper basis for making a reference to the CJEU on this issue.

81 In his submissions, Mr Jones sought to rely on a different *Evans* case: *R (Evans) v Attorney General* [2014] EWCA Civ 254; [2014] QB 855. That case concerned a different directive (Parliament and Council Directive 2003/4/EC regarding access to environmental information), which is drafted in materially different terms from the Habitats Directive (since the Environmental Information Directive requires "access to a review procedure before a court of law" whereby the court of law can review and make final decisions of its own: see Article 6, set out at para. [12] of the judgment) and requiring a materially different scheme of decision-making processes to be followed (see paras. [42]- [47], [52] and [54]-[68]). By reason of the different context and terms of the directive in issue in that case, I consider that Mr Jones's attempt to pray in aid *R (Evans) v Attorney General* as the relevant analogy for present purposes fails."

186 In fact, in *R (Evans) v Secretary of State for Communities and Local Government* [2013] EWCA Civ 114; [2013] JPL 1027, [32]-[42] Beatson LJ expressly rejected the idea that the standard of review had been altered by the Aarhus Convention, as pointed out by Sales LJ. It is worth referring to the way in which Beatson LJ dealt with the point:

"32 Mr Wolfe's submissions on this part of the application were essentially that the decisions of this Court which adopted and confirmed the *Wednesbury* approach either pre-date the Aarhus Convention and its enactment into EU and national law and developments in the jurisprudence of the CJEU, or are distinguishable or *per incuriam*. He placed particular weight on the Aarhus Convention Compliance Committee's December 2010 report expressing concern about the *Wednesbury* approach. He also relied on the fact that "what are in play here are fundamental rights", rights to participation in front-line decision-making and the right of access to a court able to assess the substantive and procedural legality of an environmental decision: EIA Directive Articles 6 and 11 (formerly 10A) and Aarhus Convention, Article 9.

33 In fact, the decisions of this court in *Bowen-West* and *Loader* were in 2012, and the decision of the CJEU in Case C/508/03 *Commission v United Kingdom* (2007) Env LR 1 in 2006 post-dated those developments. In *Loader*'s case it appears that by the conclusion of the oral submissions, Mr Pereira, counsel for the claimant, conceded

that, provided the correct test was applied by the Secretary of State, the court should approach a challenge to the decision on *Wednesbury* principles. Notwithstanding Mr Wolfe's attempt to distinguish that case, the arguments in this case appear in substance to re-run arguments considered and rejected by this court. See, in particular, Mr Pereira's submissions set out at [21] – [24].

34 In *Commission v UK*, the CJEU stated (at [88] – [92]) that the test required by EU law is "manifest error of assessment", a test substantially the same as the *Wednesbury* test. At [91] the CJEU stated:

> "It is also clear from…*Commission v Portugal* (2004) ECR 1 5517 that, in order to demonstrate that the national authorities exceeded the limits of their discretion by failing to require that an impact assessment be carried out before giving consent for a specific project, the Commission cannot limit itself to general assertions by, for example, merely pointing out that the information provided shows that the project in question is located in a highly sensitive area, without presenting specific evidence to demonstrate that the national authorities concerned made a manifest error of assessment when they gave consent to a project."

35 On this point too, Mr Wolfe, like Mr Pereira in *Loader's* case, sought to rely on the decision of the Grand Chamber in case C/127/02 *Waddenzee* (2004) ECR 1 – 7405. Although Pill LJ did not refer to this decision in the conclusions section of his judgment, his conclusion that the *Wednesbury* test suffices can only be understood as rejecting the argument that, in this context, assistance for a more intrusive scope of review is to be obtained from *Waddenzee*.

36 The Aarhus Convention and the views of the Aarhus Convention Compliance Committee do not ultimately assist Mr Wolfe. First, it is clear from the jurisprudence that the Convention is not part of domestic law or EU law: for example, see *Walton v Scottish Ministers* [2012] UKSC 44 at [100]. Secondly, the Compliance Committee has reached no concluded view that the *Wednesbury* approach is impermissible. Moreover, its expression of concern is general and unparticularised. For example, it only refers to *Wednesbury* and does not refer to the other established heads of public law review; error of law, error of fact, and the principles of relevance and of propriety of purpose which are sometimes insufficiently distinguished from Lord Greene's residual category, which Lord Diplock termed "irrationality". It also does not identify the variations in the intensity of *Wednesbury* review that reflect the nature of the interest affected.

37 The cases of *Bowen-West* and *Loader* were decided since the Aarhus Convention Compliance Committee expressed its concern but in neither did this court consider that put into question the existing approach. The Committee's view and concern is undoubtedly worthy of respect. But, even if it had reached the view that the *Wednesbury* approach does not enable the court to assess the substantive and procedural legality of the Secretary of State's decision, its view would have had no direct legal consequence. Thirdly, as far as Article 9 of the Aarhus Convention is concerned, although this has been brought into EU law as Article 10A of the EIA Directive, it did not result in the later decision of the CJEU in *Commission v UK* criticising the use of the *Wednesbury* rule.

38 I have referred to the fact that Mr Wolfe floated before us, but did not propose, a proportionality test. Any suggestion that the appropriate approach might be proportionality, however, has to overcome a formidable obstacle. The question for the Secretary of State when making his screening direction in this case was a question of fact, albeit not a hard-edged question. Accordingly, the reasons it cannot be subjected

to a test of proportionality which were identified by Laws LJ in *R (Bowen-West) v Secretary of State* [2012] EWCA Civ 321 at [40], a judgment referred to by Pill LJ in *Loader*'s case, apply here. Laws LJ stated:

> "I do not see that there is any true question of proportionality arising in the present case. We are not concerned with the exercise of a discretion and therefore we are not concerned with assessing whether a response to a particular aim is or is not proportionate. We are concerned with a fact-finding exercise. There is nothing, as it seems to me, in the jurisprudence of the Court of Justice to show that the conventional English law approach is inapt…."

39 Mr Wolfe's argument also has to overcome the fact that the Commission's guidance, as Pill LJ stated in *Loader's* case at [43], recognised that national planning authorities have a degree of freedom in appraising whether or not a particular project must be made subject to an assessment. This was recognised in the *Waddenzee* case. Here, the national authority with power to make the decision under the Regulations is the Secretary of State.

40 Finally, the argument that the applicant's environmental rights under the EIA Directive require a proportionality-based standard of review because they are fundamental rights is also misconceived. The applicant only has such rights if the development is EIA development. The fundamental right will therefore only incept once the development is found to be an EIA development.

41 Mr Wolfe's submissions are largely based on the position of the Aarhus Convention Compliance Committee. But that body has made no decision and has only expressed concerns. The questions which Mr Wolfe seeks this court to consider and to refer to the CJEU have been considered by this court on a number of occasions, including occasions since the Public Participation Directive. The court has decided in substance that the standard of review is to be the familiar common law *Wednesbury* standard. That was also the position of the CJEU in 2006. The recent cases are all post-Article 10A, and post-*Waddenzee*. The judges of this court referred to *Waddenzee* but gave no indication that it puts into question the *Wednesbury* approach to review. The only other recent CJEU case that has been put before us is *Commission v UK*. That case gives no support to Mr Wolfe's submission. ……..”

42 I have also carefully considered Mr Wolfe's submissions on the question of referring this case to the CJEU, but have decided that, since he was unable to point to any European jurisprudence taking or favouring an approach that differs from the standard common law approach to judicial review including the different strands of the *Wednesbury* test, his submission that there is sufficient doubt in the position to justify making a reference is simply not made out.”

187 I therefore reject Mr Streeten’s submission that there is a different standard of review in an Aarhus case. He did not refer me to the Court of Appeal authorities which were contrary to his submission. But even if there were a different test, the evidence from Mr Caulfield, which I accept and is supported by the assessment documents, and the description of the programme, shows beyond argument that in the case of each removal of trees, the reasons for it have been approached properly.

188 It is not the function of this court to take decisions for the democratically elected decision maker, nor to act as an appeal court on the merits. Disagreements on such issues are a matter for the ballot box in elections, not judicial review. The most that the claimant and others have shown is that in some cases it may be possible to have a different view about the retention of one or more trees. But that does not get close to

showing that any decision to fell made by the City Council was irrational, or one which no reasonable Council could have made. The view of Mr Dillner and other objectors that there is an objection of principle to the felling of highway trees cannot be sustained in the light of the statutory codes.

189 In any event, the application in this case is to quash the decision of the City Council "refusing to cease to fell trees in connection with the Streets Ahead Project." The only grounds upon which it is argued, are on the planning permission/EIA/s 72 ground, and on the question of consultation.

190 Although many of those who oppose the project have done so on wide ranging grounds, the actual challenge on the legality of the felling mounted before me was on those two points. Mr Streeten has not suggested that the Streets Ahead programme was unlawful, and he has not suggested that the 6 Ds policy was unlawful, nor that its criteria were unlawfully chosen. He has not suggested, or sought to do so, that the approach as set out in the Five Year Tree Management Strategy Programme Document as set out at paragraphs 37 ff above were wrongly chosen or that it omitted anything relevant. Further, if the Claimant seeks to argue more widely, and that the Streets Ahead programme was unlawful from the outset, he also runs into the major hurdle that the programme is now over 3 years old, and this application for judicial review was only made in February 2016.

Ground 1; the Consultation Ground

191 I turn now to Ground 1, which deals with the Consultation issue. I must start by reminding those who read this Judgment of an important constitutional matter. While certain societies have operated a system of decision making whereby citizens were expected to participate not just in elections but in the making of the decisions, the relevant political bodies in United Kingdom do not have such a system, save only for the occasional referendum on specific issues where Parliament has elected to hold one (as they have done in four cases, all on constitutional matters - membership of the EU and its predecessor (twice), Scottish independence, and electoral reform) or in the case of Local Government, in the exceptional cases, relating to governance and finance, provided for in sections 9M and 52ZG of the *Local Government Act 2000 (as amended by the LA 2011).* They do not occur as a matter of course so as to apply to other decisions within the wide range which a local authority must make, although a local authority may, if it wishes, hold one. But save for such exceptions, decisions in this country are taken by elected members, and not on a participatory basis. In England and Wales, a Council such as Sheffield is a creature of statute, with its members elected at elections. While a Council can elect to invite participation from members of the public in meetings or otherwise, there is no overarching right of those residents of a City/Borough/County/District who are not members of the Council to participate in decision making.

192 In my judgment there are four relevant questions here:

(a) was SCC under a duty to consult residents of the City before it entered into the Streets Ahead contract, or drafted the 6 Ds criteria, or before it embarked on felling?

(b) has anything occurred which has created a duty to consult since then, and on what terms?

(c) has SCC complied with the form of consultation which it said it would perform?

(d) if not, has that resulted in unfairness?

193 There is no statutory requirement in the *HA 1980, TCPA 1990* or any other potentially relevant statute which requires SCC to have invited representations from the public on the contents of the Streets Ahead programme or contract, and none was cited to me. (If however an improvement was proposed, which would count as development because of its significant environmental effects, then consultation would be required in the process of planning application and Environmental Assessment.) It follows that if there was a duty to consult on its terms, or on the 6Ds criteria, it can only have come about if, and if only, SCC had made a representation that it sought representations upon it. Mr Streeten relied on no other source for the existence of the duty.

194 So far as the specifics of works are concerned, if they did not amount to acts of development for the purposes of s 55 *TCPA 1990,* and if no EIA assessment was required, then no question of any statutory duty to consult can arise, and none was cited to me. It follows that if there was a duty to consult on the specifics of works, it can only have come about if, and if only, SCC had made a representation that it sought representations upon that matter.

195 Before looking at what was said by those who might be connected with SCC, it is necessary to deal with the issues that arise about the scheme of governance at Sheffield. Mr Eccleston's lucid account describes its features. In short terms, the only person or body within the Council with the power to take actions or make decisions with regard to the works was the Cabinet member responsible. In particular the full Council had no power to do so. As a matter of first principles, while a delegate can bind the delegating body if acting in connection with a matter delegated to him/her, s/he cannot do so otherwise.

196 Here, the full Council passed resolutions moved by the relevant Cabinet member (Mr Fox) in response to concerns brought to the full Council. It was suggested by Mr Honey that the decisions of the full Council could not be relied on, as it had no authority in highway matters. I disagree. Standing Orders made the full Council the appropriate body to debate petitions, and a resolution of that Council must carry some weight. I reject the idea that such resolutions cannot bind the Council so far as the doctrine of a legitimate expectation of consultation is concerned. They are capable of creating a legitimate expectation of the kind contended for here. The issue is whether what happened did so.

197 While I well understand that some local residents would have wanted to be consulted on the proposals, there was no duty of consultation before SCC entered into the Streets Ahead contract, or drafted the 6 Ds criteria, or before it embarked on felling, nor was any suggested to me.

198 Since then a number of residents have objected to felling taking place, and one may take it that some now objecting do so now not just to the decision to fell individual trees, but also to the 6Ds criteria.

199 The first matter relied on by the Claimant is the letter from an employee of the Council (Mr Wain) to Dr Shetty. The first difficulty the Claimant has is that this was something held out to Dr Shetty. It was not made to the public at large, and the Claimant does not suggest that he was informed of it. Secondly, the most the letter said was that the Tree Walks gave residents a platform to discuss the decision making process, have their input and raise concerns with key decision makers. Dr Shetty's interpretation of it, that there would be a full and comprehensive community consultation before any further tree works were conducted, cannot be implied by the letter. Thirdly, there is no evidence that the officer had any authority to hold out any wider offer of consultation in the sense argued for by Dr Shetty.

200 The next events relied on are what occurred in June to July 2015. There is nothing in the events at the full Council meeting of 3rd June 2015, or the question and answer session on 8th June 2015, which could be taken as the Council committing itself to anything more than a discussion at that meeting, which is what occurred. The full Council meeting of 1st July 2015 is important. I do not consider that what is said by the relevant Cabinet member during a discussion can necessarily bind the Council. One has to look at what the Council resolved, but of course the motion which was passed was proposed by Councillor Fox. It endorsed the policy, but its terms make it plain that a moratorium on felling trees was not acceptable. However it endorses the establishment of the Highway Trees Forum (HTAF), which was "so we can have strategic conversations with representative bodies, also allowing residents to have a say in their own neighbourhoods." That must be read in the light of sub paragraphs (c) and (i), which show that the 6Ds policy remained unaltered, and that the Council voted that there should not be a moratorium on the felling of trees. That implies that the HTAF should be able to discuss matters which were consistent with those two principles.

201 But some notice must also be taken of the word "strategic." That might imply that it was not a body which would deal with decisions relating to individual trees. However in the real world, one could not have a sensible discussion about such issues without actual examples being cited and discussed. The Minutes of HTAF of 23rd July 2015 show that it looked at issues covered by the 6 Ds.

202 On 7th October 2015 the full Council considered the matter again. It is noteworthy that it considered that there had been insufficient public consultation around the tree felling and replacement programme, including its implementation on individual streets. It regarded the HTAF as a first step in restoring public faith and trust in SCC's management of the tree stock, including street trees. It referred to the HTAF as "(providing) a platform for an open discussion about the issues that affect highway trees and to open the Council to public scrutiny over decisions relating to highway trees. It also referred to it "hold(ing) the Council to account over the highway trees stock, including the Council's criteria for tree felling and sensitive engineering solutions."

203 That resolution, while showing that the HTAF was being held out as a forum for discussion, cannot be read as stating that there would be any form of moratorium over tree felling. However, given the fact that discussions would have little point unless held in advance of tree felling, it must be thought that residents' views could be brought before the HTAF and considered. But while that is true, the HTAF was not, nor had ever been held out to be, a public consultation exercise in any wider sense than a forum for discussion and scrutiny of the implementation of the programme. The Council's

resolutions gave it no mandate to reconsider the use of the 6 Ds criteria, as opposed to scrutinising how they were being applied. Further, the Council had twice expressly rejected the idea of a moratorium on the felling of trees.

204 It is clear on the evidence that the ITP system is not a public consultation exercise into whether SCC should apply the 6 Ds criteria. Indeed the media announcement is explicit that they remain. It is a way of assessing the views of a street's residents on felling proposals.

205 It follows from the above that SCC has never said that it will carry out any public consultation exercise beyond that of the ITP survey, together with the holding of the HTAF, which is a body which, at most, is one which scrutinises the execution of the Streets Ahead programme. Despite the basis of the Claimant's case, it is also plain that SCC never stated that tree felling would cease; indeed it kept rejecting that suggestion.

206 It may be that SCC could have been more adroit, and that it could have predicted that in certain areas, there would be a good deal of resistance to the idea of losing trees from the highways. The impression is given that in mid July 2015 it was being merely reactive to the adverse reaction the programme was meeting. But on the other hand, it had taken steps, as described in the evidence of Mr Caulfield, to tell people what was involved. But criticism can also be made of some of those who objected. The tone of a good deal of the material cited by objectors shows that they had not read, or at least had not understood the documents drawn up by SCC, and even more importantly had, while reading up a great deal on some technical matters, failed to address the Council's statutory duties as highway authority, and had failed to note that their attempts to persuade SCC to effect a moratorium on felling had never been accepted.

207 But the task which the Court has is not one of deciding this issue on the basis of who had been more adroit or better informed at the relevant time. The Court has to look at the application of the relevant criteria to the facts it finds. I find that

(a) SCC made no representation capable of giving rise to a legitimate expectation that it would conduct a consultation exercise beyond the scope of the HTAF and ITP arrangements;

(b) SCC made no representation capable of giving rise to a legitimate expectation that it would exercise a moratorium over the felling of trees pending, save for those cases where a 50% majority of responses from a street opposed felling, and in such case until the ITP had reported on the matter;

208 Although Mr Streeten did not claim that this was such a case, I must now consider whether this is one of those rare cases where there has been a conspicuous failure to consult in a case where fairness required it. I conclude that it was not, for the following reasons:

(a) this was a case in which the statutory obligation on SCC to keep its highways in proper repair must be taken as a given. It cannot be right that it was necessary for SCC to conduct a consultation on whether it should perform the statutory duty imposed on it by statute, and in a situation where statute imposes no such obligation;

(b) so far as the 6Ds criteria are concerned, it cannot seriously be suggested that there is anything untoward about them, and as I have noted above, no attack on them was made before me;

(c) as set out in the evidence of Mr Caulfield, SCC had taken considerable steps to keep the public informed of the programme and what it entailed, both generally and in neighbourhoods which were affected;

(d) given the fact that the programme had to be carried out, and that given the fact that the 6 Ds criteria (supported by the other material to which I have referred) accepted that felling was to be a last resort after methods had been considered of saving a tree from felling, the only realistic scope for disagreement came about in the making of decisions with regard to individual trees. That could not have been advanced by a public consultation exercise conducted in Sheffield generally, or even in one of its districts;

(e) the ITP process gives those most affected - the residents of the particular streets - the opportunity to have their say. While there are criticisms of the survey methodology, it has to be taken account of in considering the overall question of whether there has been unfairness;

(f) if a public consultation exercise of the kind sought by the Claimant were held now, it would be held over three years after the scheme got under way, and long after the publicity given to it by SCC had been put in place. That would have substantial effects on the performance of the contract.

209 For those reasons, I conclude that this is not such a case.

210 I can deal swiftly with the challenges made to the ITP methodology. Some of the objections to it (e.g. on the choice of members and on the inclusion of the diversity questionnaire) have no arguable foundation and require no further discussion. Some of the complaints relate to teething problems which were ironed out rapidly, such as the problems over the website address. I also consider that the issue about whether all views in a household are the same is not of much import. The form gives scope for someone to enter that there is a difference of view. There is no evidence at all of this actually occurring. In my judgment the two important questions are

(a) should there be a cut-off point of 50 per cent of votes cast? and

(b) should residents of streets other than the one in question be consulted about felling?

211 The first and most important answer is that the ITP methodology does not differ at all from what the Council said it would be. Secondly, SCC was entitled to consider what a reasonable process of consultation would be. But in any event, there is nothing in the petition on 3rd February 2015 where the objectors complain about the terms of the ITP approach. As Mr Honey submitted, there is no evidence at all from anyone saying that their view about felling has been disregarded as a result of the ITP scheme, whether they be in a minority on a street, or a resident of another street.

212 So far as the resolution the subject of challenge is concerned, in my judgment the Claimant's case about it is unfounded. The Council was not being asked in the relevant petition to cease the felling of trees. The petition raised no issues about consultation. What it raised was the issue of sensitive engineering solutions, which coincided with the terms of the 6Ds criteria. I find it very hard to see how the Council's resolution on that date, set out above, constituted a breach of any legitimate expectation at all. The claim that there was a legitimate expectation that felling would cease is unsustainable given the repeated decisions of the full Council to the opposite effect.

213 But, however much one sympathises with those who seek to retain the existing trees in their roads and streets, it must also be observed that the petition's demands show the difficulties in the case of those who object to the tree felling. A blanket ban on tree felling in Nether Edge or elsewhere cannot be justified in the light of the statutory duties on SCC. The relevance of a Conservation Area designation had been recognised in the documents referred at paragraph 37ff, but the duty to maintain imposed on SCC by *HA 1980* is no different in a Conservation Area. An injury to a pedestrian who has tripped over a damaged kerb or an exposed tree root is not less serious because it has happened in a Conservation Area. The same point arises in the case of biodiversity; it cannot provide a reason not to carry out the statutory duty in *HA 1980*. It was addressed in the relevant documents, but it too does not absolve SCC from its duties of maintenance and repair.

J DELAY

214 This point was taken by SCC. One starts by stating that judicial review claims must be brought promptly. By s 31(6) *Senior Courts Act 1981*

> "(6) Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant—
>
> (a) leave for the making of the application; or
>
> (b) any relief sought on the application.
>
> if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration"

215 By CPR 54.5 (1) of the *Civil Procedure Rules*, any claim must be made promptly, and in any event not later than 3 months after the grounds to make the claim first arose.

216 Mr Honey says that the grounds in relation to the need for an EIA, and concerning the alleged need for planning permission, and the effect on Conservation Areas, arose when the Streets Ahead programme started. He points out that in the summer of 2015 the Environmental Law Foundation was advising objectors. Dr Shetty's evidence for the claimant is that she was aware of the need for an EIA by July 2015. Another witness for the Claimant, Dr Carusi, says that she was having discussions with her son, a trainee solicitor said by her to have some experience in planning and environmental law, from autumn 2015. An email of 8th February 2016 from the Environmental Law Foundation, which was originally acting for the Claimant, stated that it had been approached about the matter towards the end of summer 2015.

217 In the case of the Consultation ground, Mr Honey says that it was apparent by 7th-8th December 2015, which are the dates when an organisation called "SORT" (Save Our Roadside Trees) set out its complaints about the nature of the ITP process and survey.

218 SCC and Amey have advanced evidence to show that delays to the Programme will have serious financial consequences. It was given in opposition to the injunction, but I take it into account, because it describes the effect of the scheme coming to a halt, which would also occur if the Court makes an order declaring the works unlawful. This contract has now been in place for 4 years, and prices were fixed with subcontractors on a 2012 base. Highway maintenance contracts like this one have a 5 year core investment period in which to clear any backlog of maintenance required, followed by a further two "peaks" in investment to sustain the highway assets, putting investors' funds at risk for longer. Delays would increase that risk. Contracts with subcontractors will have to be varied. Amey employees engaged in connection with the scheme may have to be dismissed or laid off. Amey has already had to reprogramme the areas which it can complete. The main contract will have to be changed to meet new "milestone targets," and funding negotiated on a 5 years basis will have to altered or extended, which will increase the charges made upon SCC by the banks and equity providers. Amey can be expected to charge the Council for the cost implications of delays. Further, the risks of personal injury to users of the highway would not be addressed as they were under the Programme, and potential dangers to the public would not be dealt with. The risk of compensating those injured by lack of repair, currently held by Amey, would revert to SCC.

219 Mr Streeten says that

(a) the claimant was not aware of these matters earlier;

(b) each decision to fell is a fresh challengeable decision;

(c) it is a matter in the public interest.

220 So far as the case advanced by the Claimant on the EIA, planning permission and Conservation Area issues is concerned, this could have been brought in 2012. There is nothing about that aspect of the case which was not in the public domain then, and indeed about which there was considerable publicity and consultation. I also regard Mr Streeten's attempt to argue that each felling is a separate decision as ingenious but irrelevant. This is not an argument about the limitation period for claims in tort, where a cause of action does arise at each new infliction of damage, but a claim in judicial review. But what was unlawful, if the Claimant be right, was to go ahead with the scheme without conducting an assessment or gaining permission first. That took place as long ago as 2012.

221 As to the public interest, large numbers of claims in judicial review engage the public interest. The issue is whether the public interest is such that the rules on delay should be set aside. That will involve a balancing exercise considering the public interest and other considerations on both sides of the case, and the delay involved. On the one side here, one has the public interest in retaining as many trees as one can so as to preserve the contribution which the trees make to the street scene and otherwise to the environment, and on the other the very considerable harm to good administration (including the risks of danger to the public) which the interruption of the contract

programme will bring. But one must also appreciate that there is no realistic prospect of there being a new set of criteria by which to judge removal, and no prospect at all of the Council being able to get rid of the clear statutory duty cast upon it. There has been no good reason shown why the objections to the programme could not have been made in 2012 or in every subsequent year.

222 Further, the leading lights in the campaign against the removal of trees have known of the EIA argument since at least the summer of last year, including the Environmental Law Foundation, and Dr Shetty. Mr Streeten could put forward no reason as to why none of the various bodies and objectors who were so opposed to the felling of the trees had not taken action. In my judgment no good reason has been shown why the EIA/planning permission/Conservation Area consent argument has been so long delayed.

223 So far as the Consultation question is concerned, the Claimant's case is that the expectation that felling would cease unless there was full consultation was carried out, was created by the letter in March 2015 to Dr Shetty. I can understand that it was hoped that there would be a new consultation exercise. Its terms were known from the beginning of November 2015. I would not be willing to refuse leave on the grounds of delay so far as this ground is concerned.

K GRANTING OF RELIEF

224 Even if I had been persuaded that the Claimant had reason to show that SCC had acted unlawfully, a problem would still exist in terms of the making of an Order. The Claimant's case, it will be recalled, has failed to address the nature of SCC's duties under *HA 1980* and there is no doubt that the retention of a highway which is in disrepair is in breach of them, and poses a risk to the safety of those using the highway, as well as exposing SCC to the risk of private complaint in the courts, or civil action for damages.

225 If, contrary to my judgment, it is held that the EIA Directive applies and/or that planning permission of Conservation Area consent is required for some of the works on the basis that they amount to an "improvement" which would have adverse environmental effects, it by no means follows that all removals of trees are occasioned by such works. The Claimant's case has never addressed the difference. In circumstances of potential danger and obstruction of the highway, it would in my judgment be wrong to prevent all operations on the basis that some may require consent.

L CONCLUSIONS

226 The Court's task is to determine if any of the grounds have legal merit. The Court is neither an elected politician making policy decisions, nor an arboriculturalist or highway engineer carrying out an expert assessment of the effect of felling particular trees on particular streets, or of the prospects of avoiding their being felled. It is no part of the Court's role in a democratic society to substitute any view it may hold for that of the elected Council, or to seek to substitute its own view of the factual or technical merits of an arboricultural or engineering assessment, unless they reveal some error of law. The only exception to that principle would arise if the Court considered that no reasonable Council could have acted as it did, or that no reasonable assessment could

have reached the findings it did. Whether one takes the traditional test of "*Wednesbury*" unreasonableness, or applies some more nuanced test, there is no basis for considering that any such case is made out, and tellingly, none of the Grounds of Claim allege it. It follows that the Court's task is directed at whether the actions of SCC and Amey have been unlawful, and should be restrained. The Claimant has contended that the conduct of SCC was legally flawed, and that this Court should prevent SCC and Amey from felling any more trees. The Court's task is thus to determine if that challenge is properly made.

227 Turning to the grounds based upon the asserted need for the EIA directive process to be followed, the claim that the works amounted to development requiring planning permission, and the claim that Conservation Area consent was required, this judgment has addressed them at considerable length. The Court's conclusion is that those grounds and arguments are devoid of merit. In any event I would not have permitted an application to be made on Grounds 2 and 3 because of the inordinate delay in bringing the claim.

228 So far as the claim concerning Consultation is concerned, that too has been addressed at some length in this judgment. The Claimant has not identified anything which created a legal duty upon SCC to consult more widely than it did via the ITP and the HTAF.

229 In any event, the attempt to use the resolution of 3rd February 2015 as the vehicle for advancing those various grounds is misconceived. As this judgment records, there was and is no arguable basis for contending that SCC had agreed to apply a moratorium to the felling of trees, save for the particular process involved in the ITP scheme.

230 I refuse permission to apply for judicial review on all grounds.

231 I have already discharged the interim injunction. It was obtained by the Claimant without any mention in the application of the duties under the *HA 1980* nor of the difference between "maintenance" and "improvement" in s 55 of *Town and Country Planning Act 1990*. Indeed it has been apparent throughout this litigation that the Claimant and those who advise him have never addressed their minds properly to those important topics. Despite the fact that the potential grounds had been known of for some considerable time, no pre-action protocol letter was sent. Had it been so, SCC and Amey would have been able to respond to the uninformed aspects of this claim in a timely fashion.

232 I repeat that nothing in this Judgment is to be read as criticising the residents of Sheffield for seeking to protect the trees in their streets and roads, whose presence many of them appreciate so much. But as with many matters, such an understandable and natural desire must be tempered by acceptance of the important duties cast on the highway authority to maintain those roads and streets in good repair. It is unfortunate in the extreme that those advising the Claimant and others who object have failed to address both sides of the argument, and even more so that the claim was advanced, and the injunction sought, without any proper analysis on their behalf of the statutory and legal context. It may be that those who will be disappointed by the terms of this Judgment will want to see a different legislative regime in place. That is a matter for Parliament, and not for this Court.