Neutral Citation Number: [2021] EWHC 1093 (Admin)

Case No: CO/1172/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/04/2021

Before:

PRESIDENT OF THE QUEEN'S BENCH DIVISION
and
MR JUSTICE CHAMBERLAIN

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Between :

(1) HERTFORDSHIRE COUNTY COUNCIL **(2) LAWYERS IN LOCAL GOVERNMENT** **(2) THE ASSOCIATION OF DEMOCRATIC SERVICES OFFICERS**	**Claimants**
- and –	
SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT	**Defendant**
-and-	
(1) LOCAL GOVERNMENT ASSOCIATION **(2) NATIONAL ASSOCIATION OF LOCAL COUNCILS** **(3) WELSH GOVERNMENT MINISTER FOR HOUSING AND LOCAL GOVERNMENT**	**Interested Parties**

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Peter Oldham QC and Leo Davidson (instructed by **Legal Services, Hertfordshire County Council**) for the **Claimant**
Jonathan Moffett QC and Rose Grogan (instructed by **the Government Legal Department**) for the **Defendant**
Jonathan Auburn QC (instructed by **the Local Government Association**) for the **First Interested Party**

Hearing dates: 21 April 2021

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Approved Judgment

Dame Victoria Sharp, P. and Mr Justice Chamberlain:

Introduction

1 Schedule 12 to the Local Government Act 1972 ("the 1972 Act") makes provision relating to "meetings" of statutory authorities in England and Wales. It covers matters such as how often meetings must take place, how notice of them is to be given and who can attend. Schedule 12 refers, in a number of provisions, to the "place" of such meetings, to people being "present" at them and to the persons who may "attend". Other statutory provisions govern the circumstances in which meetings are required to be "open to the public" or "held in public".

2 Until March 2020, local authorities, by long-established custom and practice, conducted their meetings "in person" – i.e. with the participants gathering to meet face-to-face at a designated physical location and the observers coming to the same location. Council buildings are configured to allow in-person meetings. In the case of principal authorities, there are bespoke council chambers and formal meeting rooms with seats for the chair, elected members, council officers, members of the public and press. In the case of other authorities, there are other established arrangements and facilities for in-person meetings.

3 Until very recently, there was a consensus that the legislation, as it applied in England, did not permit "remote" meetings – i.e. those where not all of the participants are in the same physical location. On 25 March 2020, in response to the Covid-19 pandemic, Parliament passed the Coronavirus Act 2020 ("the 2020 Act"), s. 78 of which authorised the making of regulations to make provision for (among other things) "the manner in which persons may attend, speak at, vote in, or otherwise participate in, local authority meetings". This expressly included "provision for persons to attend, speak at, vote in, or otherwise participate in, local authority meetings without all of the persons, or without any of the persons, being together in the same place". But the provision was limited in application to local authority meetings required to be held, or held, before 7 May 2021.

4 As respects England, the power to make regulations under s. 78 was conferred on the Secretary of State for Housing, Communities and Local Government ("the Secretary of State"). On 1 April 2020, he made the Local Authorities and Police and Crime Panels (Coronavirus) (Flexibility of Local Authority and Police and Crime Panel Meetings) (England and Wales) Regulations 2020 (SI 2020/392: "the Flexibility Regulations"). These permitted local authority meetings to be held remotely.

5 Local authorities have made extensive use of these powers. They have found them to be useful, particularly as many of those who have to participate in local authority meetings are in groups at high risk from Covid-19. In October 2020, the Local Government Association, the Centre for Governance and Scrutiny and the National Association of Local Councils ("the local authority associations") wrote to the Secretary of State asking for the powers to be extended to meetings held on or after 7 May 2021. The Secretary of State declined to promote primary legislation for this purpose, due to pressure on the Government's legislative programme.

6 The question before us today is whether the 1972 Act will permit remote meetings in England when the Flexibility Regulations cease to have effect. The answer is not likely to

have any impact on local authorities in Wales or Scotland, which are subject to different legislative regimes.

The legal framework and the background to these proceedings

The 1972 Act

7 The 1972 Act applies to a wide range of authorities. In England, it applies to some 340 principal councils (county councils, district councils and London boroughs), about 9,000 parish councils, 10 combined authorities and to some other categories of authority, such as joint authorities. In Wales, it applies to counties, county boroughs and community councils.

8 Section 99 gives effect to Schedule 12, which is split into seven parts. These contain provisions relating to principal councils (Part I), joint authorities (Part IA), parish councils (Part II), parish meetings (Part III), community councils (Part IV), community meetings (Part V) and general matters applicable to local authorities and joint authorities (Part VI).

9 Each of Parts I, IA, II and IV refers to local authorities having "meetings" at a "place" at which the participants are "present" or which they "attend". It is not necessary to set out all of these provisions. Paragraph 4 supplies one example. It provides as follows:

> "(1) Meetings of a principal council shall be held at such place, either within or without their area, as they may direct.
>
> (1A) Five clear days at least before a meeting of a principal council in England—
>
> (a) notice of the time and place of the intended meeting shall be published at the council's offices and, where the meeting is called by members of the council, the notice shall be signed by those members and shall specify the business proposed to be transacted at the meeting; and
>
> (b) a summons to attend the meeting, specifying the business proposed to be transacted at the meeting, and authenticated by the proper officer of the council, shall be sent to every member of the council by an appropriate method."

10 Materially similar provision is made in relation to parish councils (para. 10(1) and (2)) and community councils (para. 26(1) and (2)).

Legislation about public access to meetings

11 Various legislative provisions govern public access to meetings and documents. Section 1 of the Public Bodies (Access to Meetings) Act 1960 requires any meeting of a body to which that section applies to be "open to the public" (subject to a power to exclude the public). Part VA of the 1972 Act contains further provision requiring certain meetings to be "open to the public" except to the extent that they are excluded. Section 9G of the Local Government Act 2000 and regs 3 and 4 the Local Authorities (Executive

Arrangements) (Meetings and Access to Information) (England) Regulations 2012 (SI 2012/2089) make provision governing when meetings of a local authority executive are to be "open to the public" and "held in public".

The Scottish legislation

12 The position in Scotland was governed by s. 97 of and Schedule 7 to the Local Government (Scotland) Act 1973, which, like the 1972 Act, used the terms "meeting", "place", "attend" and "present". But in 2003, the Scottish Parliament decided to provide for remote participation in and calling of local authority meetings. Section 43(1) of the Local Government in Scotland Act 2003 ("the 2003 Scottish Act") provides as follows:

> "43.—(1) The meetings of a local authority and its committees, including joint committees, and sub-committees thereof may (as well as being conducted in the way in which they have been conducted before the commencement of this section, that is to say, by all members being present together in a pre-determined place) be conducted in any other way in which each member is enabled to participate although not present with others in such a place.
>
> (2) A meeting shall be conducted by virtue of subsection (1) above, however, only on the direction of the convener, whom failing, the deputy convener of the authority, committee or, as the case may be, sub-committee."

13 Section 43(3) and (4) made consequential modifications to the existing Scottish provisions governing the place of meetings, the attendance of members and the giving of notice for meetings. In particular, the existing provision that "[m]eetings shall be held at such place, either within or without their area, as the council may direct" was omitted, as was the reference to the place of the intended meeting in the existing provisions about notice. "Local authority" was defined in s. 61(c).

The Welsh legislation prior to 2020

14 In Wales, the National Assembly for Wales made the Local Government (Wales) Measure 2011 ("the 2011 Welsh Measure"), s. 4 of which provides materially as follows:

> "4.—(1) A reference in any enactment to a meeting of a local authority is not limited to a meeting of persons all of whom are present in the same place.
>
> (2) For the purposes of any such enactment, a member of a local authority who is not present in the place where a meeting of that authority is held (a "member in remote attendance") attends the meeting at any time if all of the conditions in subsection (3) are satisfied.
>
> (3) Those conditions are that—
>
> (a) the member in remote attendance is able at that time—
>
> (i) to see and hear, and be seen and heard by, the members in actual attendance,

> (ii) to see and hear, and be seen and heard by, any members of the public entitled to attend the meeting who are present in that place and who exercise a right to speak at the meeting, and
>
> (iii) to be seen and heard by any other members of the public so entitled who are present in that place;
>
> (b) the member in remote attendance is able at that time to hear, and be heard by, any other member in remote attendance in respect of whom the condition in paragraph (a) is satisfied at that time;
>
> (c) use of facilities enabling the conditions in paragraphs (a) and (b) to be satisfied in respect of the member in remote attendance is not prohibited by the standing orders or any other rules of the authority governing the meeting."

15 Section 4(5) empowered local authorities to make standing orders about remote attendance at meetings. Section 4(6) provided that, in doing so, a local authority "must have regard to guidance given by the Welsh Ministers in relation to the meetings of the authority attended remotely in accordance with the section". "Local authority" was defined in s. 175 as "a county borough council or county council in Wales".

Proposals for remote meetings in England

16 In November 2016, the Department for Communities and Local Government published a consultation paper entitled *Connecting Town Halls: Consultation on allowing joint committees and combined authorities to hold meetings by video conference* ("the 2016 Consultation"). It related to local authorities in England only. It began as follows:

> "**Introduction**
>
> 1. The Department for Communities and Local Government is consulting on proposals to give local authorities operating joint committees, and combined authorities, but not councils as a whole, the ability to hold formal meetings using video conferencing facilities.
>
> **The Rules about Council Meetings**
>
> 2. Schedule 12 of the Local Government Act 1972 sets out the rules for holding council meetings. The legislation is clear that all those taking part in a council meeting should be physically present in the place where the meeting is taking place. The Government considers that these rules still remain appropriate for council meetings that do not involve the meetings of a joint committee, or a combined authority. However, given the quality of video conferencing facilities available today it is right that local authorities operating joint committees, and combined authorities, be given the ability to hold meetings on multiple sites.

> 3. Making any change to the rules on how council meetings are held in England will require changes to the Local Government Act 1972."

17 The 2016 Consultation went on to set out some of the benefits which the Government considered could flow from allowing meetings of joint committees to be conducted using video-conferencing facilities. These included removing the "barriers of time and distance that might arise where meeting of a joint committee or combined authority is held at a location far from the home of a councillor or member of the public" and helping to "ensure that people are not discouraged from participating in these types of pan-local authority meeting" (para. 11). However, the Government was clear that there would have to be safeguards:

> "13… Video conferencing of meetings must mean that not only can the participants of the meeting see and hear one another, but members of the public can see and hear all the participants, just as if the meeting were taking place in a single room with a public gallery.
>
> 14. To ensure that participants and the public can take part in and observe a meeting happening in more than one location, we propose that the access to video conferencing facilities to hold council meetings be available at local authority or combined authority sites that are suitable for holding a meeting with public access.
>
> 15… A constituent council or local authority member would **not** be able to participate in a meeting held by video conference from their home, or from a private premises." (emphasis in original)

18 Under the heading "Preserving Town Hall Transparency", the Government said this:

> "21. Whilst the government is aware that 'remote attendance' was floated by then (Labour) Government in 2008, this government does **not** support councillors being able to take part in their own council's meetings from their own home, or from some other private premises; the government believes that such changes will undermine visible democracy scrutiny and public debate. Other than for joint committees and combined authorities which cover more than one local authority area, all council meetings should continue to take place, in person, in the public premises designated for that council meeting." (emphasis in original)

19 The Government's response to the consultation was published in July 2019 ("the 2019 Response"). It noted the limited nature of the proposals and summarised the "safeguards" set out in the consultation document. The section headed "Overview" began as follows:

> "Schedule 12 of the Local Government Act 1972 sets out the rules for holding council meetings. The legislation is clear that all those taking part in a council meeting should be physically present in the place where the meeting is taking place."

20 Having considered the consultation responses, the Government was "satisfied that, with appropriate safeguards to maintain town hall transparency, there were clear benefits to

giving local authorities operating joint committees and combined authorities the ability to hold for meetings by video conference". Under the heading "Next steps", the Government said this:

> "Making any change to the rules of how council meetings are held in England will require changes to the Local Government Act 1972. The government will now speak with the sector, with a view to extending the use of video conferencing in formal meetings to other local authorities, before making a final decision on what to include in the legislation."

21 There was no further consultation between July 2019 and March 2020, when the first Covid-19 "lockdown" was imposed.

The Coronavirus Act 2020 and the Flexibility Regulations

22 The 2020 Act was introduced in Parliament on 19 March 2020 in response to the Covid-19 pandemic. It received Royal Assent on 25 March 2020. Section 78 provides, insofar as material, as follows:

> "**78. Local authority meetings**
>
> (1) The relevant national authority may by regulations make provision relating to—
>
> (a) requirements to hold local authority meetings;
>
> (b) the times at or by which, periods within which, or frequency with which, local authority meetings are to be held;
>
> (c) the places at which local authority meetings are to be held;
>
> (d) the manner in which persons may attend, speak at, vote in, or otherwise participate in, local authority meetings;
>
> (e) public admission and access to local authority meetings;
>
> (f) the places at which, and manner in which, documents relating to local authority meetings are to be open to inspection by, or otherwise available to, members of the public.
>
> (2) The provision which may be made by virtue of subsection (1)(d) includes in particular provision for persons to attend, speak at, vote in, or otherwise participate in, local authority meetings without all of the persons, or without any of the persons, being together in the same place.
>
> (3) The regulations may make provision only in relation to local authority meetings required to be held, or held, before 7 May 2021.
>
> (4) The power to make regulations under this section includes power—

> (a) to disapply or modify any provision of an enactment or subordinate legislation…
>
> (5) In this section the "relevant national authority" means—
>
> (a) in relation to local authorities in England, the Secretary of State;
>
> (b) in relation to local authorities in Wales, the Welsh Ministers…"

23 Section 78(7) and (8) identify the local authorities to which the section applies in England and Wales. Section 78(7) was amended by the Business and Planning Act 2020 with effect from July 2020 to include certain additional authorities including Transport for London.

24 The Explanatory Notes to s. 78 provide:

> "123. Local Authorities are being asked to undertake a number of essential and unusual functions in order to manage the ongoing COVID-19 pandemic. They are also expected to contribute to local resilience planning for the pandemic through Local Resilience Forums and continue the effective delivery of local services, including planning and licensing. The Act creates a power to make regulations to relax some requirements in relation to Local Authority meetings for a specified period.
>
> 124. Along with the postponement of elections and by-elections this is intended to increase the Local Authorities' flexibility over how they can respond and deploy their resources, minimise risks to their continuing conduct of business, and ensure their members and officers can act in accordance with official health guidance.
>
> 125. The need for these measures arises because meetings may generate significant work that would put a strain on Local Authority resources when such resources might already be stretched or may be used efficiently elsewhere."

25 On 1 April 2020, the Secretary of State exercised the power conferred by s. 78 to make the Flexibility Regulations. They were laid before Parliament on 2 April 2020 and came into force on 4 April 2020. Parts 2 and 3, which relate to local authority meetings, apply to England only. They deal with remote attendance (Part 2) and modify existing provisions dealing with the frequency of local authority meetings and with public and press access (Part 3).

26 In Part 2, reg. 5 provides as follows:

> "(1) A reference in any enactment to a meeting of a local authority is not limited to a meeting of persons all of whom, or any of whom, are present in the same place and any reference to a 'place' where a meeting is held, or to be held, includes reference to more than one place including electronic, digital or virtual locations such as internet locations, web addresses or conference call telephone numbers.

(2) For the purposes of any such enactment, a member of a local authority (a 'member in remote attendance') attends the meeting at any time if all of the conditions in subsection (3) are satisfied.

(3) Those conditions are that the member in remote attendance is able at that time—

(a) to hear, and where practicable see, and be so heard and, where practicable, be seen by, the other members in attendance,

(b) to hear, and where practicable see, and be so heard and, where practicable, be seen by, any members of the public entitled to attend the meeting in order to exercise a right to speak at the meeting, and

(c) to be so heard and, where practicable, be seen by any other members of the public attending the meeting.

(4) In this regulation any reference to a member, or a member of the public, attending a meeting includes that person attending by remote access.

(5) The provision made in this regulation applies notwithstanding any prohibition or other restriction contained in the standing orders or any other rules of the authority governing the meeting and any such prohibition or restriction has no effect.

(6) A local authority may make other standing orders and any other rules of the authority governing the meeting about remote attendance at meetings of that authority, which may include provision for—

(a) voting;

(b) member and public access to documents; and

(c) remote access of public and press to a local authority meeting to enable them to attend or participate in that meeting by electronic means, including by telephone conference, video conference, live webcasts, and live interactive streaming."

27 Part 3 makes extensive modifications to the 1972 Act. Regulation 6 provides materially that Schedule 12 applies as follows:

"(a) any reference to being 'present' at a meeting includes being present through remote attendance;

(b) any reference to a 'place' where a meeting is held, or to be held, includes reference to more than one place including electronic, digital or virtual locations such as internet locations, web addresses or conference call telephone numbers".

28 By regulation 6(c), certain provisions in Schedule 12 are disapplied entirely. Some of these are provisions about how often and when meetings must be held. But they also include paragraphs 10(2)(a) and 15(4) (which requires notice of the time and place of a parish council or parish meeting to be fixed or posted "in some conspicuous place in the parish"). As well as modifications to the provisions governing the frequency of meetings, it deals with public and press access, providing *(inter alia)* that the 1972 Act should be read as if a new provision were inserted in Part VA. The new provision reads:

> "**100L. Supplemental provision on public access to meetings and documents**
>
> In this Part references (however expressed) to—
>
> (a) a meeting being 'open to the public' include access through remote means including (but not limited to) video conferencing, live webcast, and live interactive streaming and where a meeting is accessible to the public through such remote means the meeting is open to the public whether or not members of the public are able to attend the meeting in person;
>
> (b) being 'present' at a meeting include access through remote means mentioned in paragraph (a) above;
>
> (c) a document being 'open to inspection' includes being published on the website of the council;
>
> (d) the publication, posting or making available of a document at offices of the council include publication on the website of the council."

29 In the Explanatory Memorandum accompanying the Flexibility Regulations, their purpose was stated as being to:

> "…make provision to enable local authorities to hold meetings remotely including by (but not limited to) telephone conferencing, video conferencing, live webcast, and live interactive streaming. The Regulations further modify existing legislative provisions to remove the requirement for local authorities to hold annual meetings, and to enable requirements for public and press access to local authority meetings and associated documents to be complied with through remote means and website access."

30 The power conferred by s. 78 of the 2020 Act was exercised in relation to local authorities in Wales by the Welsh Ministers in the Local Authority (Coronavirus) (Meetings) (Wales) Regulations 2020/442, reg. 5 of which provides:

> "(1) Section 4 of the Local Government (Wales) Measure 2011 (remote attendance at principal council meetings) does not have effect in relation to a meeting held before 1 May 2021.
>
> (2) A meeting of a local authority held before that date may be held by means of any equipment or other facility which enables persons who are not in the

> same place to speak to and be heard by each other (whether or not the equipment or facility also enables those persons to see each other).
>
> (3) A reference in any enactment or other instrument to—
>
> (a) the attendance or presence of a person at a local authority meeting includes, in relation to a meeting which is held by the means described in paragraph (2), attendance by the use of those means;
>
> (b) the place at which a meeting of a local authority is held is not to be read as limited to a single physical location.
>
> (4) Nothing in this regulation limits a local authority's powers to make standing orders, executive arrangements or other rules about meetings held by the means described in paragraph (2).
>
> (5) A local authority must have regard to any guidance issued by the Welsh Ministers for the purposes of this regulation."

Local authorities' use of the power to hold remote meetings in England

31 Local authorities in England have made extensive use of the power to hold remote meetings since the Flexibility Regulations came into force. On 22 June 2020, the Lawyers in Local Government Group surveyed its members to ascertain their appetite for the continuation of remote meetings. 88% were in favour, with 75% supporting the continuation of hybrid meetings, where some individuals attend in person and others remotely. Those in favour of continuation referred to efficiency savings, the protection of vulnerable participants, increased democratic participation, the beneficial impact upon the climate and the reduction in expenditure and time savings, particularly in authorities covering large geographical areas. Some respondents, however, said that particular types of meetings – such as full council meetings and planning and licensing committee meetings – should not be held remotely. Concerns were expressed by some respondents about hybrid meetings.

32 On 12 October 2020, the local authority associations wrote to the Secretary of State for Housing, Communities and Local Government setting out what it described as the "clear case for extending the ability for councils to hold meetings flexibly beyond May 2021 while we continue to manage the COVID-19 pandemic, and to make this a permanent power for councils to be able to utilise". The letter continued:

> "Appreciating that this will require primary legislation, we ask that as a minimum we have confirmation that government is planning to extend the power beyond 7 May 2021, subject to Parliament approving the act's renewal every six months as is currently set out in the legislation."

33 The Secretary of State responded on 23 November 2020 as follows:

> "To extend the facility for councils to continue to meet remotely, or in hybrid form, would require primary legislation. There is no option to extend the current regulations under the Coronavirus Act 2020 as section 78 (3) contains

> the sunset date of 7 May 2021. There is considerable pressure on the Government's legislative program. However, I appreciate the arguments you have put forward and I will consider the case for this with colleagues in the Government."

34 On 25 March 2021, the Minister of State for Regional Growth and Local Government (Luke Hall MP) wrote to council leaders in England making clear that the Flexibility Regulations would cease to apply from 7 May 2021. He continued:

> "Extending the regulations to meetings beyond May 7 would require primary legislation. The Government has considered the case for legislation very carefully, including the significant impact it would have on the Government's legislative program which is already under severe pressure in these unprecedented times. We are also mindful of the excellent progress that has been made on our vaccination program and the announcement of the Government's roadmap for lifting Covid-19 restrictions. Given this context, the Government has concluded that it is not possible to bring forward emergency legislation on this issue at this time."

35 In the letter, the Minister went on to refer to the Covid-19 guidance on the safe use of council buildings, which highlighted ways to minimise the risk of face-to-face meetings. He suggested that those councils not subject to elections this year could consider holding their annual meetings remotely prior to 7 May 2021 and pointed out that the Government's roadmap proposed that organised indoor meetings would be permitted from 17 May 2021, subject to Covid-secure guidelines and capacity rules. He continued:

> "I am today launching a call for evidence on the use of current arrangements and to gather views on the question of whether there should be permanent arrangements and if so, for which meetings. There are many issues to consider and opinions on the detailed questions vary considerably. This will establish a clear evidence base of opinion and enable all the areas to be considered before further decisions are made. The government will consider all responses carefully before deciding how to proceed on this issue."

36 The call for evidence sought to "understand the experience of local authorities in the whole of the UK regarding remote meetings". It noted:

> "We are aware that experience of remote meetings has been varied, and that while the experience of managing and participating in remote meetings has grown considerably during the period since the remote meetings regulations came into force, there have been examples of the difficulties this format has posed for some authorities.
>
> …The Government would like to hear from interested parties about the pros and cons of making such arrangements permanent in England and the use of the arrangements to date."

37 Views were sought about the benefits, costs and disadvantages of remote meetings and about the advantages of physical meetings. Under the heading "Constraints on Remote Meetings", this was said:

> "If express provision for remote meetings were made permanent, it might be preferable for the Government to constrain the meetings or circumstances in which remote meetings can be held to ensure that effective democracy and scrutiny can still take place. There are some occasions, for example, where a remote meeting format may be seen as more appropriate, such as for smaller sub-committees, meetings convened at short notice, or for meetings where attendees are drawn from a large geographical area i.e. for some joint committees, combined authorities and large rural authorities. On the other hand, there are occasions where a remote meeting format may be viewed as less appropriate, for example larger meetings involving Full Council or an authority's Annual Meeting."

38 Responses were sought by 17 June 2021.

The pre-action correspondence

39 Meanwhile, on 23 February 2021, the Claimants wrote jointly to the Secretary of State indicating their intention to issue Part 8 proceedings seeking declarations that local authorities have power other than under the Flexibility Regulations to hold member meetings remotely, either wholly or partly.

40 The Local Government Association wrote to the Secretary of State on 4 March 2021 indicating its support for the proposed proceedings. It said: "The declaration would be a way of addressing this issue without the need for legislative change."

41 The Secretary of State responded to the Claimants' pre-action letter on 9 March 2021. The response noted that the Secretary of State was exploring next steps, such as issuing a call for evidence about the current arrangements, which would "enable the Secretary of State to consider the question of whether there should be permanent arrangements to allow remote meetings". As the Flexibility Regulations were due to expire on 7 May 2021, the Secretary of State accepted that there would be "uncertainty around whether such meetings are permitted by legislation other than the Coronavirus Act 2020 after this date". Having considered the arguments advanced by the Claimants in their pre-action letter, the Secretary of State agreed that it was possible to interpret Schedule 12 to the 1972 Act "in a way that enables remote or hybrid meetings to take place". He was therefore supportive in principle of the proposed claim, though suggested that the Claimants' objectives could be achieved if the court were to give its opinion on the meaning of the words "meeting", "place" and "present" in the 1972 Act without making a declaration.

These proceedings

42 The Claimants issued a Part 8 claim in the Queen's Bench Division of the High Court on 11 March 2021 seeking:

> "1. A declaration or declarations that any reference in the Local Government Act 1972 and other enactments to

(1) a 'meeting' of a local authority is not limited to a meeting of persons all of whom, or any of whom, are in the same physical space; and

(2) a 'place' where a local authority meeting is held, or to be held, includes reference to more than one place, and includes electronic, digital or virtual locations such as internet locations, web addresses, video-conferencing platforms or conference call telephone numbers; and

(3) a person being 'present' at a local authority meeting includes reference to their attending and/or participating in that meeting by electronic means, including by telephone conference, video conference, live web cast, and live interactive streaming.

2. Further and alternatively, a declaration or declarations that a local authority is empowered, whether under the Local Government Act 1972 or otherwise, to hold meetings

(1) not limited to meetings of persons all of whom, or any of whom, are in the same physical space;

(2) where are the meetings (as so understood) take place at electronic, digital or virtual locations such as internet locations, web addresses, video-conferencing platforms or conference call telephone numbers; and

(3) where persons attend and/or participate in the meetings (as so understood) by electronic means, including by telephone conference, video conference, live web casts, and live interactive streaming.

3. A further declaration, or further declarations, that a local authority meeting is 'open to the public' for the purposes of the Public Bodies (Admission to Meetings) Act 1960, the Local Government Act 1972 and the Local Government Act 2000, and is both 'held in public' and 'open to the public' for the purposes of the Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012 if, amongst other matters, the public may attend and/or participate in it by electronic means, including by telephone conference, video conference, live web cast, and live interactive streaming.

4. In the declarations sought in paragraphs 1-3 above

"local authority" means any and all of the following:-

(1) principal authorities, parish councils and joint authorities within the meaning of the Local Government Act 1972, and Fire and Rescue Authorities (save the London Fire Commissioner) within the meaning of the Fire and Rescue Services Act 2004;

(2) any organ of any of the authorities in one above comprised or comprised partly of members, including any committee or subcommittee thereof, and in the case of any authority operating executive arrangements under

> the Local Government Act 2000, its executive or any committee or sub-committee thereof;
>
> and
>
> "the 2020 Regulations" means the Local Authorities and Police and Crime Panel (Coronavirus) (Flexibility of Local Authority and Police and Crime Panel Meetings) (England and Wales) Regulations 2020.
>
> 5. Such further and other relief as the Court shall think necessary or appropriate."

43 On 23 March 2021, there was a directions hearing at which Swift J ordered that the claim be transferred to the Administrative Court to proceed as a judicial review claim under Part 54. He granted permission to apply for judicial review and gave directions setting an expedited timetable. The Secretary of State filed "Detailed Grounds of Resistance" indicating agreement with the Claimants on the "substantive" question: "whether… the relevant references to a 'meeting' include references to a virtual meeting and where the other, ancillary expressions should be interpreted accordingly". However, there was also a "subsidiary" question: "whether the court should grant a declaration and, if so, in what terms". On this question, much would depend on the terms of the Court's eventual judgment, but the Secretary of State urged the Court to adopt a cautious approach:

> "In particular, in light of the myriad of factual circumstances which might arise in practice, it might be appropriate for the court to address the question of interpretation in principle only, and to leave the details to be worked out on a case-by-case basis."

44 The Local Government Association and National Association of Local Councils both filed Acknowledgments of Service and witness statements supporting the claim. On 22 March 2021, the Welsh Government said that the Welsh Minister Housing and Local Government would not be participating, because "the legislative landscape in Wales is different to that in England".

The Local Government and Elections (Wales) Act 2021

45 The most recent addition to the "legislative landscape" in Wales is the Local Government and Elections (Wales) Act 2021 ("the 2021 Welsh Act"). This places a duty on local authorities in Wales to make arrangements to enable remote meetings.

46 In Chapter 4 of Part 3 of the 2021 Welsh Act, the Senedd enacted a suite of measures dealing with local authority meetings. Section 4 of the 2011 Welsh Measure will be repealed. Provision will be made for electronic broadcasts of meetings of certain specified types of local authority (s. 46), attendance at local authority meetings (s. 47) and notices of local authority meetings (s. 49 and Part 1 of Schedule 4) and confer on the Welsh Ministers the power to make regulations about notice, documents and the conduct of meetings and about rights of access to information (s. 50). Section 47 provides in material part as follows:

> "47.—(1) A local authority must make and publish arrangements for the purpose of ensuring that local authority meetings are able to be held by means of any equipment or other facility which—
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> (a) enables persons who are not in the same place to attend the meetings, and
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> (b) satisfies the conditions in subsection (2).
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> (2) The conditions are that the equipment or other facility enables persons—
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> (a) in the case of local authority meetings that do not fall within paragraph (b), to speak to and be heard by each other (whether or not the equipment or facility enables those persons to see and be seen by each other), and
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> (b) in the case of meetings of a principal council required to be broadcast under section 46 (electronic broadcasts), or any other local authority meetings required to be broadcast by regulations made under that section, to speak to and be heard by each other and to see and be seen by each other.
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> …
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> (5) A local authority making arrangements required by subsection (1) must have regard to any guidance about the exercise of that function issued by the Welsh Ministers.
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> (7) A reference in any enactment to—
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> (a) the attendance, presence or appearance of a person at a local authority meeting includes, in relation to a meeting held by the means described in subsection (1), attendance, presence or appearance by use of those means;
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> (b) the place at which a local authority meeting is held is not to be read as limited to a single physical location.
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> (8) The Welsh Ministers may by regulations amend this section so as to—
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> (a) add to, amend or omit the conditions in subsection (2)…"

47 Section 47 identifies in sub-section (6) the local authorities and meetings to which that section applies. Section 47(8)(b) gives Welsh Ministers the power to add certain joint boards to that definition. Schedule 4 makes extensive amendments to the 1972 Act provisions governing notice of, access to and attendance at local authority meetings, as those provisions apply in Wales.

Initial observations

48 Before setting out and evaluating the parties' submissions, we make the following initial observations.

49 **First**, until very recently, there had been a consensus that the 1972 Act does not permit remote meetings. That consensus was reflected in unequivocal statements by the Secretary of State in the 2016 Consultation and in the 2019 Response that the 1972 Act was "clear" in this regard. The view that primary legislation would be required to enable remote meetings to be held was also reflected in the correspondence between the local authority associations and the Secretary of State about the enactment of primary legislation to extend the provision made by the 2020 Regulations. The first indication that the Claimants dissented from this view came about two months ago, when they sent their pre-action letter. The Local Government Association, for their part, first dissented from the consensus view about six weeks ago, when they indicated their support for these proceedings as "a way of addressing this issue without the need for legislative change". The Secretary of State's first public indication of a change of mind was even more recent, in his response of 9 March 2021 to the Claimants' pre-action letter.

50 **Second**, the 2003 Scottish Act, the 2011 Welsh Measure and the 2021 Welsh Act provide three examples of legislation which expressly permit remote meetings. In all cases, legislative choices had to be made about how this should be done. The questions that had to be answered by the relevant legislature included:

(a) *Who is to decide whether to allow remote meetings and what are the procedural requirements for such decisions?* Under the 2003 Scottish Act, the convenor or deputy convenor of the authority, committee or sub-committee decides and there are there are no particular procedural requirements for the decision. Under the 2011 Welsh Measure, it is open to the authority to prohibit particular types of facilities in its standing orders or other rules, provided that it has regard to guidance given by the Welsh Ministers. Under the 2021 Welsh Act, the local authority must publish arrangements dealing with remote meetings and must have regard to guidance issued by the Welsh Ministers.

(b) *What are the minimum conditions subject to which remote meetings are permitted?* Under the 2003 Scottish Act, the condition is simply that "each member is enabled to participate although not present with others". This allows wholly remote meetings. Under the case of the 2011 Welsh Measure, however, the meeting still has to take place at a physical location; others can attend remotely, but only if they can see and hear and be seen and heard by those attending in person and can hear and be heard by others attending remotely and only if the use of technology allowing this to happen is not prohibited by standing orders or other rules of the authority. Under the 2021 Welsh Act, the conditions differ as between meetings of principal council required to be broadcast under s. 46 (where participants must be able to speak to and be heard by each other and to see and be seen by each other) and other meetings (where participants need only be able to speak to and be heard by each other); but these conditions can be amended by the Welsh Ministers.

(c) *How should the existing requirements for matters such as notice and public access be modified in their application to remote meetings?* Under the 2003 Scottish Act, there are some modifications to the Scottish equivalent of the 1972 Act, in particular, omitting the requirement that "[m]eetings shall be held at such place, either within or without the area, as the council may direct" and the reference to the place of the meeting in the requirement for publication of "notice of the time and

place of the intended meeting". Under the 2011 Welsh Measure, amendments to the equivalent provisions in the 1972 Act were not required because an in-person meeting was still required: all that was being permitted was remote attendance by some participants at such meetings. Under the 2021 Welsh Act, by contrast, there are extensive consequential amendments to the provisions governing notice of and access to and attendance at local authority meetings, as those provisions apply in Wales.

(d) *Which meetings of which authorities should be permitted to take place remotely?* In all three pieces of legislation, the authorities empowered to conduct remote meetings are carefully defined. In the 2021 Welsh Act, as noted, different types of meetings have different conditions for remote meetings to be permitted; and the Welsh Ministers are given power to add certain additional authorities to the list of authorities permitted to hold remote meetings.

51 **Third**, the 2016 Consultation (relating to England) also shows that legislative choices on these and other matters are inherent in any move to remote meetings. The Secretary of State advanced a limited proposal to allow meetings of joint committees or combined authorities, but not other authorities, to be conducted using video-conferencing. Even in relation to joint committees and combined authorities, certain safeguards were regarded as essential: the participants must be able to see and hear one another; members of the public must be able to see and hear all participants; and it would not be possible to participate from a home or private premises, only from appropriate local authority or combined authority premises. In the 2019 Response, the Government indicated that it was satisfied that these safeguards were sufficient, but the extension of the power to use video-conferencing in formal meetings to other local authorities would require further consultation. In that regard, a call for evidence is now underway with a closing date of June 2021, with consideration being given to the advantages and disadvantages of such meetings, the advantages of in-person meetings and, in particular, to the question of which meetings of which authorities should be permitted to take place remotely.

52 **Fourth**, s. 78(1) of the 2020 Act enables the making of regulations making provision relating to a number of things, including "(d) the manner in which persons may attend, speak at, vote in, or otherwise participate in, local authority meetings". Parliament thought it necessary in s. 78(2) to enact that this could include "provision for persons to attend, speak at, vote in, or otherwise participate in, local authority meetings without all of the persons, or without any of the persons, being together in the same place". The purpose of these provisions, as the Explanatory Notes make clear, was "to relax some requirements in relation to local authority meetings for a specified period". By s. 78(3), the period ends on 7 May 2021. All this is consistent with the view (taken against the legislative background in Scotland and Wales, of which Parliament must be taken to be aware) that permitting remote meetings involved the making of legislative choices; that it was appropriate for the Secretary of State to make these choices in the context of the emergency which presented itself in April 2020; but that extending them into the future would require further consultation leading to primary legislation. Whether it is only consistent with that view is a matter to which we shall have to return.

53 **Fifth**, the Flexibility Regulations – made six days after the 2020 Act – provide a further illustration of these legislative choices. The four questions addressed by the Scottish and Welsh legislation were answered as follows in relation to England:

(a) *Who is to decide whether to allow remote meetings and what are the procedural requirements for such decisions?* Remote attendance is permitted notwithstanding any contrary provision in standing orders or any other rules: reg. 5(5).

(b) *What are the minimum conditions subject to which remote meetings are permitted?* The conditions in reg. 5(3) are a variation on the conditions in the 2011 Welsh Measure. The use of the words "where practicable" to qualify the requirement that members attending remotely can "see and… be seen by" others enables greater flexibility.

(c) *How should the existing requirements for matters such as notice and public access be modified in their application to remote meetings?* Extensive modifications are made to the 1972 Act and to the other legislation governing public access to meetings and documents.

(d) *Which meetings of which authorities should be permitted to take place remotely?* These were defined in reg. 3, in line with s. 78(6) and (7) of the 2020 Act. The list of authorities was expanded by primary legislation in July 2020.

54 **Sixth**, the declaration sought by the Claimants looks very much like a piece of legislation, not only in form but also in substance. Taking the matters which are the subject of legislative stipulation in the Scottish and Welsh legislation, and the Flexibility Regulations, in turn:

(a) *Who is to decide whether to allow remote meetings and what are the procedural requirements for such decisions?* Paragraph 1 of the proposed declaration would extend beyond 7 May 2021 the effect of reg. 5(1) of the 2020 Regulations, but it would do so without anything equivalent to reg. 5(5). This means that the question whether remote meetings could be held would be a matter for local authorities to determine for themselves, raising the prospect that some might decide to do so for some or all meetings and others might decide to do so for different categories of meetings, or not at all. There would be no obligation for local authorities to take these decisions in accordance with guidance given by any central authority (contrary to the position under the 2011 Welsh Measure and the 2021 Welsh Act).

(b) *What are the minimum conditions subject to which remote meetings are permitted?* The reference in the paragraphs 1 and 2 of the proposed declaration to telephone conferencing presumably means that there is no need, in any kind of meeting, for each remote participant to see and be seen (as well as hear and be heard) by other participants. This would be different from the position under the 2011 Welsh Measure and the 2021 Welsh Act and different from the position under the Flexibility Regulations (where those attending remotely must, "where practicable", be able to see and be seen by others). It would also mean that the "safeguards" described in the 2016 Consultation and the 2019 Response as necessary to preserve transparency would be absent: meetings could take place without the participants being able to see each other at all; and participants could attend from their own homes or private premises.

(c) *How should the existing requirements for matters such as notice and public access be modified in their application to remote meetings?* Paragraph 3 of the proposed declaration would have the effect that a meeting was both "held in public" and "open to the public" for the purposes of the various statutory provisions which require these things if the public can attend and/or participate in it by electronic means. This would mean that, even if a council meeting takes place with some or all members attending in person, it would be open to the council to exclude the public from attending in person altogether provided that they are enabled to attend and/or participate by electronic means. The effect would be to make permanent the new s. 100L of the 1972 Act, which the 2020 Act and the Flexibility Regulations provided should have effect only in relation to meetings required to be held, or held, before 7 May 2021. The consequence could be, depending on the decisions taken by individual local authorities, to shut out anyone who lacks access to the technology needed for remote access, permanently and irrespective of the continuation of any public health justification for excluding in-person attendance by members of the public.

(d) *Which meetings of which authorities should be permitted to take place remotely?* The proposed declaration would specify to which authorities the power to hold remote meetings applies; and would stipulate which organs, committees and sub-committees were covered. As we understand it, the intention is to make clear that the power covers the same ground as the 2020 Act and Flexibility Regulations. This would be contrary to the proposals in the 2016 Consultation and the 2019 Response, both of which were clear that the power should extend only to joint committees and combined authorities (and subject to the safeguards noted above). It would also predetermine the question on which the Government is currently seeking evidence: whether to limit the types of meetings or circumstances in which remote meetings can be held, "to ensure that effective democracy and scrutiny can still take place".

55 **Seventh**, it may be that some of all of these points underlie the Secretary of State's view that the court should be cautious about granting declaratory relief and, rather, should confine itself to addressing the question of interpretation in principle only. This would involve leaving to be determined by future judicial decisions matters such as: whether participants must (or must if practicable) be able to see and be seen as well as hear and be heard; and whether remote access for the public is enough (and whether that remains so even if there is no public health justification for excluding in person access).

The parties' submissions

56 For the Claimants, Peter Oldham QC relied on a wealth of authorities supporting what is known as the "updating approach" to statutory construction: in particular *Royal College of Nursing v Department of Health* [1981] AC 800, *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13, [2003] 2 AC 687, *Oakley v Birmingham City Council* [2001] 1 AC 617 and, more recently, the judgment of Leggatt J in *R (ZYN) v Walsall Metropolitan Borough Council* [2014] EWHC 1918 (Admin), [2015] 1 All ER 165, which contains a useful summary of the relevant case law. None of the counsel who appeared before us took issue with any part of that summary.

57 Applying the updating approach, it was submitted that the question was not whether in enacting the 1972 Act Parliament had in mind that meetings might be conducted remotely, but whether a remote meeting is one which satisfies the purposes for which Parliament legislated for local authority meetings. The purposes were to enable members to consider and debate local authority business together and to make decisions about it. It is said that remote meetings are entirely consistent with those purposes.

58 A contrast was drawn with the decision of the present constitution of the Divisional Court in *Devon Partnership NHS Trust v Secretary of State for Health and Social Care* [2021] EWHC 101 (Admin). There, we held that the Mental Health Act 1983 could not be read as permitting approved social workers and others to see patients for the purpose of making an application for compulsory admission to hospital, or medical practitioners to examine them for that purpose, remotely. The parties submitted, however, that this was because of the prescriptive language of the provisions in question and the need for a restrictive interpretation in the context of decisions affecting the right to liberty and because the purposes of the Act would be undermined if remote means were permitted.

59 Reliance was placed on authorities dealing with communications technology. In *Gambart v Ball* 143 ER 463, the Court of Common Pleas held that photographs were covered by the Copyright of Engravings Acts, even though they had not been contemplated when those Acts were passed. In *Attorney-General v Edison Telephone Company of London Ltd* (1880) 6 QBD 244, the Exchequer Division held that a telephone was a "telegraph" within the meaning of the Telegraph Act 1863 and 1869 even though the telephone had not been invented or contemplated by 1869. By the same token, in *Messager v BBC* [1927] 2 KB 543, 547-8, the performance of a work by wireless telephony was held to fall within the phrase "any acoustic representation… including such a representation made by means of any mechanical instrument" even though telephony was not mechanical. Similarly, in *Barker v Wilson* [1980] 1 WLR 884, the Divisional Court considered that the phrase "bankers' books" in the Bankers' Books Evidence Act 1879 included microfilm. In *R v South London Coroner ex p. Thompson*, The Times, 9 July 1982, the requirement on a coroner to "take notes of the evidence" was satisfied by tape recording it. In *Derby & Co. v Weldon (No. 9)* [1991] 1 WLR 652, 654, Vinelott J held that a computer database is a "document" for the purposes of RSC r. 24 "so far as it contains information capable of being retrieved and converted into readable form". In each case, the court asked whether the new technology fell within the purpose of the existing legislation.

60 More specifically, in *Byng v London Life Association Ltd* [1990] Ch 170, it was argued that a shareholders' emergency general meeting required that attendees be physically present in the same room "because the very essence of the meeting was an assembly of persons who were present face-to-face at one time and place and not separate assemblies at different places". That argument was rejected by the Court of Appeal. Sir Nicholas Browne-Wilkinson V-C held at 183A-B that:

> "The rationale behind the requirement for meetings in the Companies Act 1985 is that the members shall be able to attend in person so as to debate and vote on matters affecting the company. Until recently this could only be achieved by everyone being physically present in the same room face-to-face. Given modern technological advances, the same result can now be achieved without all the members coming face-to-face: without being physically in the

> same room they can be electronically in each other's presence so as to hear and be heard and to see and be seen. The fact that such a meeting could not have been foreseen at the time the first statutory requirements for meetings were laid down, does not require us to hold at such a meeting is not within the meaning of the word 'meeting' in the Act of 1985."

61 Mr Oldham submitted that the same reasoning applies, *mutatis mutandis*, to meetings required by the 1972 Act.

62 *Byng* was followed in *Re Altitude Scaffolding Ltd* [2006] EWHC 1401 (Ch), [2006] BCC 904, where at [18] David Richards J cited *Byng* for the proposition that "the coming together required for the ordinary meaning of meeting may be achieved by the use of technology". See also *Re Castle Trust plc* [2020] EWHC 969 (Ch), [2021] BCC 1, in which at [38] Trower J held the essential characteristics of a meeting to be "a coming together sufficient to enable a consultation to take place". At [40] he held that a meeting held by telephone had these characteristics.

63 As to "place", Mr Oldham submitted that the word is broad enough to encompass metaphorical places such as "cyberspace", "website", "chat rooms", "forums", "platforms" and "the blogosphere". Reliance was placed on the New Zealand case of *Peters v Electoral Commission* [2016] NZHC 394, [2016] 2 NZLR 690, where at [82] Mallon J said "[t]he Internet is a place open to the public and used by the public". An alternative analysis was that the "place" where a meeting takes place is the physical place where its chairman is (by analogy with the decision in *Huber v X-Yachts (GB) Ltd* [2020] EWHC 3082 (TCC), where Kerr J held that the place where a court sits for the purposes of s. 71 of the Senior Courts Act 1981 is the place where the judge is sitting) or that the place of a meeting included any place where a remote participant was situated (by analogy with the decision of the Privy Council in *Attorney General of the Turks and Caicos Islands v Misick* [2020] UKPC 30).

64 Finally, it was said that "present" could include "present electronically", by analogy with *Byng*.

65 For the Local Government Association, Mr Auburn supported these submissions and relied in addition on the decision of Nolan J in *R v Bickenhill Parish Council ex p. Secretary of State for the Environment* [1987] JPL 773, where at 776 he inclined to the view that a meeting under the 1972 Act could be held using a conference telephone system. Mr Auburn emphasised that the White Paper which preceded the 1972 Act suggested Parliament's purposes in enacting it included modernisation and adaptability, delegation and local authority discretion and widening participation. All of these militated, he submitted, in favour of a construction which permitted remote meetings to take place.

66 For the Secretary of State, Jonathan Moffett QC supported all these submissions. He emphasised that the 1972 Act used broad, undefined terms: "meeting", "place", "present", "attend". There was no reason to suppose that these terms were used in any narrow or restricted sense. In addition, he argued that s. 78 of the 2020 Act could not be read as enacting or even assuming any view about whether the 1972 Act permitted remote meetings. The provision made by s. 78(1) was wide enough to empower the making of regulations covering a very wide range of topics. Regulations under s. 78(1)(d)

could, for example, have required local authorities to hold meetings remotely. It would not have been surprising if they had, given the other restrictions that were in fact imposed or were contemplated to address the pandemic. Section 78 was not, therefore, inconsistent with the view that the power to hold remote meetings already existed in the 1972 Act.

67 Mr Moffett urged the court to be "especially careful not to grant a declaration in terms that might suggest that a particular type of virtual meeting will invariably constitute a 'meeting' for the purposes of the relevant provisions or that it will invariably be lawful to hold a virtual meeting in particular circumstances". One circumstance in which a virtual meeting might not constitute a "meeting" for the purposes of the relevant provisions was where "members are unable meaningfully to participate in the meeting, such that the primary legislative purpose… would not be achieved". Similar issues might arise in relation to the requirement that certain meetings must be open to the public. This would not, he said, give rise to unacceptable indeterminacy. It would be for the courts to resolve disputes in difficult or marginal cases. But, as is shown by the decision in *Byng* (where Sir Nicholas Browne-Wilkinson V-C and Mustill LJ reached different conclusions about whether there had been a meeting at all), the courts can and do decide such cases.

Discussion

68 We have found the decision of Leggatt J in *ZYN* to be a useful starting point in setting out the principles to be applied to the construction of the 1972 Act. At [42], he said this:

> "On analysis… the conflict between the historical approach and the updating approach to statutory interpretation is not as deep as may at first appear. Treating legislation as 'always speaking' can still be seen as an exercise in identifying the meaning of the legislation at the time when it was made. It is just that this meaning is one which allows the relevant statutory language to have a changing application."

69 In considering whether Parliament intended an updating construction to be applied, it is appropriate to consider matters such as "the generality of the language used" (see at [46]), but "[i]n each case where relevant circumstance has changed since the legislation was enacted it is a question of interpretation whether it is reasonable to attribute to the legislature the intention that the words used should be interpreted and applied in a way which takes account of that change" (see at [48]).

70 At [53]-[54], Leggatt J noted that "Parliament can change the meaning of an existing statutory provision" either directly or by enacting a general rule of interpretation, such as occurred with the enactment of the Interpretation Act 1978 and with s. 3 of the Human Rights Act 1998. Then at [55], he said this:

> "Even without explicitly requiring the courts to give a term in existing legislation a particular meaning, or to apply a specified rule when interpreting the term, Parliament may act in a way which treats the term as having a particular meaning and signals its approval of that meaning."

71 Having given examples of cases applying or reflecting this principle, Leggatt J continued as follows at [59]:

> "This approach seems to me to respect the constitutional principle of parliamentary sovereignty. *Bennion* (p. 801) quotes a statement of Thomas Hobbes in Leviathan (Ch. 26) that 'the legislator is not he by whose authority the laws were first made, but by whose authority they now continue to be laws'. If Parliament has proceeded on the basis that an existing law has a particular meaning at a time when, if Parliament had understood the law to have a different meaning, it is reasonable to infer that it would have acted differently, that may properly be treated as an implied directive as to how a previously ambiguous law should be interpreted." (emphasis in original)

72 At [60]-[66], Leggatt J applied this approach to the facts of the case before him. The issue was whether a reference to the "Court of Protection" in the Income Support Regulations 1987 was to be read as including the new Court of Protection constituted under the Mental Capacity Act 2005. The fact that the 1987 Regulations were left unchanged when the 2005 Act was brought into force enabled the inference to be drawn that the Minister and Parliament intended the Regulations to refer to the new Court of Protection.

73 *Bennion, Bailey and Norbury on Statutory Interpretation* (8th ed., 2020) at §24.19 cites the above extract from [59] of *ZYN* as authority for the proposition that "where the legal meaning of an enactment is doubtful, subsequent legislation on the same subject may be relied on as persuasive authority as to its meaning": see also *DSG Retail Ltd v Mastercard Inc.* [2020] EWCA Civ 671, [2020] Bus LR 1360, [57]-[58] (Vos C).

74 We approach the construction of the 1972 Act as follows.

75 Mr Oldham invited us to construe the 1972 Act by first considering how the term "meeting" is interpreted in other contexts and then reasoning from that to determine the meaning of "ancillary" terms such as "place", "attend" and "present". In our view, that is the wrong approach. We can readily accept that "meeting" can, in some contexts, encompass virtual or remote meetings: since March 2020 it has become common to refer to a "Zoom meeting". But in other contexts "meeting" would not carry that meaning. If a meeting is to be "either in or outside London", one would not expect it to be conducted online. The question for us is not what "meeting" means in the abstract, or in some other context, but what it means in the particular statutory context of Schedule 12 to the 1972 Act.

76 That being so, the meaning of "meeting" must in our judgment be informed by reading Schedule 12 as a whole. This includes the obligations to hold the meeting "at such place, either within or without their area" as a principal council, parish council or community council may direct (paragraphs 4(1), 10(1) and 26(1)), to publish "notice of the time and place of the intended meeting" and to send out "a summons to attend the meeting" (see e.g. paragraphs 4(1A), 4(2), 10(2), 26(2)). In our view, a "place within or without the area" is most naturally interpreted as a reference to a particular geographical location and would not naturally encompass an online location; and a requirement to send out "notice of the time and place of the intended meeting" is inconsistent with the idea of a meeting taking place at multiple locations (e.g. in the homes of all participants). In this regard, it is noteworthy that the Scottish Parliament, when it expressly permitted fully remote meetings, also considered it necessary to omit or amend the equivalent provisions in the

predecessor Scottish legislation. Attending a meeting at a single specified geographical location would, in our view, ordinarily mean physically going to that location; and being "present" at such a meeting would involve physical presence at the specified location.

77 We accept that this is not determinative of the question whether Parliament intended an updating construction to be applied. Updating constructions have sometimes been applied so as to bring new factual situations within statutory terminology that is, on its face, inapt to include them. In *Quintavalle*, for example, an embryo that had not been created by fertilisation was held to fall within the statutory phrase "live human embryo where fertilisation is complete". Here, the inaptness of the statutory language to cover the new situation is less clear than in that case. The terms used ("meeting", "place", "present" and "attend") are relatively general, and – as Leggatt J said in *ZYN* – this could indicate that Parliament intended the meaning of the terms to be capable of evolving as technology evolved.

78 There is, however, another feature of the statutory context which makes it unlikely that Parliament intended an updating construction to apply. The meetings provided for by Schedule 12 to the 1972 Act are an important part of the mechanism of government of the country. The decisions taken at these meetings may have significant legal consequences for third parties. It will often be necessary to decide whether a meeting is quorate or whether a majority of those present has voted in favour of a particular resolution. Questions of this kind can give rise to acrimonious disputes. This makes it important to have certainty about what constitutes attendance or presence at a meeting. Without such certainty, it may be unclear whether a particular decision has been validly taken or not. The differences between the conditions for remote attendance in the 2011 Welsh Measure, reg. 5(3) of the 2020 Regulations and the 2021 Welsh Act provide a vivid illustration of the different ways of deciding what counts as remote attendance. These pieces of subsequent legislation were not, of course, available to Parliament in 1972, but the importance of certainty on these matters would have been obvious even then. It is legitimate to construe the 1972 Act in a way which promotes certainty in its application. A construction according to which meetings have to take place in person at a physical location better promotes certainty than one in which remote meetings are permissible in some but not other situations and the dividing line is not spelled out.

79 We have well in mind that, as Mr Moffett submitted, difficult or marginal cases of attendance or presence could arise even in the case of in-person meetings. But it is obvious that the scope for disagreement about whether someone has "attended" or is "present" at a meeting is much greater if remote attendance is permitted.

80 Nothing in the Court of Appeal's decision in *Byng* suggests the contrary. The decision in that case concerned a different statutory context: the Companies Act 1985. That legislation was not concerned with local democracy and did not contain anything equivalent to the requirement that the meeting be held "at such place, either within or without their area, as they may direct". One of Sir Nicholas Browne-Wilkinson's reasons for deciding that a meeting did not have to be held in person was that "[w]ere the law otherwise, with the present tendency towards companies with very large numbers of shareholders and corresponding uncertainty as to how many shareholders will attend meetings, the organisation of such meetings might prove to be impossible": see at 183E. Here, by contrast, at the time of the 1972 Act, local authority meetings had always been held in person in premises designed or adapted for that purpose; there was no reason to

think that the number of persons required to meet would ever be so large as to make in-person meetings impracticable; and (until the onset of the pandemic) no difficulty had been encountered in holding the required meetings in person.

81 Likewise, the question whether the internet was a "public place" arose in the New Zealand case of *Peters v Electoral Commission* in a particular statutory context – s. 2 of the New Zealand Summary Offences Act 1981, read in the context of s. 197(2A) of the Electoral Act 1993 (which referred in terms to the internet): see at [82]. The statutory wording under consideration there was very different. The same is true of s. 71 of the Senior Courts Act 1981, which provides that "[s]ittings of the High Court may be held… at any place in England or Wales". A "sitting" is not the same as a meeting. Nothing in Kerr J's judgment in *Huber v X-Yachts (GB) Ltd* suggests otherwise. In any event, the location where a court "sits" is itself dependent on the statutory context, as the Privy Council's decision in *Misick* shows.

82 In *R v Bickenhill Parish Council ex p. Secretary of State for the Environment*, Nolan J did not resolve the issue now before us. The most he said was that he would be "sorry to think" that the law did not permit meetings to be carried out using a telephone conference system. There is no indication, however, that he had heard argument on or considered the statutory scheme, as we have here.

83 For these reasons, if we had to construe the 1972 Act purely on the basis of what was intended in 1972, we would read "meeting" as referring to an in-person meeting taking place at a particular geographical location and "attend" and "present" as connoting physical attendance or presence at that location.

84 That is not, however, the end of the story, because, if the 1972 Act were ambiguous, it would be legitimate to consider later legislation in construing it. So far as England is concerned, there is now s. 78 of the 2020 Act. We would then have to ask whether, by enacting that provision, Parliament has "act[ed] in a way which treats the term[s] as having a particular meaning and signal[led] its approval of that meaning": see *ZYN*, [55]. In our view, Parliament has acted in that way.

85 The 2020 Act has to be read against the background of the 2003 Scottish Act, the 2011 Welsh Measure, the 2016 Consultation and the 2019 Response. The Scottish and Welsh legislation provided examples of express legislative provision for remote local authority meetings. The consultation document and response to consultation articulated in clear terms the Government's view that the 1972 Act included no such provision (in contrast to the position in Scotland).

86 Section 78(1) of the 2020 Act had a variety of purposes. Mr Moffett may be right to say that s. 78(1)(d) would on its face have authorised regulations requiring meetings to be held remotely, though its more obvious purpose was (as the Explanatory Notes said) to confer power "to relax some requirements in relation to Local Authority meetings for a specified period". But, whatever the scope of s. 78(1)(d), s. 78(2) would have been otiose if the 1972 Act already permitted remote meetings. The fact that it was included is an indicator that Parliament legislated on the basis that the 1972 Act did not permit such meetings; wished to confer power to do so; recognised that this would require legislative choices to be made; conferred power on the Secretary of State to make those choices by regulations; but limited the effect of those regulations to the period specified in s. 78(3).

This may be seen as an instance of the proposition that "[w]here one construction would render a later Act superfluous the presumption that the legislature does nothing in vain may be relevant": *Bennion, Bailey and Norbury*, §24.19.

87 It is no answer to say, as Mr Oldham did, that the 2020 Act was enacted in haste. There is no principle of construction which enables the courts to place less weight on a provision of primary legislation because it was passed in a hurry. Nor is it convincing to suggest, as Mr Moffett did, that s. 78(2) could have been inserted "for the avoidance of doubt". If that had been its purpose, Parliament could easily have made clear that existing powers to hold meetings included the power to hold those meetings remotely. It did not do that. Instead, it said that "the provision which may be made by virtue of subsection 1(d)" – i.e. the provision that Parliament in s. 78(3) said was to be time-limited – includes provision for remote meetings. In any event, when read with the Scottish and Welsh legislation, the 2016 Consultation and the 2019 Response, the implication is clear: if there were any doubt about the meaning of the 1972 Act, the 2020 Act should be treated as an "implied directive" that the 1972 Act does not permit remote meetings.

88 Finally, the considerations to which we have referred at paragraphs 49-55 above seem to us to point away from a construction in which remote meetings are permitted. Where there are two possible constructions, it is legitimate to favour the one which accords better with what has been until very recently the consensus view. That is particularly so in circumstances where the effect of the other construction would traverse the same ground covered by express legislative provision in Scotland and Wales and would undermine the express basis of a recent consultation on proposed legislative changes in England and the implied basis of a call for evidence currently underway.

Conclusion

89 For these reasons, we conclude that the Secretary of State was correct in November 2016 and July 2019 to say that primary legislation would be required to allow local authority "meetings" under the 1972 Act to take place remotely. In our view, once the Flexibility Regulations cease to apply, such meetings must take place at a single, specified geographical location; attending a meeting at such a location means physically going to it; and being "present" at such a meeting involves physical presence at that location.

90 We recognise that there are powerful arguments in favour of permitting remote meetings. But, as the consultation documents show, there are also arguments against doing so. The decision whether to permit some or all local authority meetings to be conducted remotely, and if so, how and subject to what safeguards, involves difficult policy choices on which there is likely to be a range of competing views. These choices have been made legislatively for Scotland by the Scottish Parliament and for Wales by the Senedd. In England, they are for Parliament, not the courts.

91 Subject to what follows, the claim will be dismissed.

Postscript

92 After the judgment was circulated in draft, it was pointed out that we have not determined the question whether a meeting which is required by the 1972 Act to take place in person is "open to the public" or "held in public" if the only means by which the

public are permitted to access it are remote. There was brief reference to the meaning of these phrases in submissions, but we were not asked to determine the question now raised. However, we have decided to permit the parties to address us separately on it in the light of our conclusions on the meaning of "meeting", "place", "present" and "attend" in the 1972 Act.

93 Accordingly, we shall give directions for the parties to make submissions on this point before making a final order in this case.