Neutral Citation Number: [2013] EWHC 3496 (Admin)

Case No: CO/15452/2013

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/11/2013

Before :

MR JUSTICE BEAN

- -

Between :

R (on the application of the ENFIELD LONDON BOROUGH COUNCIL)	**Claimant**
- and -	
(1) BARNET CLINICAL COMMISSIONING GROUP	
(2) ENFIELD CLINICAL COMMISSIONING GROUP	
(3) HARINGEY CLINICAL COMMISSIONING GROUP	
(4) BARNET AND CHASE FARM HOSPITALS NHS TRUST	
(5) THE SECRETARY OF STATE FOR HEALTH	**Defendants**

- -

Andrew Arden QC, Annette Cafferkey and Sam Madge-Wyld (instructed by **Enfield Legal Services**) for the **Claimant**
Neil Garnham QC, Marina Wheeler and Karwan Eskerie (instructed by **Capsticks**) for the **First to Fourth Defendants**
Rory Dunlop (instructed by **the Treasury Solicitor**) for the **Fifth Defendant**

Hearing dates: 5-6 November 2013

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Approved Judgment

Mr Justice Bean :

1. This case challenges the decisions of the Barnet, Enfield and Haringey Clinical Commissioning Groups ("CCGs") and the Barnet and Chase Farm Hospitals NHS Trust to close the Accident and Emergency department at Chase Farm Hospital with effect from 9th December 2013. Expressed a little more fully, the decision of the three CCGs, taken on 25th September 2013, was that the changes to A&E and some other services at Chase Farm, Barnet and North Middlesex Hospitals set out in the Barnet, Enfield and Haringey ("BEH") Clinical Strategy, which was adopted by the Primary Care Trusts ("PCTs") of the three boroughs in December 2007 and endorsed by the Secretary of State in 2008 and 2011, should be implemented as soon as possible beginning on 15th November 2013 (Friday). The programme's Senior Responsible Officer, in consultation with the three CCG chairs, was authorised to delay the changes should any significant unforeseen clinical or building issue arise such that the risks of implementation outweighed the risks of delay. The NHS Trust, the fourth defendant, decided consequentially that the changes to the A&E service at Chase Farm Hospital should be completed by 9th December 2013.

2. The dispute about A&E services at Chase Farm has been going on for six years, during which the claimant Council ("Enfield") has consistently argued that Chase Farm's A&E department should remain open. One judicial review claim failed in April 2009, as I shall record below. It might be thought, therefore, that delay is a conclusive answer to the present application. However, the claim issued on 16th October 2013 was a challenge to the lawfulness of decisions taken on 25th September 2013, and a threatened judicial review application in 2012 had been warded off by the Treasury Solicitor on behalf of the Secretary of State with an argument that it was premature. I do not, therefore, consider that delay is a barrier to the making of the present claim, although it would potentially be a major factor on the question of discretionary relief.

3. By an order made on 23rd October 2013 Ouseley J, noting that the urgency of the position faced by the defendants merited an early hearing, adjourned the application for permission to seek judicial review to be listed in court on 5th and 6th November as a "rolled up hearing" with two days of court time allocated. In view of the significance of the issues raised I did not consider it desirable to treat permission as a preliminary issue, and accordingly allowed Mr Arden QC for the claimants to address me for the whole of the first day of the hearing as if permission had already been granted. The submissions of Mr Garnham QC for the NHS defendants and (very briefly) of Mr Dunlop for the Secretary of State, and Mr Arden's reply to them, took up the second day.

4. It is widely recognised that there are two categories of patients who attend hospital A&E departments: the "true" or major A&E cases which can only be dealt with in A&E, and the minor cases which could be dealt with elsewhere. A&E services in the three boroughs are being concentrated at Barnet and North Middlesex Hospitals: Barnet Hospital is a little to the west of Enfield and North Middlesex is in the south of the borough of Enfield. The Council's case before me was not that the facilities at Barnet and North Middlesex are inadequate or too distant for major emergency cases from the northern part of the borough. Enfield's complaint is rather about what the Council considers are inadequate local primary care facilities to deal with the second

category of patients. This can be seen from the terms of the declaration sought against the Secretary of State, which is as follows:-

> "… that his direction of September 3, 2008, confirmed on September 12, 2011, imposed on the Barnet, Enfield and Haringey PCTs a condition that the A&E at Chase Farm could only be closed when necessary improvements to primary care had been made in Enfield, comprising either those improvements which were to be the subject of consultation and which were subsequently identified in the Enfield Primary Care Strategy 2009, save as subsequently varied either by agreement or by further consultation or decision, or a level of improvement commensurate with them."

5. The Council's challenge is brought on five grounds:

> "(i) The CCGs do not have the power to cease use of Chase Farm A&E as there has not been compliance with the Secretary of State's precondition.
>
> (ii) Alternatively, the CCGS (by themselves and/or by the predecessor NHS bodies, the Barnet, Enfield and Haringey Primary Care Trusts) have created a substantive expectation either as to the actual primary care services to be in place before closure, or (at the lowest) as to an identifiable level of such services, from which expectation it would be an abuse of power for the CCGs to depart.
>
> (iii) Alternatively, that any such departure comprises a proposal for a substantial variation in the provision of the health service in the Claimants' area, such that the Enfield CCG must consult the Claimant under Local Authority (Public Health, Health and Wellbeing Boards and Health Scrutiny) Regulations 2013, S.I.2013/218, Reg.23 before acting on it, which it has not done.
>
> (iv) Alternatively,
>
> > (a) the proposals of the CCGs predecessor NHS bodies which were subject to statutory consultation (under the then relevant statutory provisions) in 2007 were on the basis of the improvements to primary care in Enfield being in place before closure, and/or
> >
> > (b) the proposals of the Enfield CCG's predecessor NHS body which were subject to statutory consultation (under the then relevant statutory provisions) in 2009 were on the basis of the improvements to primary care in Enfield being in place before closure, and/or
> >
> > (c) the 2012 Strategy and its prior statutory consultation (under the then relevant statutory provisions) in 2012

were on the basis of the improvements to primary care in Enfield as under the BEH Clinical Strategy, which meant they needed to be in place before closure, and/or

(d) the decisions taken by the PCT Boards and/or the Enfield PCT Board pursuant to such consultations were subject to making the primary care improvements before closure which were fundamentally different proposals and decisions from those which the CCGs and the Trust have now decided to implement (*i.e.* the difference between closure preceded by, and closure without, the improvements to primary care) so that it is necessary in law for them to re-consult before deciding to implement their current proposals;

(v) The CCGs and the Trust misdirected themselves in law and/or failed to take account of relevant considerations, in that

(a) they took the closure decision without giving any or any proper consideration to the issue of whether the Secretary of State's precondition as to primary care in Enfield had been met; and/or

(b) they applied instead a test of whether closure would be clinically safe, which test, while material was insufficient in law to allow closure; and

(c) in any event, they did not have sufficient information on the basis of which they could lawfully have made a decision that the Secretary of State's pre-condition was fulfilled.

Putting the principal points at their most succinct, the Claimants contend that the Secretary of State had given a direction the effect of which was, and the relevant NHS bodies had given assurances giving rise to an expectation, that there would be no closure of Chase Farm A&E without an identifiable body or level of improvements (part of an "offer" or "trade off" for closure); closure is now proposed with so few improvements that it cannot be (and is not) contended that this body or level has been implemented; closure with, and closure without, such improvements comprises a significant change (in statutory language, substantial variation) both to the service currently being provided and to that already authorised by the 2008/2011 decisions as well as that which was promised; at no time have the Claimants been consulted on that change (so as to give rise – if they consider it necessary – to the exercise of statutory rights of referral to the Secretary of State) or agreed to it; accordingly the Claimants still did not know (until September 25, 2013) how change would impact relative to when Chase Farm would close, sufficient to form a view as to

> whether or not there would be any departure or substantial variation from what had formerly been promised."

6. In the summary grounds of resistance served on behalf of the NHS defendants the comment is made:-

> "A remarkable feature of the Claimant's case is that it is not able confidently to articulate the "identifiable body or level of improvements" that was allegedly promised. The best that the Claimant is able to do is say that "even if there are some parts of what has been promised that are unclear, so that they could not be enforced in law…, it does not follow that there is nothing to enforce". Equally fluid is the description of the assurance allegedly given. The Grounds alternate between describing the assurances as being that (a) the A&E move would be preceded by specific improvements and (b) an identifiable level of improvements to primary services was offered as a "trade off" for the Clinical Strategy. These are two different promises: only the first would – if true - support the Claimant's challenge, and in any event neither accurately reflects the facts."

Duties of the relevant NHS bodies

7. The National Health Service has been subjected to a great deal of reorganisation in recent years and its structures are notoriously complicated. It is unnecessary for present purposes to embark on a comprehensive treatise. I will only mention those matters which are relevant to the claimants' grounds.

8. Between 2002 and 2012 PCTs were responsible for the provision of primary medical services within their areas. By Section 8 of the National Health Service Act 2006 the Secretary of State had power to give directions to PCTs (and also to NHS Trusts, which managed NHS hospitals) about the exercise of their functions.

9. Since March 1st 2007 local authorities are under an express obligation by virtue of Section 82 of the 2006 Act to cooperate with NHS bodies in order to secure and advance the health and welfare of the people of England. A local authority's executive arrangements had to include provision for the appointment by the authority of one or more overview and scrutiny committees under Section 21 of the Local Government Act 2000. By the Local Authority (Overview and Scrutiny Committees Health Scrutiny Functions) Regulations 2002 it was provided that an overview and scrutiny committee might review and scrutinise any matter relating to the planning, provision and operation of health services in the area of its local authority (reg 2(1)); and that "where a local NHS body has under consideration any proposal for a substantial development of the health service in the area of a local authority, or for a substantial variation in the provision of such service, it shall consult an overview and scrutiny committee of that authority" (reg 4 (1))."

10. The Health and Social Care Act 2012 made major structural changes to the NHS. The National Health Service Commissioning Board (generally known as "NHS England") took over some of the responsibilities of the Secretary of State. PCTs were abolished

and replaced by clinical commissioning groups ("CCGS"). The Secretary of State continues to have power to give directions under Section 8 of the 2006 Act but only to NHS Trusts. He may also (under Section 13Z2 of the Act) give directions to NHS England; that body has power to give directions to CCGs if it is satisfied that a CCG is failing or has failed to discharge any of its functions, or that there is a significant risk of a CCG failing to do so.

11. Since April 1st 2013 section 2B(1) of the 2006 Act requires each local authority to take such steps as they consider appropriate for improving the health of the people in their area. A new set of provisions supersedes the 2002 Regulations relating to overview and scrutiny committees, namely the Local Authority (Public Health, Health and Wellbeing, and Health Scrutiny) Regulations 2013. The requirement for an NHS body to consult the local authority on any proposal for a substantial variation in the provision of the health service in their area is now contained in reg 23(1) of the 2013 Regulations. Where the authority is not satisfied that consultation on any such proposal has been adequate or that the reasons given for it are adequate or if the authority considers that the proposal would not be in the best interests of the health service in its area it may make a report in writing to the Secretary of State. The Secretary of State may then require the NHS body to consult the authority further, to determine whether or to take or not to take any other steps in relation to the matter (reg 25).

Legitimate expectation

12. In *Paponette v Attorney General of Trinidad and Tobago* [2010] UKPC 32; [2012] 1 AC 1, Lord Dyson considered how the court should approach legitimate expectation cases. He said:

> "The initial burden lies on an applicant to prove the legitimacy of his expectation. This means that in a claim based on a promise, the applicant must prove the promise and that it was *clear and unambiguous and devoid of relevant qualification*. If he wishes to reinforce his case by saying that he relied on the promise to his detriment, then obviously he must prove that too. Once these elements have been proved by the applicant, however, the onus shifts to the authority to justify the frustration of the legitimate expectation. It is for the authority to identify any overriding interest on which it relies to justify the frustration of the expectation. It will then be a matter for the court to weigh the requirements of fairness against that interest." [emphasis added]

Ground 1: precondition

13. In order to examine the allegation that the NHS defendants have failed to comply with a precondition imposed by the Secretary of State it is necessary to refer to some documents from the large volume of material which was placed before me. In early 2007 Professor Sir George Alberti, the National Clinical Director for Emergency Access, was asked to carry out an independent review of the case for change being put forward by local NHS bodies. He reported a strong case for moving from three to two

hospital sites for major emergency care. Such care would continue to be provided at Barnet and North Middlesex, but not at Chase Farm. He wrote:-

> "Put starkly, it is evident that safe, high quality modern care cannot be provided for all specialities in all three acute hospitals in the area."

He recommended that Chase Farm should maintain a local accident and emergency service with daytime assessment services for children and elderly patients.

14. The three PCTs established the BEH Clinical Strategy Project Board which carried out a consultation following Professor Alberti's report. On 11th December 2007 a joint meeting of the three PCTs considered a recommendation of the Project Board for the reconfiguration of local A&E services. They approved what had been described in the consultation as Option 1. This provided for the separation of planned services from emergency services. Barnet and North Middlesex would provide major emergency services as well as urgent care centres for non-life threatening conditions and day surgery. Planned care would be expanded on the Chase Farm site to incorporate planned inpatient surgery other than major surgery. A local A&E service incorporating an urgent care centre would be based on the Chase Farm site, and would be senior clinician led. The decision approving Option 1 included the following paragraph:-

> "Changes to A&E services at Chase Farm Hospital will take place when the PCTs are satisfied that there is capacity at Barnet Hospital and at North Middlesex University Hospital and also that community and primary care services will be able to accommodate changes in patient flows."

15. At a meeting on 21st January 2008 the Joint Scrutiny Committee of the three boroughs agreed to refer the issue to the Secretary of State. The formal referral appears to be contained in a letter of 31st March 2008. It refers to a number of topics and among other things stated that the committee wanted 24 hour senior doctor led A&E and obstetric units as well as birthing units at all three locations.

16. The Secretary of State referred the matter to an Independent Reconfiguration Panel ("IRP"). The IRP reported to the Secretary of State on 31st July 2008. The report contains 16 recommendations. The Panel accepted the proposals to centralise A&E services on two sites, namely Barnet and North Middlesex; and endorsed the Primary Care Plans and measures being implemented across Barnet and Haringey PCTs. The evidence in support of the present claim from Raymond James, who since 2006 has been Enfield's Director of Health, Housing and Adult Social Care, describes the "critical" recommendation as being:

> "10. The Panel supports Enfield PCT's intention to move to a public consultation exercise in respect of its primary care proposals as soon as possible…."

17. In oral argument Mr Garnham QC also drew attention to another:

> 14. The Panel endorses all of the "next steps" stipulated by the three PCTs on 11th December 2007."

18. At paragraph 4.2.1 of their report the Panel stated:-

> "The three PCT Boards have specifically agreed (11 December 2007) that the planned developments in primary care must be in place before any services are moved out of a hospital setting."

19. The then Secretary of State, in a letter of 3rd September 2008, wrote as follows:-

> "Having taken the JSC's concerns into account and having carefully considered the advice of the IRP, I am satisfied that the proposals are in the interests of the local health service and service users.
>
> However, the IRP has made a number of recommendations in regard to the proposed reconfiguration, all of which I fully support and I expect the local NHS to follow them. The recommendations are attached to this letter at Annex A.
>
> …
>
> I am pleased to note that the three PCT Boards have agreed (para 4.2.1 of the IRP report) that the planned developments in primary care must be in place before any services are moved out of the hospital setting.
>
> …
>
> I fully support recommendation 14 where the panel agrees with all the "next steps" stipulated by the three PCTs on 11th December 2007.
>
> Conclusion
>
> On balance, after full analysis of the arguments raised by the JSC and the IRP's report on the matter, I am satisfied that the proposals related to changes in the distribution of services between Barnet, Chase Farm and North Middlesex hospitals and the associated development of community and primary care services are in the interests of the local health service and health service user and I am therefore content they should be implemented on condition that the Panel's recommendations are fully taken into account."

20. In December 2007 the three Primary Care Trusts ("PCTs") decided to reconfigure services at Chase Farm, Barnet and North Middlesex Hospitals, a decision confirmed by the Secretary of State on 3rd September 2008. Enfield obtained permission from His Honour Judge Pearl, who considered their application on the papers, to challenge

those decisions by way of judicial review. By a decision of 8th April 2009 following an oral hearing on 28th January 2009 Geraldine Andrews QC (as she then was) set aside that grant of permission: *R(Enfield LBC) v Secretary of State for Health and others* [2009] EWHC 743 (Admin). She held that the claim against the Secretary of State was "fundamentally misconceived"; and that while the claim against the PCTs was arguable, the delay in bringing it had caused such a degree of prejudice to the PCTs that it would not be in the public interest for the claim to proceed further.

21. There was a further public consultation document issued by Enfield PCT in March 2009 on its primary care strategy. It is not necessary to consider it for present purposes. In 2010, following the change of Government, four new tests were set for reconfiguration of NHS services. NHS London reviewed the issue of whether the BEH Clinical Strategy had met the new tests and took the view that it had. Enfield's Health Scrutiny Panel disagreed and by letter of 20th February 2011 again exercised the right of referral to the Secretary of State. Once again the IRP was asked to consider the matter, but on this occasion they wrote:-

> "The IRP does not consider that a full review would add any value in this instance. There are no new substantive proposals for decisions to be reviewed. Concerns raised by Enfield HSP, such as its wish to see appropriate primary care services in place and working before changes are made to services at Chase farm Hospital, were covered in the IRP's recommendations in 2008 along with other actions that were required. They remain as relevant now as then."

22. The Secretary of State, by letter of 12th September 2011, accepted the advice of the IRP. He wrote that in his view "any further delay to implementing change may be detrimental to patients and the services they access".

23. On 9th November 2011 Enfield's assistant director of legal services, Asmat Hussain, wrote to Enfield PCT in accordance with the Judicial Review Pre-Action Protocol, informing them of the Council's intention to apply for judicial review unless the NHS bodies were willing to undertake, within 14 days, to withdraw the decision to close the A&E service at Chase Farm and not to proceed with the reconfiguration of acute services until they had:-

> "(a) developed and implemented a strategy for improving primary care services in Enfield and satisfied themselves that those improved care services were working properly; and"
>
> (b) undertaken fresh consultation and engagement services in relation to the Secretary of State four tests in the light of their primary care improvement strategy; and
>
> (c) following the consultation referred to in (b) above, made a fresh decision as to whether the four tests are met; and whether to reconfigure the current services and, if so, on what basis to do so."

24. This met with a robust letter of response from solicitors for the NHS bodies and separately on behalf of the Secretary of State. The latter's response included this paragraph:-

> "It follows from what we have said above about the position in relation to primary care services that any claim for judicial review is premature and misconceived as no decisions have been made to go ahead with implementation of the proposals irrespective of the primary care provision that is in place. Rather, any decision to implement the proposals in the clinical strategy is contingent on appropriate primary care provision being in place."

25. Although the letter from Capsticks on behalf of the NHS defendants argued that any challenge was too late rather than that it was premature, it seems to me that this paragraph took the sting out of what would otherwise have been a formidable argument on behalf of the all the defendants that, although in form this is a challenge to a decision made on 25th September 2013, in reality it is a challenge to decisions made in 2007 and 2008.

Ground 1: failure to comply with a precondition

26. I have already recorded the argument of the Council that Recommendation 10 of the IRP in 2007 was the "critical" one. Mr James notes that part of the argument for the removal of A&E facilities at Chase Farm put forward in the 2007 consultation was that its retention would absorb so much financial resources that the planned new primary care services described in the consultation documents could not be developed: at one point the consultation document had described this as a trade-off. The Council's skeleton argument summarising Mr James' evidence continues:

> "(vii) It is accepted that on the wording of Recommendation 10 in isolation, this called for no more than consultation. It was, however, clear from the position taken by the PCT itself during the process (in the light of its consultation, *i.e.* the "trade off" point at (v), above), from the body of the IRP report and from the Secretary of State's decision that what it required was that primary care plans actually be delivered before closure of Chase Farm A&E. This is not only a well-founded and documented explanation of Recommendation 10, but how it was at all times until recently perceived and treated."

27. I regret to say that this argument is sophistry. Recommendation 10 does indeed do no more than require consultation. Recommendation 14 imposed a precondition of compliance with the relevant "next steps" undertaking in the consultation document's Option 1. I set this out again with two additions in brackets which seem to me implicit on a fair reading::

> "Changes to A&E services at Chase Farm Hospital will [only] take place when the PCTs are satisfied that there is [sufficient A&E] capacity at Barnet Hospital and at North Middlesex

> University, and also that community and primary care services will be able to accommodate changes in patient flows."

28. There is nothing surprising nor illogical about these being the conditions imposed. They required, in short, that proper alternative arrangements be made for the two types of patient attending at the A&E department of Chase Farm if that department was to be closed.

29. It is clear from the evidence submitted on behalf of the NHS defendants that the CCGs *are* satisfied that there is sufficient A&E capacity at Barnet and North Middlesex, and that it will be sufficient even after the closure of A&E at Chase Farm. It is not suggested that this is a perverse conclusion: on the contrary, the evidence is that the changes (recommended by Professor Alberti six years ago) will result in an *improvement* in the quality of A&E cover in the three boroughs. It is also clear that the CCGs *are* satisfied that community and primary care services in Enfield, including urgent care centres one of which has been established at Chase Farm, will be able to accommodate changes in patient flows brought about by the closure. Thus the two preconditions deriving from the 2007 Option 1 document have been fulfilled.

30. Despite the vigour with which Mr Arden put the Council's case I do not think that it is even arguable that the Secretary of State's approval of the reconfiguration conditional upon the IRP's recommendations imposed a precondition of the wide and general kind for which the Claimants contend. The Minister's letter of 3rd September 2008 was carefully drafted, as one would expect; so were the IRP's recommendations. Nothing is said in either document about a trade-off. The first ground of challenge fails.

Ground 2: legitimate expectation

31. Ground 2 as pleaded argued that there was "a substantive expectation either as to the actual primary care services to be in place before closure, or (at the lowest) as to an identifiable level of such services, from which expectation it would be an abuse of power for the CCGs to depart". However, the Claimants' skeleton argument puts the case in a different way:

> "Legitimate expectation is relevant to and underlies both Grounds (ii) and (iii). Upon reflection, Ground (ii) may be an inappropriate way to put the claim. It has at no time been the Claimants' case that the NHS bodies cannot close without providing the improvements to which the Claimants contend that they have a legitimate expectation: rather, it has at all times been their case that if the NHS bodies are not going to do so, they have first to agree changes or consult (the outcome of which may be referred to the 5th Defendant), pursuant [to the Regulations in force at the time]. The fact that compliance remains an option open to the NHS bodies does not make the claim one to enforce a substantive expectation: compliance would mean that there was no claim, as in every expectation case. Thus, no order requiring the improvements in question to be implemented before closure has been sought, because it would be met by the response that the 1-4th Defendants remain

> entitled to consult on closure without improvements. The relief sought is to quash the closure decision and declarations which, in substance, say either improve or consult."

32. I agree that the claim based on substantive legitimate expectation could not succeed. But nor, in my view, can the same argument refashioned on the basis of what Mr Arden described as a procedural legitimate expectation. Both ways of putting the case come up against the same barrier: the requirement for the Council to point to a promise which, in the words of Lord Dyson in *Paponette*, was "clear, unambiguous and devoid of relevant qualification" and which has been broken. If they could do so, then, in Lord Dyson's words (at para 46) "good administration as well as elementary fairness" would demand that the defendants take into account that the proposed act would amount to a breach of the promise. The NHS defendants did not promise that Chase Farm A&E would remain open until all the primary care improvements in Enfield argued for by the Council had been carried out; nor did they make the same promise with the alternative of yet further consultation.

Ground 3: substantial variation

33. This can be dealt with very shortly. The 2013 decision under challenge is not a new one: it represents the implementation of earlier decisions, in particular those taken in 2007 which were the subject of widespread consultation. They do not, therefore, represent a "proposal for the substantial development of the health service in the area……or for substantial variation in the provision of such service" so as to bring the requirement under what is now reg 23 of the 2013 Regulations into play.

Ground 4: Common law obligation to reconsult

34. Mr Arden accepted that this is essentially a common law version of the "substantial variation" argument. It must in my view fail for the same reason.

Ground 5: failing to have regard to material considerations

35. This depends on a finding that there was a precondition to closure which has not been met. Although put in three different ways in the claimant's Grounds, it adds nothing given my rejection of Ground 1.

The claim against the Secretary of State

36. The Secretary of State filed Summary Grounds of Defence arguing that he should not have been made a party to the claim. Nevertheless the Council's skeleton argument stated at paragraph 71 that:-

> "the reasons for seeking relief against the Secretary of State are as follows:
>
> (i) Unless a party, the Secretary of State is not bound by the outcome nor required to act in accordance with it.
>
> (ii) The Secretary of State has power under s.13Z2, National Health Service Act 2006, as amended, to give directions to

> NHS England, which in turn has power to give directions to the CCGs.
>
> (iii) The Secretary of State also has power to give directions to the 4th Defendant, under s.8, 2006 Act.
>
> (iv) If aware of the proper interpretation of the 2008/2011 decisions, the Secretary of State may exercise one or other or those powers and, at the lowest, needs to consider doing so, on the basis of that interpretation, *i.e.* on the basis that the 1-4th Defendants are acting in breach of the earlier decisions.
>
> (v) The practical reality is that, if aware of the proper interpretation, the Secretary of State has sufficient influence to obviate the need for any further proceedings as the 1-4th Defendants are highly unlikely to take a course that conflicts with his wishes.
>
> (vi) If there is consultation on variation, it is possible (and not remotely so) that there will be a further referral to the Secretary of State; when reaching his decision on it, the ambit of the previous decisions will likewise be germane when deciding what action to take and/or when deciding whether or not to make a direction to NHS England under the 2013 Regulations."

37. It is difficult to see what any of these could have added to the Council's case against the closure of Chase Farm A&E in the legal (as opposed to the political) sphere in any event; but in the light of my rejection of each of the grounds of claim against the NHS defendants, in particular those based on precondition or substantial variation, it is plain that these grounds cannot succeed.

Conclusion

38. The grant of substantive relief in judicial review is a discretionary power. Even if I had found that there was any unlawfulness in the decision of 25 September 2013, I would have had to go on to consider the formidable case presented by the Defendants against an order quashing that decision: their witnesses argue that A&E services in Enfield will be far better able to cope with the strains of the coming winter if the reconfiguration proceeds than if it is stopped. However, in the light of my rejection of the grounds of claim it is unnecessary to deal with that issue further.

39. Enfield has fought the good fight to save the A&E department at Chase Farm from closure for several years, and I appreciate that the Council genuinely believes that it would be in the interests of those they represent for the department to remain open. But in legal terms that fight has reached the end of the road. I have come to the conclusion that the Council has no arguable case for judicial review. I refuse permission and dismiss the claim.