

# HARRISON GRANT RING

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31 January 2024

## **FOR YOUR URGENT ATTENTION** **JUDICIAL REVIEW PRE-ACTION PROTOCOL LETTER**

Dear Sirs,

### **Proposed claim for judicial review of the unlawful consultation into the revised Armada Way Scheme**

1. This is a pre-action letter under the Judicial Review Pre-Action Protocol in support of an application for permission to apply for judicial review of Plymouth City Council's consultation concerning the revised Armada Way Scheme ("**the Revised Scheme**").

### **The Claimant**

2. The proposed claimant is Alison White, founder of Save the Trees of Armada Way ("**the Claimant**").

### **The Defendant**

3. The proposed defendant is Plymouth City Council ("**the Defendant**").

### **The decision under challenge**

4. The decision under challenge is the Defendant's failure to carry out a fair consultation into the Revised Scheme.

### **The facts and grounds of challenge**

5. The context to this proposed challenge is well-known to both parties given the ongoing judicial review CO/975/2023, namely the Defendant's proposed scheme to transform Armada Way.
6. Following the unlawful felling on 14 and 15 March 2023, which is the subject of the ongoing judicial review, on 17 October 2023 a consultation was announced into the Revised Scheme, which builds on the original scheme with some minor alterations. In particular, of the 16 trees saved by the injunction of Mr Justice Freedman of 15 March 2023 (continued by the Order of Mrs Justice Lang on 22 May 2023) and the 3 further trees that were not felled due to nesting birds, the Defendant proposed to keep 13 of the trees and to translocate 6.
7. The consultation was overseen by ECF on behalf of the Defendant and ran until 28 November 2023 ("**the Consultation**").
8. During the Consultation, our client and others asked for more detailed information, including details of the 'sustainable urban drainage system' ("**SuDS**") and a cost-benefit analysis of the translocation proposal. Our client and others also raised concerns about the Consultation survey, including the leading nature of the questions and the requirement to answer questions before being able to move to later questions, even though the only answers available were ones supportive of the scheme.
9. On 18 December 2023, we wrote setting out our client's concerns regarding the Consultation. On 5 January 2024, the Defendant responded with a response to requests for information. No response was provided on the substance of the concerns set out in that letter, although responses have now been set out in the draft report to the cabinet published online in January 2024.

#### Ground 1 - Unlawful Consultation

##### *a. Costs of the Revised scheme*

10. Reports produced by the Defendant at the time of the February 2023 'engagement' stated that the Armada Way scheme would cost £12.7 million.
11. This was repeated in the Executive Decision Report of 14 March 2023, which stated twice that the project was "fully funded" and that the budget was to come from the Transforming Cities Fund of £2.7 million and local match funding of £10 million.
12. The Consultation on the Revised Scheme published seven months later in October 2023 made no reference to any increased costs. Indeed, news reports from October 2023 suggest the media were informed that the cost would remain the same.<sup>1</sup>
13. Councillors have also reported being told by the Defendant that by using workers already employed there would only be a "very marginal" increase in costs.<sup>2</sup>

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<sup>1</sup> <https://www.plymouthherald.co.uk/news/plymouth-news/first-look-plymouths-armada-way-8835083>

<sup>2</sup> <https://www.youtube.com/watch?v=1MDYh54mv3I> at 1.25.

14. Following questions raised during the consultation, an update was posted on the consultation website on 15 November 2023 (two weeks before the consultation closed) entitled "Answering queries raised so far". This stated:

*We are still finalising the costs for the new scheme, and we won't be able to complete that work until we have finished the consultation, considered all the feedback and made any amendments to the scheme that need to be made. The previously proposed scheme cost £12.7 million. The new, improved and more ambitious design is likely to exceed that. Some funding (£2.7 million) is from the Government's Transforming Cities Fund (TCF). The Council has already committed £10m match funding as part of the TCF grant process. Any further funding will be from Plymouth City Council's Capital budget. [emphasis added]*
15. The Defendant provided no indication of the scale of any potential increase and only suggested that an increase was "likely" as opposed to inevitable.
16. Respondents who provided feedback before 15 November 2023 would have been unaware of any increase in the funds required and where that money would come from.
17. Respondents who saw the update, which was not prominent, being one item in a list of other questions, would have assumed the increase was not a foregone conclusion and not sufficiently significant to merit an indication of the likely cost.
18. Neither group of respondents would have assumed that the Revised Scheme would have entailed any significant increase in costs. This is because the Revised Scheme came just 7 months after the original scheme, the original scheme was going to cost £12.7 million and was "fully funded", the Revised Scheme broadly mirrored the original scheme and parts of the Revised Scheme had already been completed, such as the tree-felling works.
19. The fact that respondents believed that the Revised Scheme would cost the same can be seen in the Armada Way Consultation Report published in January 2024, which summarised the response from the Plymouth Civic Society as suggesting that the funding for the previous scheme and the Revised Scheme were "same".
20. Based on the draft Cover Sheet presented to the Growth and Infrastructure Overview and Scrutiny Committee ("**GIOS Committee**") in January 2024 ("**the Draft Cover Sheet**") it is now clear that the Revised Scheme will exceed the original cost. Instead of £12.7 million, the Revised Scheme is likely to cost over £36.7 million, three times the original budget.
21. The Revised Scheme presented to the GIOS Committee on 22 January 2022 contained 10 very minor amendments (for example, retaining 2 trees, altering the species of 1 tree, adding a water fountain). They would not have materially altered the cost of the project. It is therefore highly likely that PCC knew, or could have known, of the increased costs prior to the end of the consultation but chose to withhold them.
22. Indeed, by January 2024, the project team were able to provide the likely increased costs of the Revised Scheme, namely a new total of £36.7 million comprising £25.7 million for construction costs, a further £7.3 million for risks and project management fees, and costs to date of £3.7 million (the Draft Cover Sheet).

23. Given that the additional funds must come from PCC's budget, on top of the £10 million PCC has already approved for the scheme, this was critical information that the public ought to have been made aware of.
24. Where a public authority chooses to consult, the consultation must be adequate and fair (*R (Coughlan and others) v North & East Devon Health Authority* [1999] EWCA Civ 1871).
25. A consultation will only be adequate and fair if it follows certain guiding principles (*R v London Borough of Brent, ex p Gunning* [1985] LGR 168. To ensure compliance with these principles, the authority must provide sufficient information *R (Capenhurst) v Leicester City Council* [2004] EWHC 2124 (Admin). That was manifestly not the case here.
26. Although the Draft Cover Sheet now provides some details relating to the costs of the Revised Scheme, it is in no way adequate for proper decision making. In particular, the Draft Cover Sheet suggests that the original budget was £27 million, instead of £12.7 million. The £27 million in fact referred to a total budget for other redevelopment schemes, including the £12.7 million earmark for Armada Way.
27. Furthermore, there is no breakdown of the vast increase in costs, including the additional £25.7 million in construction, £7.3 million for risk and project management and the £3.7 million already spent. Indeed, some of the £3.7 million must have been included within the original budget.
28. The explanation given in the Draft Cover Sheet for a threefold increase in costs is the COVID-19 pandemic, Brexit and the Ukraine war. These events all began before 2022. They were not unforeseen factors and cannot account for an increase from £12.7 million to £36.7 million in 10 months.<sup>3</sup>
29. In the GIOS Committee meeting on 22 January 2024, the Defendant was asked why the Committee had not been furnished with sufficient financial details, whether Cabinet would be provided with the information and whether the final figure could be higher.
30. The response from Mr Paul Barnard, the Service Director for Strategic Planning and Infrastructure at PCC, was that final detailed costings and a costings report were not yet available and may not be available to the Cabinet before a decision is made.<sup>4</sup> He stated that overall figures would be presented when they were able to do that but that they 'wanted to be open and transparent as to the scale of the figures now', which is why the 'headlines' have been provided in the report.
31. There is no explanation as to why, if the Defendant wanted to be 'open and transparent', these 'headline' figures were not provided to the public during the consultation. If the Defendant had not obtained these headline figures in time for the consultation, they ought to have done, given the dramatic increase in public spending they entail.

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<sup>3</sup> At the GIOS Committee meeting Councillor Briars-Delve suggested that the increase is because the figure of £12.7 million was based on a 2017 figure. But this is not what was said in the February 2023 report where the project was referred to as "fully funded" and the total budget given as £12.7 million. It was also not what Councillors and the media were told when the Consultation opened in October 2023. No consultee would have been aware that the £12.7 million figure was wildly outdated.

<sup>4</sup> <https://www.youtube.com/watch?v=1MDYh54mv3I> at 1:23

32. An 'open and transparent' Council would have provided a detailed breakdown of the costs, showing how the figures given have been reached. Calculations of some sort must underpin the figures.
33. Furthermore, although the £36.7 million is in some places referred to as a maximum figure, it was clear from the response of officers during the GIOS Committee meeting that the final figure could go up or down.

*b. Translocation of Retained Trees*

34. The Defendant also failed to provide sufficient information in respect of the translocation of the trees. The information that was provided was misleading.
35. The consultation materials made no reference to the expense of translocation and the severe risks posed to the trees, despite a series of questions being raised by our client and others and previous advice obtained by the Defendant in January 2023 that translocated trees would die.
36. On 15 November 2023, two weeks before the consultation closed and after many people would have already responded, the Defendant published a document entitled 'Tree Translocation Assessment' prepared by its consultants YGS.
37. This provided some further details of the translocation process but no details of the cost of relocation and once again minimising the risks to the trees.
38. No mention was made of the fact that translocation is unlikely to succeed and is costly. For example, the Woodland Trust Translocation Factsheet states:

"The Woodland Trust undertook a review of the limited published work on translocation available and found a lack of evidence to suggest it is a successful process. It is very expensive and the costs and benefits should be weighed up against, for example, planting a much larger new wood without salvaging soils."

39. It is clear, following the Defendant's letter of 5 January 2024, that the Defendant has undertaken no cost-benefit analysis in relation to the translocation of the trees. Given the spiralling costs of the project, PCC should have determined the costs of translocating trees and the likelihood of the trees surviving and provided those details to consultees. The failure to do so breached the requirement to provide sufficient information.
40. The Consultation also stated that if the six trees designated for translocation were not relocated, the proposed scheme was 'not possible'. This was inaccurate and misleading, as demonstrated by the fact that two further trees are now scheduled for retention with no apparent change to the scheme.
41. In addition, there was (and is) insufficient information on why the Defendant needs to translocate the four remaining trees. Details provided are scant and often conflicting.
42. For example, the YGS Tree Translocation Assessment, published two weeks before the consultation closed, references the Silver Maple's (T125) impact on the rain garden (Appendix A, p.15). However, there are other existing trees that the Defendant has incorporated into the new rain gardens.

43. The draft Cabinet Report presented to the GIOS Committee in January 2024 added another reason for translocation of the Silver Maple, that it is located within 'alignment of underground infrastructure' (para.6.80). The 'underground infrastructure' appears to refer to a below ground tree irrigation network, which presumably is, or can be, designed to work around trees, as appears to be the case with the Cockspur Thorn (T007) that the Defendant is now retaining.

*c. SuDS scheme*

44. The Defendant has failed to provide sufficient information relating to the SuDS scheme. Such information is particularly important given that it is said to be the first of its kind in the world<sup>5</sup> and is frequently said to be one of the primary reasons for the need to translocate existing trees.
45. In response to our letter of 18 December 2023 requesting further details, the Defendant pointed us to the YGS Tree Translocation Assessment, which was not published until 15 November 2023 under the 'Nature and Greenery' section of the Consultation. This contains a single page diagram of Armada Way, showing 3 small underground tanks and a simple layout of irrigation and drainage networks. No technical details of how the scheme will operate and why existing trees are in the way of the SuDS are provided.
46. Indeed, the Defendant in its letter of 5 January 2024 acknowledges that the only information available on the SuDS scheme is on the Consultation website and that detailed technical plans for the new scheme have yet to be drawn up.
47. Given this is a 'first of a kind scheme' that is resulting in the translocation of trees, details of the scheme should have been provided to consultees.

*d. Bias for the scheme*

48. Our letter of 18 December 2023 set out numerous concerns regarding the leading nature of the Consultation, as follows:

The Survey responses that can be quantitatively assessed do not allow for any response objecting to or critical of the scheme. For example, there is no quantitative option to support the retention of all remaining trees and not to relocate any of them, no quantitative option to suggest the play park is too big and no quantitative option to suggest the cycle path is not fit for purpose.

...

This concern is compounded by the fact that the online Survey initially required respondents to select from a list of options before they could proceed to the next question. For some of the questions, this effectively forced respondents to tick something that was supportive of the scheme.

While the online Survey was amended following complaints from the public, anyone who had already responded would have been forced to tick at least some positive comments to complete the survey. Furthermore, ECF's announcements about this change on 20 October only referred to the play park section of the Survey. The online and paper Survey still stated, for example, that "TWO PRIORITIES" should be selected for the nature and greenery

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<sup>5</sup> This has been stated by a number of PCC officers, including the project head, Martin Ivatt.

section, without suggesting this could be skipped. In addition, hard copies of the Survey deposited in the central library were not updated.

The lack of space for qualitative responses on the paper version of the Survey made it even more difficult for respondents to voice objections to the scheme.

49. The response provided in the draft report to the Cabinet submitted to the GIOS Committee does not adequately address these failings.

### **What the Defendant is required to do**

50. The Defendant is asked to:
- a. Publish details of the anticipated costs of the Revised Scheme, including calculations for the figures provided in the Draft Cover Sheet and explanations for why these costs have increased so significantly in the last 9 months;
  - b. Undertake and publish a cost-benefit analysis of the translocation of the 4 trees proposed for relocation;
  - c. Obtain and publish details of the proposed SuDS scheme, including how any of the 4 trees impact on the delivery of the SuDS scheme;
  - d. Confirm that the public will be consulted on the Revised Scheme having been provided with a to c above and having addressed the concerns at d above;
  - e. Take the results of the further consultation into account prior to any final decision on the Revised Scheme being made; and
  - f. Pay our client's costs.
51. If the Defendant does not agree, please explain why not.

### **Further information requested**

52. Pursuant to the duty of candour and the Environmental Information Regulations (2004), the Defendant is asked to provide the following:
- i. all information relating to the costings presented in the Draft Cover Sheet, including any workings demonstrating how these figures have been calculated and what they comprise; and
  - ii. the dates that these costings were available to the Defendant's officers.

### **Other applications made**

53. An application for disclosure will be made if the documentation requested is not provided.
54. We reserve the right to apply to amend our grounds if any final decision is made, including on the following basis:

### Discretion afforded to individuals who have misled the Court and are implicated in the Defendant's alleged contempt of court

55. Recommendation 7 of the Draft Cover Sheet recommends that the Cabinet:  
*Grants authority to the Service Director for Strategic Planning and Infrastructure to take all such action as necessary to implement the project*

*including all subsequent design amendments (excluding amendments which impact on the retention of any existing trees or the approved translocation of trees), scheme approval submissions, procurement and contract awards associated with developing and delivering the Armada Way scheme through to construction and completion, in consultation with the relevant Cabinet Members.*

56. The current Service Director for Strategic Planning and Infrastructure is Mr Paul Barnard.
57. Mr Barnard has already been ordered by the Court to explain why he delayed in complying with a court injunction (Order of Sir Ross Cranston of 24 March 2023). He has also misled the Court and our client and has had to apologise for doing so (third witness statement of Paul Barnard of 18 April 2024). Even while apologising, Mr Barnard misled the court further by withholding relevant material, which came to light following a fourth witness statement on 31 August 2023.
58. Furthermore, and as set out in our client's application for contempt of court, Mr Barnard was instrumental in both ensuring the decision to fell the trees on Armada Way was made known only at the same time as the works commenced, thereby interfering with the administration of justice, and in PCC breaching the terms of the injunction of Mr Justice Freedman of 15 March 2023 by failing to direct contractors or agents to cease works immediately.
59. Recommendation 7 places far reaching powers in the hands of Mr Barnard regarding the delivery of the Revised Scheme. Given Mr Barnard's central role in the alleged contempt of court and unlawful felling of the trees on Armada Way, a decision to invest such powers in him would be irrational.

#### **Aarhus Convention claim**

60. The Claimant considers this to be an Aarhus Convention claim within CPR r.45.41(2) and so claims the costs protection which arises. The Defendant is invited to agree. If the Defendant disagrees then please explain why, pursuant to the Judicial Review Pre-Action Protocol.

#### **Legal advisers dealing with this claim**

61. Harrison Grant Ring, Temple Chambers, 3-7 Temple Avenue, London EC4Y 0HP attention Alice Goodenough at [agoodenough@hgrlaw.co.uk](mailto:agoodenough@hgrlaw.co.uk) and Richard Harwood KC of 39 Essex Street Chambers.

#### **Address for reply and service of court documents**

62. The address for reply and service of court documents is as above. We also accept service by email. We would prefer not to be sent hard copies of documents unless they are specifically requested.
63. The Defendant is also requested to confirm whether they will accept electronic service of any claim that is issued. If so, please confirm the email address(es) to which service



should be affected and whether there are any limitations on their acceptance of electronic service such as file size.

**Period for reply**

64. Please confirm safe receipt. Please respond substantively by **4pm on 8 February 2024** and prior to any decision to approve the Revised Scheme.

Yours faithfully,

*Harrison Grant Ring*  
**Harrison Grant Ring**