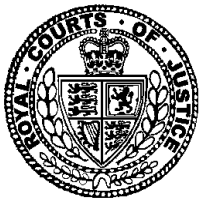

Neutral Citation Number: [2025] EWHC 1223 (Admin)

Case No: AC-2022-LON-000592

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 May 2025

Before :

MR JUSTICE SHELDON

- -

Between :

THE KING (ON THE APPLICATION OF MICHAEL-KARIM KERMAN)

Claimant

- and -

CHARITY COMMISSION FOR ENGLAND AND WALES

Defendant

- -
- -

Mr Alex Goodman KC, Mr Rupert Butler (instructed by **Leverets**) for the **Claimant**
Mr James Hodivala KC, Mr Faisel Sadiq, Ms Emma Hynes (instructed by **The Charity Commission**) for the **Defendant**

Hearing dates: 19 March 2025

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 20 May 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

MR JUSTICE SHELDON

Mr Justice Sheldon:

1. On 10 February 2022, the Charity Commission for England and Wales ("the Commission") published a report ("the Report") following an inquiry into the activities of the well-known charity: Keeping Kids Company (commonly known and referred to herein as "Kids Company" or "the charity"). Camila Batmanghelidjh, the founder and former Chief Executive Officer of Kids Company, sought to challenge a number of the findings set out in the Report by way of judicial review. Ms Batmanghelidjh died on 1 January 2024 and, with the permission of Swift J, the proceedings have been continued by Michael- Karim Kerman, the former Clinical Director of Kids Company. Permission to proceed to a substantive hearing was granted by Bourne J on 19 December 2022.

2. The grounds of challenge are that:

    i. the Report was irrational overall, and specifically that the Commission was irrational in making findings in the Report that were critical of Kids Company with respect to

        a) record-keeping and destruction of records;

        b) the method of reporting the numbers of service-users;

        c) the provision for reserve funds;

        d) late payments made to some creditors (including Her Majesty's Revenue and Customs ("HMRC")) amounting to financial mismanagement; and

        e) whether the Trustee Board had insufficient skill to scrutinise the charity's operations; and

    ii. there was an appearance of pre-determination to produce a report that was critical of Kids Company".

Factual Background

3. Kids Company was founded by Ms Batmanghelidjh in 1996 and incorporated in 1997. It provided support to disadvantaged and vulnerable young people at a number of centres in London, Liverpool and Bristol, as well as schools in London and Bristol. Kids Company was a high profile charity which received considerable support from central government as well as from private donors. Kids Company went into insolvent liquidation in August 2015. On 20 August 2015, the Commission, which is the statutory regulator for the charitable sector in England and Wales, initiated a statutory inquiry into Kids Company under the Charities Act 2011 ("the 2011 Act").

4. A draft "Interim statement of the Commission's statutory inquiry" which was being worked on in 2017, and which was disclosed as part of these proceedings, shows that the inquiry was opened to cover:

> "•investigation of concerns about the administration, governance and financial management of the Charity, including the concerns arising from specific allegations made by the three former employees of the Charity about alleged inappropriate spending,

breaches of financial controls and the conduct of the trustees and CEO amid concerns about the future viability of the organisation;

• any regulatory issues arising from the investigation carried out by the Official Receiver as part of the liquidation process; and

• whether or not the trustees had complied with and fulfilled their duties and responsibilities as trustees under charity law."

5. The draft "Interim statement" explained that:

"In practice, the Statutory Inquiry focused on the following areas:

"a. The former employees' allegations – the seven regulatory concerns arising from the allegations made by the three former employees of the Charity (with the exception of the concern about possible trading whilst insolvent which was a matter of company law for the Official Receiver to investigate). The remaining allegations in essence, were:

i. Potential employment irregularities

ii. Unclear purpose for payment (PhD fees and accommodation payments)

iii. Potential state benefits issues

iv. Non-charitable expenditure/acting outside of objects – including payments made to the "top 20/25" clients and understanding how clinical decisions were made

v. Circumventing trustee financial controls

vi. Related party transactions (related to one employee and one trustee)

b. The financial management of the Charity, including the adequacy of financial procedures and controls, and the scrutiny, oversight and control exercised by the trustees over financial matters.

c. The governance of the Charity, in particular the level of oversight and scrutiny by the trustees over the management, administration and running of the Charity including the relationship between the CEO and the trustees, and how the trustees held the CEO and staff to account.

d. The business and funding model adopted by the Charity; including accepting child self-referrals, the extent of the Charity's reliance on statutory funding and its practice of starting each year with only 25-30% of required funding having been

> secured; the trustees' management of the Charity's reserves policy; and how the trustees assessed and managed the risks arising from these decisions.
>
> e. The conduct and response of the trustees and CEO during the period when there were issues about the financial health and the viability of the Charity.
>
> f. Other issues raised by the Official Receiver's investigation and subsequent complaints by beneficiaries.
>
> g. Whether or not the Charity's trustees had complied with, and fulfilled, their duties and responsibilities as trustees under Charity law."

6. The statutory inquiry was put on hold when the Official Receiver commenced proceedings against all of the directors who had been in office at or shortly before the date of collapse of the charity, together with the Chief Executive Officer, Ms Batmanghelidjh. The Official Receiver sought to disqualify the directors and the Chief Executive Officer under section 6 of the Company Directors Disqualification Act 1996 ("the 1996 Act").

7. Between October and December 2020, Falk J (as she then was) conducted a 10 week trial of the claim brought by the Official Receiver. The basis of the claim was that the directors (described as trustees) and the Chief Executive Officer were "unfit" as they had caused and/or allowed Kids Company to operate an unsustainable business model. In an extremely detailed judgment, consisting of 914 paragraphs (*Keeping Kids Company, Re* [2021] EWHC 175 (Ch)), Falk J dismissed the claim against each of the directors and Ms Batmanghelidjh (finding that the latter was not a *de facto* director for the purposes of the 1996 Act and, in any event, was not "unfit").

8. The conclusion reached by Falk J was expressed at [878] of her judgment:

> "In their roles as directors of Kids Company the Trustees were required to, and did, balance a range of factors. They were seeking to meet Kids Company's charitable objectives, and in doing so not only to address the significant needs of the charity's vulnerable clients for whom the charity provided a very real safety net, but to have proper regard to safety and safeguarding issues (which included ensuring that the work was properly staffed). They were required continually to assess whether sufficient funding could be obtained, both from the government and private sources, and whether the position with creditors could be appropriately managed. The decisions they made were matters of honest judgment, made in difficult circumstances in what they thought were the best interests of the charity. The Official Receiver has not demonstrated that decisions that the Trustees took, or failed to take, in the factual context were outside a range of reasonable decision-making, and in my view the Trustees' conduct does not amount to incompetence of a high degree".

9. Following Falk J's judgment, the Commission reinstituted its statutory inquiry. A fresh investigation team (referred to in the evidence and submissions as "the Second Team") reviewed the work that had been carried out previously by the initial investigation team (referred to in the evidence and submissions as "the First Team"). On 10 February 2022, after several rounds of *Maxwellisation* (the process by which a draft report is sent out to those who may be criticised so that they can provide comments and representations), the Commission issued the Report.

10. The Report described the work of Kids Company and set out the chronology of the charity's various communications with the Commission in 2015, as well as the events that led up to the closure of the charity. The Report described the charity's funding difficulties. The Report explained that, on 31 July 2015, Kids Company contacted the Commission to say that the police were conducting a criminal investigation into allegations of sexual and physical abuse at the charity. The Report noted that the investigation concluded in January 2016 with no action being taken: the police stated that they had found no evidence of criminality, nor any failings by the charity with respect to its safeguarding duties.

11. The Report explained that Kids Company ceased operations on 5 August 2015, and that a petition winding up the charity was made by the trustees on 12 August 2015. On 20 August 2015, the charity was put into compulsory liquidation and the Official Receiver was appointed as liquidator.

12. The Report described the collapse of Kids Company as being "a dramatic and significant event not only for the Charity itself – including its beneficiaries, supporters, volunteers and employees - but also for the wider charitable sector. It attracted widespread publicity, as had the Charity's activities prior to its collapse." The Report went on to say at [28] that:

> "The Charity had enjoyed support from philanthropists and celebrities as well as being in receipt of substantial amounts of Government funding. There was considerable media and public interest in what had happened at the Charity in the immediate period prior to its collapse in August 2015. There was a risk of significant damage to the charity sector's reputation due to the very public failure of a charity of this size. It had worked with extremely vulnerable beneficiaries and had enjoyed support from high profile individuals as well as receiving millions of pounds in grants from central and local government".

13. The Report referred to the reports of the National Audit Office (29 October 2015) and of the House of Commons' Public Administration and Constitutional Affairs Committee (21 January 2016) (PACAC), which had examined aspects of Kids Company's activities. The summary of the PACAC report was quoted:

> "The Board failed to protect the interests of the charity and its beneficiaries, despite its statutory obligation to do so. Trustees repeatedly ignored auditors' clear warnings about Kids Company's precarious finances. This negligent financial management rendered the charity incapable of surviving any variance in its funding stream; when allegations of sexual

> misconduct emerged in July 2015 and threatened to impede fundraising, the charity was obliged to close immediately."

The Report also referred to a number of findings made by the PACAC:

> "• The Charity did provide valuable support to many vulnerable young people;
>
> • The trustees lacked the experience in youth services and psychotherapy necessary to interrogate the decisions of the CEO and assess the appropriateness of expenditure;
>
> • There was a lack of sufficient evidence about the effectiveness of the Charity's interventions;
>
> • The Charity's demand-led model – based on the doctrine that no child should be turned away – carried the constant risk that the Charity would not be able to ensure its commitments would be matched by its resources and the trustees failed to address this risk;
>
> • The Charity relied on a 'hand-to-mouth' existence and by refusing to prioritise the building of sufficient reserves the trustees failed to exercise a duty of care towards its employees and donors; and
>
> • There was a "clear link" between a failure to correct serious weaknesses in the organisation and a failure to refresh its leadership".

14. The Report outlined the conclusion reached by Falk J in the proceedings brought by the Official Receiver, and set out a summary of the findings made by the learned judge:

> "(a) Whilst aspects of it were high risk, the Charity's operating model was not unsustainable in principle.
>
> (b) The Charity experienced significant cash flow difficulties. Costs accrued evenly over the year, but donations were seasonal, which increased the risk of cash flow difficulties.
>
> (c) The Charity recognised that it could not continue to increase in scale to meet demand without changing its funding model. From 2013 there were discussions about the Charity's future funding model, and the shape and size of the Charity.
>
> (d) Funding came under further strain during 2014. The trustees reasonably believed that additional funding could be obtained, and it was reasonable to clarify the Government's funding priorities before determining if cuts were required. A contingency response was developed and discussions with the Government were pursued.

> (e) The Charity had a full-time permanent executive, in addition to the CEO, whose expertise the trustees were legitimately entitled to rely upon, and they did so.
>
> (f) The Charity had formulated a restructuring plan. If it had not been for the unfounded sexual assault allegations it is more likely than not that the restructuring would have succeeded, and the Charity would have survived".

15. The Report also reported the following:

> "32.13 The Judge considered that had it not been for the unfounded allegations the Charity's plans for restructuring would have been successful. The allegations came in the aftermath of the Jimmy Savile abuse scandal and the Police were obliged to investigate them in detail. The Police investigation was discontinued in January 2016 when they reported that they had not identified any failings by the Charity in its safeguarding duties. The Judge further commented that if the Charity had built up sufficient reserves to cover 3 months of its operating costs then the Charity would still have been well short of what was required to sustain it to the point where the Police investigation concluded.
>
> 32.14 The Judgement also included findings that: (a) The CEO did have a central role, including in developing strategy, but she was subject to supervision and control by the trustees, who were the ultimate decision makers. (b) The trustees exercised real scrutiny over expenditure and were entitled to gain comfort from external reports and to expect staff to draw any major concerns to their attention. (c) The trustees' conduct did not amount to incompetence of a high degree.
>
> 32.15 The Judge concluded that 'most charities would, I would think, be delighted to have available to them individuals with the abilities and experience that the Trustees in this case possess' and that it is vital that able and experienced individuals are not dissuaded from becoming or remaining trustees. A disqualification order was not warranted against any of the trustees and the public needed no protection from them. The Judge stated that she had a great deal of respect for the care and commitment the trustees had shown in highly challenging circumstances".

16. The Report went on to describe the "Issues under Investigation" by the Commission. The Report described the "scope of the Inquiry" as set out at the time of its opening as being to examine:

> "(a) The administration, governance and financial management of the Charity including concerns around allegations of inappropriate spending, breaches of financial controls and the

> conduct of the trustees and the CEO amid concerns about the future viability of the Charity;
>
> (b) Any regulatory concerns arising from the investigation carried out by the OR as part of the liquidation process; and
>
> (c) Whether or not the trustees had complied with and fulfilled their duties and responsibilities as trustees under charity law".

This is a slightly abbreviated version of the scope of the inquiry as set out in the draft "Interim statement": see paragraph 4 above.

17. It was explained that the regulatory concerns for the Commission and the scope of its inquiry were not the same as the concerns considered in the litigation before Falk J or by the other investigations that had been undertaken into the charity. The Report stated that:

> "The Commission's duties and functions include the identification and investigation of misconduct and/or mismanagement in the administration of charities and to take remedial or protective action in respect of such misconduct and/or mismanagement. Whilst misconduct and mismanagement are not defined in statute, the Commission has set out some of the actions and conduct which, in its view, would constitute misconduct and/or mismanagement. Determining that an individual is unfit is a relatively high test to meet; there is a range of conduct which would not or would not be likely to meet the test for unfitness but which would or could still constitute misconduct and/or mismanagement in a charity's administration".

18. The Report explained the steps that the Commission had taken following the publication of the judgment by Falk J: that the judgment was "carefully considered", along with the work that had already been completed by the inquiry. It was stated that, as a result, "the Inquiry decided that the legal test had not been met for it to commence its own disqualification proceedings against the trustees and/or the CEO".

19. The findings of the inquiry were set out in the Report under five headings. I shall set out those findings in full as it is necessary to consider them in some detail in addressing the grounds of challenge.

> "**Charity records**
>
> 41. The Inquiry has based its findings on the records that it was able to examine. Whilst the Inquiry was able to review substantial documentation, there were insufficient records for it to make findings in some areas. This is for two reasons. Firstly, some of the Charity's records were destroyed at the time of its collapse. Secondly, it appears that some records may not have actually been created. The Inquiry accepts that when the trustees were first notified of the destruction of the Charity's records,

they gave immediate instructions for it to stop. In her Judgement, Falk J found that the destruction of the documents was contrary to the trustees' instructions. The Inquiry notes, however, that the trustees were ultimately responsible for ensuring that the Charity made and retained proper records.

42. If records had not been destroyed, this could have helped to ensure that sufficient information was available to protect the interests of beneficiaries going forward – particularly if support to them was continued by another charity or service provider. The Inquiry's view is that the destruction of the Charity's records, at the time of its collapse, was not in the best interests of either the Charity or its beneficiaries. It also meant that full records were not available for scrutiny by the Inquiry or other interested parties. It is the Inquiry's view that the destruction of some of the Charity's records in the run up to it ceasing to operate should not have taken place.

43. The Inquiry was told that records existed of decision making in relation to payments to clients, but it was unable to find such records amongst those that it was able to review. The Inquiry could find only limited and, in its view, insufficient records of decision making in relation to expenditure on some beneficiaries for school fees, rent and accommodation, cash payments, clothing and birthday presents. Whilst these payments would have been within the objects of the Charity the Inquiry saw insufficient evidence of how the Charity assessed the needs of individuals in relation to some of these payments.

The Charity's Beneficiaries

44. In an interview with the Commission on 14 January 2016, the Charity's CEO informed the Inquiry that the Charity assisted around 36,000 beneficiaries a year. This figure is also mentioned in the Charity's Annual Report. She explained that this figure was made up of approximately 19,000 school pupils, 9,700 children at street-level centres and 7,200 adults. Leaders from all the Charity's sites would gather and check data on the numbers they worked with. The figures would then be collated by the Charity's audit department. The Commission's understanding is that the figure of 36,000 included indirect as well as direct beneficiaries, meaning that if one child in a family was assisted the other children in that family were counted as beneficiaries, and if one child in a school class was a direct beneficiary the other children in the class were counted as indirect beneficiaries. The Inquiry considers that in the interests of transparency and to avoid misconceptions, the methodology for calculating these figures should have been clearly articulated wherever they were cited, particularly in the Charity's annual reports.

45. The beneficiaries who received the largest amounts of financial assistance from the Charity were referred to within the Charity as the 'top 25'. The Inquiry was only able to obtain partial records in relation to some payments to these clients. For example, the Charity's records seen by the Inquiry showed that between January and July 2014 the top 25 beneficiaries had spent on them a total of £311,049.99; this is an average of £1,777.43 per beneficiary per month. From the limited information that the Inquiry was able to review the Commission saw insufficient evidence of the decision making in relation to some of these payments to be satisfied that they were justified or made in the best interests of the Charity. The Charity's trustees ultimately had discretion on how to spend its resources in furtherance of its objects. However, it is possible that the Charity might have been able to have provided more assistance to more clients if expenditure on the 'top 25' beneficiaries had been reduced.

46. The Inquiry examined the Charity's policies relating to payments to its beneficiaries. These stated that three or more professionals should be involved in making decisions regarding financial support and that financial support should be regularly reviewed in case management meetings. The inquiry acknowledges witness testimony as recorded in the High Court Judgement that senior management team members provided trustees with appropriate assurances that the policies were followed. Due to a lack of records, the Inquiry was not able to examine sufficient records to test and come to its own conclusions as to whether the policies were adhered to in practice.

Operating Model

47. The Charity operated under a demand-led model, continuing to experience increased demand for its services and year-on-year growth. The trustees decided to put the funds it obtained into expansion rather than building reserves and/or paying some of its creditors. The Charity's financial viability depended on a combination of securing government grants, large donations from wealthy philanthropists, and donations from the public. The trustees allowed expenditure to increase without a secure stream of income or adequate reserves to cover the increased costs. The Charity increasingly relied on short-term loans to address shortfalls in income and negative cash flow balances which the Charity was on some occasions unable to repay and which in some cases were converted into donations.

48. The Inquiry notes that whilst there are risks associated with this operating model, such a model is not in and of itself unusual; in the Commission's experience as regulator of the charitable sector what is unusual is the operation of such a model in respect of a charity of this size. The combination of a lack of reserves,

reliance on grants, donations and short-term loans, reliance on a key individual for fundraising and operating a demand-led model is high risk. The Inquiry acknowledges that the Charity had operated this model for many years whilst providing charitable services to its beneficiaries, and that they were in the process of restructuring before the Charity's closure. It also notes the argument that donors may expect donations to be spent on delivering activities for beneficiaries rather than building reserves and that it might have been difficult to fundraise for the purpose of building reserves. However, it is unclear to the Inquiry the extent to which donors would have ceased to make donations to the Charity if a proportion of the funds donated had been put into reserves. Whilst recognising the challenges charities can face when building reserves, many charities do successfully manage to build reserves whilst being largely reliant on grants and donations.

49. The Inquiry notes that the auditor's management letters to the Charity for the financial years ending 31 December 2011, 31 December 2012 and 31 December 2013 (which accompanied the Charity's unqualified accounts) clearly stated the risks associated with the low level of reserves held by the Charity. Despite the risks being restated for each of the financial years, the trustees maintained the Charity's low level of reserves.

50. Trustees have a duty to manage their charity and its resources effectively and prudently. The 2013 accounts showed the Charity had reserves of just over £434,000, equivalent to around 1.9% of the Charity's expenditure for that financial year. The level of the Charity's reserves had been repeatedly raised in management letters by the Charity's auditors. The Charity prioritised the immediate and urgent needs of its beneficiaries at the expense of its longer term sustainability.

51. It is accepted that the criminal investigation had a significant impact on the Charity and is likely to have impacted donor confidence. If the Charity had had a higher level of reserves, it may have been able to utilise these to weather this storm and thereby avoid insolvency and/or wind up in a more orderly fashion or merge with another organisation and therefore ensure ongoing care and support for its beneficiaries. The trustees' decision to operate with a low level of reserves meant they could not do so.

52. The trustees had recognised the need to make changes as early as 2013. As referred to above, prior to its closure the trustees had put in place plans to restructure the Charity. If it were not for the criminal investigations, had the restructuring gone ahead, it is likely that the Charity could have continued to operate despite the low level of reserves.

53. The High Court's Judgement found that the trustees' decision to put money into the Charity's expansion rather than to build up reserves fell within the wide range of reasonable decisions the trustees could make in exercising their discretion. However, in the Inquiry's view it would have been prudent for the Charity to seek to build up reserves to provide it with a financial cushion in the event of unexpected expenses or an unexpected fall in income.

Financial Management

54. The Charity regularly failed to make some PAYE payments to HMRC on time. Records seen by the Inquiry from July 2014 onwards show a pattern of failure to pay monies owing to HMRC on time, warning letters being received from HMRC, negotiations with HMRC, part payments of debts being made and debts then continuing to rise again. By June 2015 the Charity owed an estimated £1,162,920 to HMRC and at the time of its liquidation the Charity owed around £850,000 to HMRC.

55. The Judgement makes reference to payroll being one day late in November 2014 due to funds not having cleared. It also refers to the anxiety of self employed workers who were collectively owed £100,000 in outstanding payments for July 2014; these payments were still outstanding and being discussed by the Charity's Finance Committee in November 2014. The Inquiry also saw evidence that payments to some workers were not made on time. Reasons given to one of those affected included the Charity's variable income stream, waiting for Government grants to honour invoices and waiting for funding agreements exchanges between Government, philanthropists and trustees to be finalised.

56. These failures to make payments to HMRC, workers, and other creditors on time is, in the Inquiry's view, evidence of mismanagement in the administration of the Charity. This mismanagement would have undermined confidence in the Charity and its management by its trustees.

The trustees and the CEO

57. The Inquiry notes that the trustees were skilled and experienced individuals in their lives outside of the Charity and that they were able to bring these skills to their operation of the Charity. The Charity had a full-time executive team whose advice the trustees legitimately relied upon and whom they held to account. However, the trustees did recognise the need to strengthen and diversify the Board. There was evidence that a review took place and that candidates were identified but this process had not been completed before the Charity's closure.

58. Whilst some of the trustees had previous experience of being trustees of other charities, in the Inquiry's view, given the size of the Charity, the trustee board may have benefitted from having someone on the board with operational experience of running a large charity, for example a CEO of a large well-run charity. The trustees might also have sought to benchmark the Charity's performance against that of other charities operating in similar circumstances. There are many large charities that rely on donations and grants and operate a demand-led service and have been able to build reserves and meet their financial liabilities on time to make them more resilient. An appreciation of how other charities manage in a difficult financial environment was likely to have made a useful contribution to the collective skills of the Board.

59. The Inquiry notes that the Chair of the Charity's trustees had been in post since 2003 and the CEO since 1996. Rotation of the trustee board including the chair is usually in the interests of a charity as it allows for an injection of new ideas and approaches and for challenges to the way in which a charity operates. Trustees should think about how long they have been in post, the requirements of their Governing Document and their current mode of activities and whether the current composition of the Board is operating in their charity's best interests. The Inquiry notes that it was told by the trustees that some of them had wanted to step down but agreed to stay on and that the planned restructure would have included the appointment of new trustees.

60. The Inquiry also noted that none of the trustees appeared to have any qualifications or experience in the field of youth services or psychotherapy. An introduction of new trustees, including trustees with relevant experience in the field in which the Charity was operating, might have increased the performance and effectiveness of the Charity. It would also have allowed for practices and processes to be reviewed in a way that did not happen in the Charity. As mentioned above, the trustees were planning to restructure the board prior to the Charity's closure. The trustees informed the Inquiry that as part of this restructuring they were looking to appoint individuals with financial and clinical experience.

61. If some of the trustees had more experience in the areas in which the Charity was operating, they might have been better able to perform their role as ultimate decision makers by questioning the decision making of others – e.g. the trustees might have exercised greater oversight of the clinical team's decision making if they had had the knowledge and experience to assess its decision making more effectively.

> 62. The CEO was the public face of the Charity and had significant influence over it. The Inquiry notes the findings of the Judgement of 12 February 2021 that the trustees were the ultimate decision makers and that whilst the CEO had significant influence, she was accountable to the trustees. Nevertheless, a single person holding a senior leadership role in a charity for many years can reduce the level of challenge to long established methods of operating and prevent it from identifying and managing risks that flow from longstanding practice. For example, the charity's auditors raised concerns with the charity's low level of reserves and the high number of self-employed staff for two consecutive years (2012 and 2013) prior to the charity's closure. Whilst the Inquiry accepts that the trustees did hold the Charity's executive to account, it is its view that the regular addition of new trustees is likely to have challenged the status quo more effectively".

20. The Report's Conclusions were set out as follows:

> "70. The Commission has had regard to the High Court Judgement and agrees with it that there was no dishonesty, bad faith, or inappropriate personal gain in the operation of the Charity.
>
> 71. In the Commission's opinion, the Charity operated under a high-risk business model as illustrated by the combination of (i) heavy reliance on grants and donations, (ii) reliance on a key fundraiser (the CEO), (iii) a lack of reserves and (iv) a demand led service. The trustees were aware of these risks and continued to operate the Charity under the same model for many years, only developing a restructuring plan in the last months of the charity's operation. The restructuring plan included reducing the Charity's operating costs, building reserves and appointing a new CEO. The Inquiry notes that in the context of the OR's claim the Judge viewed these decisions to be in the wide range of reasonable decisions available to the trustees.
>
> 72. Some of the Charity's records were destroyed when the Charity closed. The Inquiry has seen no records of what was destroyed. Given that the destruction of its records was significant and irreversible, the Commission would have expected there to be better record keeping in relation to destruction of records. It was also not clear on occasion whether records were destroyed or never existed in the first place. Trustees ensure accountability through the records the charity keeps and as a result of the destruction of some records they were not able to fully account for some of their decisions and activities. The Inquiry accepts that the trustees were not directly involved in the destruction of records and when they were made aware of it they acted to stop it; nevertheless, the destruction of

the records fell below the standards the Commission would expect from a charity.

73. If the Charity had had a higher level of reserves then it would have been able to utilise these when the Charity faced financial difficulties. Higher levels of reserves may have allowed the Charity to avoid liquidation and to have wound up in a more orderly fashion or merged with another charity, even if it was determined that it could not continue to operate. This would have allowed all relevant records to be maintained and ultimately handed over to another service provider which would have been in the interests of the Charity's beneficiaries. A risk of maintaining insufficient reserves is that a charity is more vulnerable to external and variable pressures, such as – in this instance - the public allegations against the Charity and the Police investigation that followed which resulted in the withdrawal of support from donors.

74. The Charity's repeated pattern of failing to make payments to HMRC when these were due and failure to make payments to workers on time illustrates the financial difficulties that the Charity was in and the failure to manage these effectively. This repeated failure was mismanagement in the administration of the Charity by its trustees.

75. It is clear that beneficiaries did benefit from the Charity's operations and that the Charity's CEO was an effective fundraiser. The trustees were skilled professionals, aiming to further the objects of the Charity by the contributions that they made to it. They had experience in business and, for some, experience as charity trustees. The Judgement referred to the variety of abilities and skills held by the trustees. However, there were some skill gaps within the trustee body, including a knowledge of psychotherapy, youth services and experience of running a large and complex charity. Further, greater rotation of the key roles – including the chair of the trustees – would have meant that longstanding practices in the management or operation of the Charity were more likely to be challenged constructively and regard had to good practice from outside the Charity.

76. The Charity's high-risk operating model combined with its year-on-year growth placed an obligation on the trustees to assess the risks and take steps to manage them accordingly. The Commission notes the significant amount of public funding received by the Charity and the existence of cash flow problems within the Charity as well as its apparent inability to operate without government funding. These conditions were not unique to the Charity but did increase the risk to its long-term viability. Further steps could have been taken earlier during the Charity's period of growth to improve its financial stability, for example

> by building up reserves, paying off its debts thereby strengthening its cash flow position, and controlling the rate at which the Charity was expanding. The Inquiry noted that restructuring plans were in place which could not be fully implemented due to the Charity's abrupt closure. The Commission concludes that the Charity's trustees should have taken action earlier during its period of growth".

21. The Report also described the various steps that the Commission had undertaken in carrying out the inquiry: 22 interviews had been conducted with the trustees and the Chief Executive Officer; information had been sought from the charity's auditors and from interviews with donors and benefactors; interviews had been conducted with employees; the charity's records had been examined; and further material provided by trustees had been reviewed. With respect to the examination of records, the Report stated that:

> "The Inquiry examined over 167 boxes of documents, 96 filing cabinets and had access to approximately 500,000 electronic documents. This enabled the Inquiry to identify evidence to support concerns it had put to those being interviewed and to verify witness accounts. The documents inspected and scrutinised included minutes of trustee meetings, minutes of finance and governance sub-committee meetings, policy documents, and staff and volunteer records. 154 of the boxes examined contained some paper based financial management and accounting records, all of which were reviewed by the Inquiry. All of the cabinets, and 48 of the 167 boxes inspected contained beneficiary related files, including numerous loose-leaf documents, which were not placed on individual beneficiary files before the Charity closed. The Inquiry accessed 11,286 electronic records relating to beneficiaries. Given the sheer volume of the task, the Inquiry focussed on those records relating to 205 beneficiaries that were referenced specifically in various financial records inspected by the Inquiry".

22. The Report also included a section entitled "Issues for the wider sector". It was noted that the particular circumstances leading up to Kids Company's closure were "unique", but there were lessons about "running, funding, and closing a charity for charities and trustees to take on board". The broader issues that could be learned fell into the following areas:

> "- the importance of checks and balances, and the right blend of skills and knowledge, in charity boards
>
> - the requirement for operating models to reflect the nature and scale of the charity
>
> - the role of financial planning and reserves policies
>
> considerations when charities grow".

23. With respect to the first of these lessons, the Report stated that:

> "***Diversity***
>
> Our inquiry report notes that a greater breadth of experience in the trustees at the Charity might have meant they were better placed to question the executive's decisions; likewise if the trustees had a broader range of skills, including knowledge about the therapeutic process. Whilst the trustees of Kids Company did recognise the need to strengthen and diversify the Board, the implementation had not been completed before the Charity's closure".

24. With respect to the second of these lessons, the Report stated that:

> "**Charities should undertake financial planning and recording including maintaining a reserves policy**
>
> There is no single level of reserves that is right for every charity.
>
> However, a low level may mean limited resilience against challenges including short term financial difficulties, cash–flow problems, or increasing demand. COVID-19 is an example of how reserves can be vital to withstand short–term and unforeseen pressures. Research for the Commission found that 40% of charities have drawn on reserves as they responded to the challenges presented by the pandemic.
>
> Kids Company operated on a low level of reserves for many years, prioritising the immediate needs of its beneficiaries and expansion over building up reserves. If the Charity had held greater levels of reserves, it may have been able to wind-up in a more orderly fashion or merge with another charity, which would have gone some way to mitigate the impact of its closure on beneficiaries. We advise all trustees to make well rounded and appropriate decisions about their approach to reserves".

Grounds of Challenge: the parties' submissions

25. The Claimant, Mr Kerman, was represented in the judicial review proceedings by Alex Goodman KC and Rupert Butler. The Commission was represented by James Hodivala KC, Faisel Sadiq and Emma Hynes.

Ground 1: Irrationality

26. Mr Goodman KC contended that the Report was unlawful by reason of "process irrationality" (that is, the Commission failed to have regard to considerations that should have been taken into account; failed to grapple with contentious issues; and failed to make sufficient inquiry), as well as "outcome irrationality" (the Commission reached conclusions that were outside of the reasonable range). Reference was made to *(KP) v SSFCDA* [2025] EWHC 370 at [55]-[57]; *R (The Law Society) v The Lord*

Chancellor [2018] EWHC 2094 (Admin); *Secretary of State for Education v Tameside Metropolitan Borough Council* [1977] AC 1014; *R (Balajigari) v Secretary of State for the Home Department* [2019] 1 WLR 4647 at [70]; *R (L) v Director of Public Prosecutions* [2020] EWHC 1815; and *R(DSD) v Parole Board for England and Wales* [2019] QB 285.

27. Mr Goodman KC made a number of overarching points on irrationality, submitting that:

(i) the Commission did not have regard to the evidence adduced before Falk J, including the notes that had been prepared by junior counsel who attended each day of the proceedings on behalf of the Commission;

(ii) the Commission did not read all of the evidence and information gathered by the First Team;

(iii) the Commission acknowledged that some of the questions used by the First Team in interviews were closed and leading, but did not re-conduct any interviews but relied on the transcripts of the First Team;

(iv) whilst the First Team looked at certain records of the charity, the Second Team did not examine the paper records;

(v) the Second Team undertook no, or no detailed, inquiry into the "*Aurora*" electronic database created by the charity, noting that in a response to a Part 18 request and as part of its ongoing duty of candour, a witness statement was provided by Timothy Hopkins (the Commission's Assistant Director of Investigations and Inquiries and the head of the Second Team) in which he stated that "The second team did not seek to understand the inner workings of the *Aurora* system";

(vi) no evidence has been provided to support the assertion that client records were not created;

(vii) the Report does not contain any mention of the matters that had originally been within the scope of the Commission's inquiry, but were rejected. The effect of this was to present a one-sided document, and reflects the position of the Official Receiver whose case was criticised by Falk J as being overstated and not presented in a balanced way;

(viii) the Report contradicts key findings in Falk J's judgment on key points without grappling with these contradictions: thus the Report asserts that restructuring should have taken place earlier, even though Falk J found that it was the sexual abuse allegations that caused the charity's collapse; the Report asserts that there was "insufficient evidence of the decision-making" with respect to payments to beneficiaries, even though Falk J rejected that allegation;

(ix) the Report undertakes a "rotten cherry-picking" review of Falk J's judgment;

(x) the Report's findings are vague, superficial and inconclusive and this appears to have been deliberate. There is only one finding of misconduct, the rest of the Commission's statements are observations, including repeated assertions of what 'may' have happened or what was 'possible'. The effect of this is that the Report criticises the

charity by innuendo. Further, no challengeable examples are given of any of the Report's contentions, such as the assertion that records are missing or were never created;

(xi) the Report does not properly recognise the overlap between the proceedings brought by the Official Receiver and the Commission's own inquiry and pays inadequate attention to the evidence before, and the findings of, Falk J; and

(xii) by analogy with the concern expressed by Falk J with respect to the proceedings brought by the Official Receiver, the effect of the Commission publishing the Report is to undermine public confidence in charities and public willingness to take on the role of trustees.

28. Mr Goodman KC accepted that if the findings or observations in the Report could not have any material effect on anyone associated with Kids Company then those findings or observations would not be irrational. It was not necessary, however, to establish that there was substantial prejudice to anyone. Mr Goodman KC contended that the findings and observations complained about did have a materially negative effect on those who were previously involved with Kids Company, perpetuating the stigma around the charity that had arisen at or around the time of its demise. If left unchallenged, Mr Goodman KC submitted that the Report would continue to have a chilling impact on the charity sector.

29. Mr Hodivala KC contested these general propositions on behalf of the Commission. He submitted that the Commission acted lawfully in publishing the Report. The powers of the Commission are set out in the 2011 Act. Section 50 of the 2011 Act affords the Commission a broad discretion regarding the publication of either a report or such other statement of the results of the inquiry "as the Charity Commission thinks fit".

30. In assessing reasonableness, the Court was urged to bear in mind that the Commission has limited resources and is under a duty to have to regard to the need to use its resources in the most efficient, effective and economic way (section 16(3) of the 2011 Act); and the Report was an expression of opinions and conclusions published pursuant to the Commission's statutory duties which include the objective of increasing public trust and confidence in charities, promoting compliance by trustees with their legal obligations in exercising control and management of the administration of charities, promoting the effective use of charitable resources, and enhancing the accountability of charities to donors, beneficiaries and the general public; and the Commission has the general functions of encouraging and facilitating the better administration of charities, identifying and investigating apparent misconduct or mismanagement and the giving of such advice or guidance with respect to the administration of charities as it considers appropriate (see sections 14-15 of the 2011 Act).

31. Mr Hodivala KC also referred to the Supreme Court's decision in *Kennedy v Information Commissioner* [2015] AC 455, which was concerned with an inquiry conducted by the Commission under the previous (but similar) statutory regime, noting the observations of Lord Mance at [49] that "The proper functioning and regulation of charities is a matter of great public importance and legitimate interest'", and of Lord Toulson at [109] that a public body carrying out a statutory inquiry has an inherent jurisdiction to determine its own procedures, and at [122] that the conduct of such an inquiry is a "quasi-judicial function".

32. Mr Hodivala KC submitted that the Report provided a fair and balanced summary of Falk J's judgment and, among other things, showed real care in formulating its conclusions, making only one express finding of mismanagement, and was produced following an extensive *Maxwellisation* process which demonstrated the fairness with which the process was conducted. Mr Hodivala KC complained that what the Claimant was doing in this case was to subject the Report to granular consideration; this was inappropriate. Mr Hodivala KC referred to the fact that the Commission expressly stated that it was not taking regulatory action against the trustees, and this needed to be borne in mind when considering the reasonableness of the steps taken by the Commission to inform itself of the material evidence. Furthermore, the Report was not the product of judicial determination and should not be viewed as such. There was no requirement to provide the same kind of reasons as would be necessary for the adjudication of a complaint or where civil rights and obligations were being determined.

33. Mr Hodivala KC contended that there were a number of findings made by Falk J which supported the Commission's findings. These included: (a) the minutes of a Board Meeting on 25 July 2013 which recorded that HMRC was owed £1.262m ([214]); (b) between May and August 2014 creditors were not being paid promptly and the charity was unable to make full payments to HMRC in June and July 2014 ([244]); (c) building up cash or other liquid reserves would have obviously been desirable, as they might have allowed greater scope for a restructuring plan in case a contingency plan needed to be implemented, although having reserves was not a legal requirement ([530]); (d) although documents should not have been shredded, there was evidence that a material amount of shredding had occurred at the time of the charity's collapse ([560]); (e) one of the charity's employees, Diane Hamilton, had carried out work on *Aurora* in early 2015 and had indicated gaps in records ([561]); (f) various assessments or authorisations were not in client files in accordance with the charity's policies, although their absence may not prove that the relevant assessment or authorisation did not occur ([574]); and (g) the Charity's business model was potentially high-risk but not unsustainable ([805]).

34. Addressing each of the specific challenges set out in the Grounds of Challenge: With respect to the charity's records (paragraphs 41-43 of the Report), Mr Goodman KC contended that the Report is critical of Kids Company in its findings, or observations, that (a) records were destroyed and if this had not happened that would have better helped the interests of beneficiaries going forward; (b) some records may never have been created; and (c) there was insufficient record of decision-making with respect to expenditure on beneficiaries and assessment of needs. Mr Goodman KC submitted that there was no evidence to support any of these findings or observations, and that they are inconsistent with the evidence that was before Falk J and the conclusions reached by the learned judge. With respect to (a), there was no evidence that any 'harm' had been caused to beneficiaries, and to suggest that there was gives rise to a stigma to the charity and those who worked there.

35. Mr Hodivala KC submitted that it was not irrational for the Commission to conclude that records had been shredded or destroyed, relying on Falk J's judgment at [560], and evidence from a number of interviewees. Similarly, there was evidence (in particular from Ms Hamilton) to suggest that data was missing, including "quite a few people missing assessments", and that the charity did not always create records. Although Ms Hamilton's evidence had been criticised by Falk J, the Commission was not irrational

in relying on it. Mr Hodivala KC disputed that the Report stated or implied that there had been any 'harm' caused to beneficiaries.

36. With respect to the charity's beneficiaries (paragraphs 44-46 of the Report), Mr Goodman KC contended that the Report is critical of Kids Company by asserting that (a) the charity assisted around 36,000 beneficiaries per year and that "the methodology for calculating those figures should have been clearly articulated"; and (b) there was "insufficient information of the decision-making in relation to some of these payments" to beneficiaries and that more assistance could have been made to more clients if there had been a smoother distribution of disbursements.

37. Mr Goodman KC submitted that point (a) is an extremely narrow one for the Commission to make, applying to one report only: the 2013 Annual Report of the charity. There was also evidence from Ms Batmanghelidjh which explained where the 36,000 figure came from, and that could not have been taken by the Commission to include indirect as well as direct beneficiaries, such that if one child in a family was assisted then all members of that family were counted by the charity as beneficiaries.

38. With respect to point (b), Mr Goodman KC contended that this amounts to critical innuendo of the charity's conduct with respect to the profile of its payments even though the Report accepts that payments were within the ambit of the charity's discretion, and Falk J in her judgment was satisfied that the trustees of Kids' Company exercised regular scrutiny of "kids costs" including "deep dive" analysis about decisions on individual clients. Falk J had even noted at [552] that "there was evidence that the average spend per client reduced while the number assisted increased, which provides an indication of restraint being applied" by the charity, and this was not mentioned in the Report. Further, the amount spent on the "Top 25" (which was itself a concept designed as an oversight tool) represented around 3% of the charity's total expenditure. Furthermore, the assertion that there was "limited information", and "insufficient evidence" of decision-making ignores the considerable evidence of this matter that was adduced before Falk J.

39. With respect to point (a), Mr Hodivala KC submitted that it was entirely appropriate for the Commission to be concerned that Kids Company's statement in its Annual Report for 2013 could be interpreted as meaning that the charity was directly supporting 36,000 persons when that was not correct. This was not a pernickety point made by the Commission as the public was entitled to know with a degree of clarity how many persons were being supported by the charity.

40. With respect to point (b), Mr Hodivala KC submitted that it was self-evident that if less money had been paid to the Top 25 beneficiaries more money would have been available for others. That was not irrational. There was also evidence of missing records as to the decision making for some of the expenditure on these beneficiaries.

41. With respect to the operating model (paragraphs 47-53 of the Report), Mr Goodman KC took issue with a number of criticisms made of the charity in this part of the Report: describing the charity's operating model as "high risk", and that the charity prioritised the immediate and urgent needs of its beneficiaries at the expense of its longer-term sustainability. Further, that it would have been "prudent" for the charity to "seek to build up reserves to provide it with a financial cushion in the event of unexpected expenses or an unexpected fall in income". The latter finding was unfair and

contradicted by Falk J's finding that the decision to put money into the charity's expansion rather than building up the reserves was within the range of reasonable decisions that could have been made by the trustees. Mr Goodman KC also referred to the comment made in the Report that had the charity maintained a higher level of reserves "it may have been able to utilise these to weather this storm [of the criminal investigation] and thereby avoid insolvency and/or wind up in a more orderly fashion or merge with another organisation and therefore ensure ongoing care and support for its beneficiaries. The trustees' decision to operate with a low level of reserves meant they could not do so". Mr Goodman KC contended that this finding was contradicted by Falk J's rejection of the suggestion that if Kids Company had had appropriate reserves it would have been able to survive the unfounded criminal allegations.

42. Mr Hodivala KC submitted that there was evidence of repeated concerns being expressed about the low level of reserves held by the charity, and Falk J had noted that the operating model "made for a potentially high risk enterprise" ([805]), and observed that building up reserves would have been "desirable" ([530]). The opinion expressed in the Report about the charity's ability to "weather this storm" might have been infelicitously worded, but was not irrational. Having reserves to pay staff wages whilst restructuring is a sensible precaution that other charities and trustees reading the Report could learn from, even if having such reserves was not legally required.

43. With respect to Financial Mismanagement (paragraphs 54-56 of the Report), Mr Goodman KC pointed out that the only finding of mismanagement made by the Commission in the Report is that "The Charity regularly failed to make some PAYE payments to HMRC on time . . . These failures to make payments to HMRC, workers, and other creditors on time is, in the Inquiry's view, evidence of mismanagement in the administration of the Charity'. Mr Goodman KC contended that this finding does not pay proper regard to, or engage with, the extensive evidence and consideration of the issues before Falk J. Further, it relies on an irrational premise that late payment by an organisation constitutes financial mismanagement.

44. Mr Hodivala KC contended that the challenge to this point was hopeless as there was evidence of late payments by the charity to HMRC, its staff and contractors. This was reflected in Falk J's judgment at various points (see e.g. [214], [244] and [267]), and a finding that this constituted mismanagement in the administration of the charity was well within the range of conclusions open to the Commission. "Mismanagement" was an ordinary English word: see *Mountstar (PCT) Limited v Charity Commission* (CA/2013/001) at [139].

45. With respect to the Trustees and the CEO (paragraphs 57-62 of the Report), Mr Goodman KC submitted that the observation made in the Report that "If some of the trustees had more experience in the areas in which the Charity was operating, they might have been better able to perform their role as ultimate decision makers in questioning the decision making of others" was scurrilous. Mr Goodman KC contended that this observation had no bearing on the matters for which the inquiry into Kids Company had been established. Mr Goodman KC also pointed out that Falk J had been extremely positive about the charity's trustees, stating at [911] that "Most charities would, I would think, be delighted to have available to them individuals with the abilities and experience that the Trustees in this case possess". With respect to the decision making of the clinical team working for Kids Company, Mr Goodman KC

contended that this was within the proper bounds of discretion and the oversight by the trustees was punctilious.

46. Mr Hodivala KC contended that this observation was open to the Commission on the evidence. Indeed, it was supported by the trustees themselves who stated that they were seeking to search for individuals with accountancy, clinical and IT backgrounds. The fact that this observation was contained in the Report was not a comment on the events leading to Kids Company's closure but was part of the Commission's objective of reporting on wider lessons for the charity sector.

Ground 2: Apparent Pre-determination

47. Mr Goodman KC submitted that a fair-minded and informed observer would conclude that there was a real possibility that the Commission was predetermined to criticise Kids Company. The First Team's investigation appeared to involve closed and leading questioning (seeking a predetermined outcome), and the Second Team then proceeded to write its report ignoring swathes of evidence gathered by the First Team. The Second Team made no direct interviews or inquiries by itself. Further, the Report takes the form of "rotten cherry-picking", seeking to maintain such negative and critical comments as it could in spite of Falk J's repudiation of the Official Receiver's case against the trustees and the Chief Executive Officer, without proper reference to the full picture. The Report takes every opportunity to criticise Kids Company, even taking extraordinarily narrow points (such as with respect to the 36,000 beneficiaries) but fails to mention matters that were favourable to the charity. The Report is full of innuendo as well as unnecessary adverse findings.

48. Mr Hodivala KC submitted that, when considering whether there was apparent predetermination, the notional fair-minded and informed observer is not "unduly sensitive or suspicious, but neither is he or she complacent" (see *Bubbles & Wine Limited v Lusha* [2018] EWCA Civ 468 at [18]).Mr Hodivala KC submitted that predetermination is an "extremely difficult test to satisfy": see *R (Lewis) v Redcar and Cleveland BC* [2009] 1 WLR 83 at [109], and the test was not satisfied here.

49. In the instant case, Mr Hodivala KC submitted that the fair-minded and informed observer would be aware of a number of facts which pointed against an appearance of predetermination: (a) the Commission, as the regulator for the charitable sector, has a wide statutory discretion regarding the production and contents of its reports and in the allocation of its limited resources when conducting an inquiry and producing a report; (b) the Commission suspended its inquiry pending the outcome of the proceedings before Falk J; (c) Falk J's judgment related to a different issue, but included comments and findings that were relevant to the administration, governance and financial regulation of the charity; (d) the Report provided a fair and balanced view of Falk J's judgment; (e) the Second Team rejected some of the First Team's conclusions in its draft Report as unsupported by the evidence; (f) the Second Team made allowance for any leading questions in interviews; (g) the Second Team drew on many different sources of evidence when producing its Report; and (h) there was an extensive *Maxwellisation* process, in which the Second Team accepted some of the points made by the legal representatives for the trustees and the Chief Executive Officer.

The Legal Framework

50. The production of the Report has to be seen in the context of the statutory framework within which the Commission operates.

51. Section 14 of the 2011 Act outlines the Commission's objectives:

> "1 *The public confidence objective*
>
> The public confidence objective is to increase public trust and confidence in charities.
>
> 2 *The public benefit objective*
>
> The public benefit objective is to promote awareness and understanding of the operation of the public benefit requirement.
>
> 3 *The compliance objective*
>
> The compliance objective is to promote compliance by charity trustees with their legal obligations in exercising control and management of the administration of their charities.
>
> 4 *The charitable resources objective*
>
> The charitable resources objective is to promote the effective use of charitable resources.
>
> 5 *The accountability objective*
>
> The accountability objective is to enhance the accountability of charities to donors, beneficiaries and the general public".

52. The functions of the Commission are set out at section 15 of the 2011 Act:

> "(1) The Commission has the following general functions—
>
> 1 Determining whether institutions are or are not charities.
>
> 2 Encouraging and facilitating the better administration of charities.
>
> 3 Identifying and investigating apparent misconduct or mismanagement in the administration of charities and taking remedial or protective action in connection with misconduct or mismanagement in the administration of charities.
>
> 4 Determining whether public collections certificates should be issued, and remain in force, in respect of public charitable collections.

> 5 Obtaining, evaluating and disseminating information in connection with the performance of any of the Commission's functions or meeting any of its objectives.
>
> 6 Giving information or advice, or making proposals, to any Minister of the Crown on matters relating to any of the Commission's functions or meeting any of its objectives.
>
> (2) The Commission may, in connection with its second general function, give such advice or guidance with respect to the administration of charities as it considers appropriate.
>
> (3) Any advice or guidance so given may relate to—
>
> (a) charities generally,
>
> (b) any class of charities, or
>
> (c) any particular charity,
>
> and may take such form, and be given in such manner, as the Commission considers appropriate.
>
> . . . "

53. The Commission's general duties are set out at section 16 of the 2011 Act:

> "The Commission has the following general duties—
>
> 1 So far as is reasonably practicable the Commission must, in performing its functions, act in a way—
>
> (a) which is compatible with its objectives, and
>
> (b) which it considers most appropriate for the purpose of meeting those objectives.
>
> 2 So far as is reasonably practicable the Commission must, in performing its functions, act in a way which is compatible with the encouragement of—
>
> (a) all forms of charitable giving, and
>
> (b) voluntary participation in charity work.
>
> 3 In performing its functions the Commission must have regard to the need to use its resources in the most efficient, effective and economic way.
>
> 4 In performing its functions the Commission must, so far as relevant, have regard to the principles of best regulatory practice (including the principles under which regulatory activities

> should be proportionate, accountable, consistent, transparent and targeted only at cases in which action is needed).
>
> 5 In performing its functions the Commission must, in appropriate cases, have regard to the desirability of facilitating innovation by or on behalf of charities.
>
> 6 In managing its affairs the Commission must have regard to such generally accepted principles of good corporate governance as it is reasonable to regard as applicable to it".

54. The Commission's power to institute inquiries is set out at section 46 of the 2011 Act.

> "(1) The Commission may from time to time institute inquiries with regard to charities or a particular charity or class of charities, either generally or for particular purposes.
>
> (2) But no such inquiry is to extend to any exempt charity except where this has been requested by its principal regulator.
>
> (3) The Commission may—
>
> (a) conduct such an inquiry itself, or
>
> (b) appoint a person to conduct it and make a report to the Commission.
>
> . . . "

55. Publication of the results of inquiries is set out at section 50 of the 2011 Act:

> "(1) This section applies where an inquiry has been held under section 46.
>
> (2) The Commission may—
>
> (a) cause the report of the person conducting the inquiry, or such other statement of the results of the inquiry as the Commission thinks fit, to be printed and published, or
>
> (b) publish any such report or statement in some other way which is calculated in the Commission's opinion to bring it to the attention of persons who may wish to make representations to the Commission about the action to be taken".

56. It is clear, therefore, that the Commission has broad discretion as to whether to carry out an inquiry, and there are no prescribed rules for how that investigation is to be conducted. The Commission also has a broad discretion as to whether to publish a report of the person conducting the inquiry and, if it does publish, what to include in the report. The exercise of discretion will be governed by public law principles, including the principles relating to irrationality.

57. An allegation of irrationality with respect to the content of a report of a public body entrusted with the function of investigation or inquiry is never easy to establish: see *R (Governing Body of X) v Office for Standards in Education, Children's Services and Skills* [2020] EWCA Civ 594 at [43].

58. There is no real dispute between the parties as to the relevant legal principles with respect to irrationality challenges. The two aspects of *rationality* – "process rationality" and "outcome rationality" - were recently discussed by Chamberlain J in *R(KP) v Secretary of State for Foreign, Commonwealth and Development Affairs* [2025] EWHC 370 (Admin):

> "55. In most contexts, rationality is the standard by which the common law measures the conduct of a public decision-maker where there has been no infringement of a legal right, no misdirection of law and no procedural unfairness. It encompasses both the process of reasoning by which a decision is reached (sometimes referred to as "process rationality") and the outcome ("outcome rationality"): see e.g. *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin), [2019] 1 WLR 1649, [98] (Leggatt LJ and Carr J).
>
> 56. Process rationality includes the requirement that the decision maker must have regard to all mandatorily relevant considerations and no irrelevant ones, but is not limited to that. In addition, the process of reasoning should contain no logical error or critical gap. This is the type of irrationality Sedley J was describing when he spoke of a decision that "does not add up – in which, in other words, there is an error of reasoning which robs the decision of logic": *R v Parliamentary Commissioner for Administration ex p. Balchin* [1998] 1 PLR 1, [13]. In similar vein, Saini J said that the court should ask, "does the conclusion follow from the evidence or is there an unexplained evidential gap or leap in reasoning which fails to justify the conclusion?": *R (Wells) v Parole Board* [2019] EWHC 2710 (Admin), at [33].
>
> 57. Outcome rationality, on the other hand, is concerned with whether – even where the process of reasoning leading to the challenged decision is not materially flawed – the outcome is "so unreasonable that no reasonable authority could ever have come to it" (*Associated Wednesbury Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 233-4) or, in simpler and less question-begging terms, outside the "range of reasonable decisions open to a decision-maker" (*Boddington v British Transport Police* [1999] 2 AC 143, 175)".

59. A further example of "process rationality" occurs where the decision-maker has failed to grapple with the relevant evidence: see *R(L) v Director of Public Prosecutions* [2020] EWHC 1815 (Admin) at [36]. It is also convenient for present purposes to describe the *Tameside* duty as a further aspect of "process rationality": that is, whether the decision-maker took reasonable steps to acquaint itself with the relevant information to enable the decision-maker to answer the relevant question correctly (*Tameside* at 1065B, per

Lord Diplock); as discussed further in *R (Balajigari) v Secretary of State for the Home Department* at [2019] 1 WLR 4647 at [70]: the obligation on the decision-maker is only to take such steps to inform himself as are reasonable, and so forth. There may be cases where the decision-maker, especially one which has an inquisitorial function, acts irrationally by failing to undertake a particular or further inquiry: see *DSD*.

60. Against this background, I consider that the various findings in the Report need to be looked in their overall context. It is necessary to consider how the Report will be understood by the reasonable reader. Further, that not every error or misstatement in a report will result in a finding of irrationality. Some errors will be corrected by other material within the report. In addition, there must be a minimum threshold of harm to, or impact on, those who are the subject of the report to give rise to irrationality. I agree with Mr Goodman KC that findings or observations in the Report which could not have any material effect on anyone associated with Kids Company would not be irrational. I also agree that it is not necessary to establish that there was substantial prejudice before a finding of irrationality could be made.

61. With respect to a challenge to a decision on grounds of apparent predetermination, the test to be applied is (by analogy with the apparent bias test) whether the fair-minded and informed observer would consider that there was a real risk that the decision-maker (here, the Commission) had made up its mind and come to a determination as to what would appear in the Report before the right moment for that decision had come. The fair-minded and informed observer is not "unduly sensitive or suspicious, but neither is he or she complacent" (see *Bubbles & Wine Limited v Lusha* [2018] EWCA Civ 468 at [18]). Establishing apparent predetermination is "extremely difficult" see *R (Lewis) v Redcar and Cleveland BC* [2009] 1 WLR 83 at [109].

Discussion

Ground 1: Irrationality

62. The Claimant's contention is that the Report contained a number of specific irrational findings, and was irrational overall when the Report is considered in the round. I will consider the specific challenges first and then go on to consider the overall challenge to the Report.

(a) Specific irrational findings

(i) The charity's records

63. The challenge here is to three matters: the findings, or observations, that (a) records were destroyed and if this had not happened it could have helped to ensure that sufficient information was available to protect the interests of beneficiaries going forward (paragraph 42 of the Report); (b) some records may never have been created (paragraph 41 of the Report); and (c) there was insufficient record of decision-making with respect to expenditure on beneficiaries and the assessment of their needs (paragraph 43 of the Report).

64. With respect to (a), the statement in the Report that "*If records had not been destroyed, this could have helped to ensure that sufficient information was available to protect the interests of beneficiaries going forward – particularly if support to them was continued*

by another charity or service provider", the implication is that some of the records that were destroyed were those which concerned important information about the beneficiaries: such as the assessment of their needs and the provision or expenditure made. This was the information that would be useful to another charity or service provider, and was information that would "protect their interests". I do not consider that the "information" would be read as referring to the broader range of documents involving the charity's arrangements as suggested by Mr Hodivala KC in oral argument. First, the broader range of documents relating to the charity would not ordinarily be regarded as being relevant to protect the interests of beneficiaries going forward. Second, paragraph 42 needs to be read together with paragraph 43 of the Report which refers specifically to decision making in relation to expenditure and information about assessments.

65. The possibility that beneficiaries' interests would not be protected would, to the reasonable reader of the Report, amount to a criticism of those involved with Kids Company and I accept that this would have a materially negative effect on them. The underlying purpose of the charity was to help vulnerable children and young people and the possibility that, as a result of the charity's activities, their interests were not protected would be antithetical to that purpose. Accordingly, a public law challenge to what was said by the Commission at (a) is appropriate.

66. There would be unlawfulness in the making of the relevant statement if there was no factual basis to justify making the statement or if it was arrived at following an irrational process. In doing so, it is necessary to consider the evidence relied upon by the Commission to support the contention that that information had been destroyed.

67. The Report itself does not explain how the Commission reached the view that information relating to the assessment of beneficiaries' needs and the decision-making relating to the support that beneficiaries had been provided were among the records that were destroyed. The reasoning process has, however, been explained in the evidence before the Court.

68. In his First Witness Statement, Mr Hopkins described the reasoning for the challenged statement as (a) the charity records for several beneficiaries were incomplete; (b) a number of personnel had confirmed in interviews with the First Team that shredding of the charity's records had taken place; (c) Falk J had reached the view at [560] that "there was evidence that a material amount of shredding occurred. I have no reason to doubt that the motivation would have been a well-intentioned aim of avoiding confidential information ending up in the wrong hands"; and (d) there was no record of what had been shredded. I am mindful that the Court should be very cautious about entertaining such evidence (see *R. v Westminster City Council Ex p. Ermakov* [1996] All. E. R. 302). Nevertheless, the various points made by Mr Hopkins are corroborated by other evidence and so do not appear to me to an improper attempt to provide an *ex post facto* rationalisation for a finding or observations that are subsequently subject to challenge.

69. I consider that the reasoning described by Mr Hopkins provides a sufficient, and rational, basis for the statement made by the Commission in the Report at paragraph 42. Although there is no evidence referred to by Mr Hopkins which says explicitly that information relating to expenditure on beneficiaries or assessments of beneficiaries' needs had been shredded, I consider that this can be inferred.

70. First, there was evidence that records for several beneficiaries were not complete: this is discussed further below with respect to records relating to the 'top 25 clients': see paragraphs 104-113. If records were not complete, it is possible that this resulted from the shredding that had taken place. Second, in her judgment at [560], Falk J stated that "there was evidence that a material amount of shredding occurred. I have no reason to doubt that the motivation would have been a well-intentioned aim of avoiding *confidential information ending up in the wrong hands*" (emphasis added). If the motivation of those doing the shredding was to avoid "confidential information" getting into the wrong hands, it was possible for the Commission to infer that the shredding involved information that was of some sensitivity and importance to beneficiaries: that could include expenditure on them and the assessment of their needs. This also makes commonsense. If shredding of documents is going to take place, it is most likely to be of sensitive material, and the most sensitive material would relate to the beneficiaries of the charity.

71. This inference is not contradicted by the representations that were made to the Commission by Ms Batmanghelidjh as part of the *Maxwellisation* process. In correspondence from her solicitors dated 27 May 2021, Ms Batmanghelidjh stated that:

> "We handed to the Official Receiver 87 metal filing cabinets full of files which were kept secure. The children's files in the schools were kept there so no one could have access to shred anything. Other than those records that had been entered onto the charity's Aurora database, paper client files were not shredded. They were kept in a completely different building from where the shredding of paper had taken place".

These representations suggest that files relating to children in schools were not shredded; and that the only paper client files that were shredded were those that were entered onto the *Aurora* database. It was open to the Commission to reach the view, however, that this response from Ms Batmanghelidjh was not conclusive of the matter.

72. First, there was no record kept of what files were shredded and so Ms Batmanghelidjh's response cannot be taken as definitive. Second, not all of the client files were entered onto the *Aurora* database, and so there was a possibility that client files that had been shredded were not duplicates of those on the database. This was remarked upon by Falk J in her judgment. At [558], the learned judge stated that:

> "The charity was effectively running a dual system of paper and electronic records. An electronic system, Aurora, had relatively recently been introduced but many existing paper records were not transferred across. It also appears that the Bristol operation may not have been using Aurora. Paper documentation was still being created to a significant extent, and although some scanning occurred, as I understood it this was largely done at head office following a physical transfer of papers from the relevant centre. It appears from the transcript of the interview just referred to that a lot of staff were reluctant to use the Aurora system".

73. Mr Goodman KC also challenged the statement at paragraph 42 as being irrational on "process" grounds. He argued that it was not open to the Commission to make the

finding about the lack of information as the Commission did not follow reasonable lines of inquiry or take reasonable steps to obtain available information. In this regard, Mr Goodman KC made specific reference to the evidence of Mike Gee, a safeguarding manager working for Kids Company, whose witness statement had been before Falk J and which was not actually sought out and read by the Commission.

74. I do not consider that it was irrational for the Commission not to have sought to examine Mr Gee's witness statement. It is clear that Falk J had considered that statement, as she refers to Mr Gee's evidence in her judgment (see [556]). In circumstances where Falk J has herself referred to the issue of shredding and "confidential information" it cannot be said that the material that lay behind those observations had to be looked at by the Commission.

75. With respect to point (b), the statement in the Report at paragraph 41 that some records may never have been created, I accept that this observation has the potential to cause material harm to those who had been involved with Kids Company as it suggests that proper processes were not adopted by the charity. The Commission acknowledged this in the Report at paragraph 72, where it is stated that "Trustees ensure accountability through the records the charity keeps". Accordingly, the statement made by the Commission is something which calls for scrutiny as a matter of public law. In my judgment, however, there was nothing irrational about the conclusion reached by the Commission. There was evidence available to the Commission that records were not always created.

76. There is no reasoning set out in the Report as to why the Commission made the finding that "some records may not have actually been created". This finding is explained by Mr Hopkins in his First Witness Statement. As with the point discussed above about shredding, I am mindful that the Court should be very cautious about entertaining such evidence (see *Ex p. Ermakov*). Nevertheless, the various points made by Mr Hopkins are corroborated by other evidence and so do not amount to an *ex post facto* rationalisation for a finding or observations that are subsequently subject to challenge.

77. Mr Hopkins referred to the fact that the First Team had interviewed Diane Hamilton, who had served as interim finance director for Kids Company from July 2014 to January 2015. Ms Hamilton explained that she had carried out a review of the *Aurora* computer system, looking at the top 25 clients for 2013 and 2014 and took a random sample. She stated that "there was a lot of data missing basically. So that was the main conclusion. And then I made the observation again about families . . . They were missing things like who is the case manager, a lot of them are missing – quite a few people are missing assessments and things of that nature." Ms Hamilton also referred to the distribution by Ms Batmanghelidjh of £35,000 worth of vouchers at a Christmas event. Ms Hamilton said that Ms Batmanghelidjh "just gave them out to people", and although she asked her staff to make sure they noted who had received what, that did not happen. They had "no ability to know who received those vouchers".

78. Mr Hopkins also referred to the finding of Falk J at [574] with respect to the Official Receiver's report relating to client files which had been examined and where assessments were missing. Falk J asked herself what this proved, answering:

> "Of itself, it simply means that there is an absence of documentation, or documentation in the correct location,

> demonstrating that a policy-compliant decision-making process had taken place, whether in terms of the appropriate assessment of the client's needs, or the correct authorisation process within the organisation. *In many cases this may not prove that the assessment or authorisation did not occur, but simply that there is now no written record of it, or none that the Official Receiver has located*. At most that would be a breach of a policy to create and retain records".

(Emphasis added). Those observations by Falk J do not contradict the Commission's comment that "some records may not actually have been created". Falk J states that "*In many cases* this may not prove that the assessment or authorisation did not occur" (emphasis added), not "In every case", leaving open the possibility that records were not actually created.

79. Mr Goodman KC submitted that Ms Hamilton's evidence should not have been relied upon. There had been criticism of her evidence by Falk J. At [86], it was stated by the learned judge that "While I accept that Ms Hamilton gave her evidence honestly, I did notice what appeared to be some exaggerated caution in confirming some points, relying on failures of recollection". However, as Mr Hopkins has explained, the Second Team had regard to Falk J's conclusion that whilst Ms Hamilton gave her evidence honestly, she appeared to confirm some points with exaggerated caution and relied on failures of recollection. The Second Team also took into account the evidence that Ms Hamilton gave to the Commission at interview, and noted that she would have been advised that providing misleading or false information to the Commission is a criminal offence pursuant to section 60 of the 2011 Act.

80. With respect to (c) -- the Commission's observation at paragraph 43 of the Report that there was an insufficient record of decision-making with respect to expenditure on beneficiaries and how individuals' needs were assessed in relation to some of these payments -- the implication from this is that Kids Company may not have made such records. As with (b), this has the potential to cause material harm to individuals associated with the charity as it suggests that proper processes were not adopted with respect to these matters. I do not consider, however, that the observation at (c) gives rise to an innuendo that the Commission's view was that the expenditure was not properly made. I note, in this regard, that the language used at paragraph 43 of the Report can be contrasted with that at paragraph 45 (referred to in more detail below at paragraphs 104-113) where the Commission stated that it saw insufficient evidence of decision making with respect to expenditure on the 'top 25' clients "to be satisfied that they were justified or made in the best interests of the Charity".

81. I note that there is an evident inconsistency between the first sentence of paragraph 43 - where the Report states that the Commission "was unable to find such records amongst those it was able to review", referring to records of decision-making in relation to clients - and the second sentence of paragraph 43, where the Report states that the Commission could find "only limited" evidence of decision making with respect to certain expenditure. The 'expenditure' and 'payments' are the same thing. To that extent, there is an error in the Report.

82. Nevertheless, I do not consider that this means that paragraph 43 of the Report is irrational as a matter of public law. As I have already explained, not all errors or

misstatements in a report will be irrational. It is necessary, among other things, to look at the overall context of the Report. With respect to this matter, a reasonable reader of the Report would appreciate that the former statement was a mistake and that the Commission had, in fact, seen *some* records of the decision-making in respect to payments to beneficiaries, as that is referred to in the same paragraph. In addition, at paragraph 45 of the Report, there is a reference to the Commission having obtained 'partial records' with respect to expenditure on the 'top 25' beneficiaries, which means that some records must have been available.

83. It was not irrational for the Commission to say that it could only find limited, and insufficient, records of decision-making with respect to "some beneficiaries" as there was a proper and reasonable basis for this. There was material from which the Commission could form the view that there were limited and insufficient records of decision-making with respect to payments to the 'top 25' beneficiaries, a group that represents "some" beneficiaries as referred to at paragraph 43 of the Report. The reasoning for that conclusion is set out at paragraphs 104-113 below; and that reasoning applies to the challenge under this Ground.

(ii) The Charity's Beneficiaries

84. The Claimant takes issue with the Commission's observations about the methodology for calculating the figures for the number of beneficiaries that Kids Company claimed to be working with (paragraph 44), and also takes issue with observations about the 'top 25' clients of the charity (paragraphs 45-6).

(a) 36,000 beneficiaries

85. The challenge with respect to the number of beneficiaries ("*the figure of 36,000 included indirect as well as direct beneficiaries, meaning that if one child in a family was assisted the other children in that family were counted as beneficiaries, and if one child in a school class was a direct beneficiary the other children in the class were counted as indirect beneficiaries*") is unfounded. There was material available to the Commission from which it could reach the conclusion that the 36,000 beneficiaries that Kids Company claimed to support consisted of both direct and indirect beneficiaries: the actual reference in the charity's Annual Report for 2013 stated that "Kids Company currently supports some 36,000 children, young people and vulnerable adults". (At the hearing before me, I was told by Mr Hodivala KC that the Annual Report for the charity for 2011 and 2012 also referenced the 36,000 beneficiaries. This was not contradicted by Mr Goodman KC).

86. The background to this matter was explained by Mr Hopkins in his First Witness Statement. Once again, I am mindful that the Court should be very cautious about entertaining such evidence (see *Ex p. Ermakov*), but the various points made by Mr Hopkins are corroborated by other evidence and so do not appear to me to amount to an *ex post facto* rationalisation for a finding or observations that are subsequently subject to challenge.

87. Mr Hopkins noted that the First Team did not consider that Kids Company had 36,000 clients, and it was "potentially misleading to donors" if this number was referring to the number of children, young people and adults who benefitted from the charity's extended activities. Mr Hopkins explained that the matter was revisited by the Second

Team, who noted that David Quirk-Thornton, a senior leader within the London Borough of Southwark who had responsibility for co-ordinating the response to the PACAC inquiry from 3 affected local authorities, had said to PACAC that he had "found no evidence to support the claims by Kids Company that they were working with 36,000 children and young people… The number of cases handed over to Local Government suggests that they were working with considerably fewer clients than they repeatedly stated."

88. In the PACAC report, it was stated that:

> "Kids Company has also stated that the files handed over to the local authorities do not reflect the charity's work in schools, which it claimed served 19,000 children in 48 schools. According to Mr Quirke-Thornton, however, Kids Company was in fact only "working in 34 schools in 2014–15 and had already ceased work in 3 schools in the 2014–15 academic year." He explained that "in accounting for their work in schools, Kids Company referred to the benefit to the whole class of them working with an individual child or young person, so they counted the whole class as 'clients'. I know of no other organisation working with children and young people in schools that accounts for their 'clients' in this way due to inferred benefit(s)". Dr Genevieve Maitland Hudson, former employee at Kids Company and now Director of consultancy company OSCA, said that the "use of aggregate 'reach' numbers as proxies of effectiveness is particularly unhelpful. It encourages inaccurate reporting and gives very little insight into programme capacity."

89. It was entirely reasonable for the Commission to place weight on Mr Quirk-Thornton's evidence. The majority of Kids Company's work took place in London, and the Commission rightly assumed that the 3 authorities for whom he was speaking would have received the vast majority of any files relating to the charity's beneficiaries at the point of its collapse.

90. Mr Hopkins also explained that the Second Team's concerns as to whether 36,000 was the number of direct clients of Kids Company were evidenced by comments made by Alan Yentob, the Chairman of the Board of the charity, in an interview with the First Team in February 2016, where he stated that:

> "although I would argue sometimes with [Ms Batmanghelidjh] about the numbers, only because the schools are where the numbers expanded. She believed that sometimes whole schools would be taken in assembly, and you can read it in some of the documentation from the schools, so her scope was significant. We didn't just look after the kids, we – and this is so important. We worked with the families. In fact, the numbers are all there. 7,600 or whatever, you know, family members as well as the children, the key children, 19,000 in the schools, broken down the ones we looked after a good deal".

In addition, the trustee Erica Bolton told the First Team in January 2016 that whilst the charity primarily worked with disadvantaged children, it also worked with 'adults, carers, schools etc'.

91. Mr Hopkins also referred to statements made by Ms Batmanghelidjh. In her interview with the First Team, Ms Batmanghelidjh stated that the 36,000 beneficiaries was made up of 19,000 school pupils, 9,700 children at street-level centres and 7,200 adults. With respect to the school pupils, she stated that:

> "10,736 were supported through personalised support. That could be therapy, social work, any variation of those. 7,224 received one-to-one therapeutic support, such as counselling, psychosocial therapy, speech and language, occupational therapy. 900 attended therapeutic groups, and then there were groups – activity-based stuff like 9,557, and then there was another 8,224 who attended all sorts of activities, like remedial, homework club and so on".

The adults were said by Ms Batmanghelidjh to have been:

> "made up of people who were parents of the kids who attended the street level centres, people who were parents of people who attended the schools programme and we delivered something to them. It may have been counselling, advice… We never misled anyone. We never said we offered therapy to all of these people".

92. Against this background, Mr Hopkins stated that the Second Team formed the provisional view that there was a lack of clarity about how the 36,000 beneficiaries was calculated, and this view was not shaken by what was said in the *Maxwellisation* process. In that process, feedback from some of the trustees included the comment that "The Commission knows from interviews with the trustees that the claim in relation to 36,000 beneficiaries included all the children at the schools in which the charity worked." This tended to support the conclusion that the 36,000 included indirect beneficiaries. Furthermore, Mr Hopkins noted that, in her *Maxwellisation* response, Ms Batmanghelidjh did not dispute that the 36,000 beneficiaries included classes and families of those directly supported.

93. I do not consider that the approach taken by the Second Team, as explained in some detail by Mr Hopkins, was irrational. It did not defy the evidence that was available to it, but was based on an inference that was open to it from the evidence.

94. Further, there was nothing unreasonable to the point of being unlawful for the Commission to include in the Report the observation that "in the interests of transparency and to avoid misconceptions, the methodology for calculating these figures should have been clearly articulated wherever they were cited, particularly in the Charity's annual reports", as it was essentially a comment on the need for transparency and the avoidance of misconceptions in publications put out by a charity. It was open to the Commission to consider that providing accurate information as to the number and type of beneficiaries has some importance for a charity's donors and potential donors, as well as other supporters and grant makers. Indeed, this seems self-evident.

95. I do not consider that the inclusion of this observation in the Report was "pernickety", as argued by Mr Goodman KC, on the basis that the 36,000 figure appeared in only one document produced by the charity. In fact, it appears that the 36,000 figure was referred to in several of the charity's documents. In any event, it was not irrational for the Commission to hold the view that trust and confidence in the charitable sector could be adversely affected if inaccurate or unreliable information about the quantity of services provided by a charity was put into the public domain through a document such as an Annual Report.

(b) The 'top 25' clients

96. Further challenge to this section of the Report concerns the observations about the 'top 25'. Taken in isolation, there is nothing unreasonable about the comment made by the Commission that "it is possible that the Charity might have been able to have provided more assistance to more clients if expenditure on the 'top 25' beneficiaries had been reduced". That statement is self-evidently correct: given that the charity had limited funds, if less was spent on the 'top 25' clients more could be spent on others.

97. However, that comment needs to be seen in the context of paragraph 45 of the Report as a whole. Paragraph 45 records that "The Inquiry was only able to obtain partial records in relation to some payments to" the 'top 25' clients of Kids Company. The average spending on those clients in the period between January to July 2014: the sum of £1,777.43 per month, is then referred to. The paragraph continues to state that "From the limited information that the Inquiry was able to review the Commission saw insufficient evidence of the decision making in relation to some of these payments to be satisfied that they were justified or made in the best interests of the Charity". This implies that some of the payments to the 'top 25' clients may not have been justified, or in the best interests of the charity. That implication is not cancelled out by the subsequent comment that "The Charity's trustees ultimately had discretion as to how to spend its resources in furtherance of its objects" as, when read alongside the previous comments, this may be a criticism of how that discretion was exercised. It also colours the final sentence that more assistance might have been able to be provided if expenditure on the 'top 25' had been reduced.

98. The overall effect of paragraph 45 for the reasonable reader, therefore, is that payments were made to the 'top 25' clients which might not have been justified or in the best interests of the charity and might have been spent better if spread out among the other beneficiaries. In my judgment, the reasonable reader of the Report would regard paragraph 45 as being a criticism of Kids Company with respect to the expenditure on the 'top 25' clients, and this would add to the stigma that those who worked for, or were otherwise associated with, the charity may continue to feel. If, therefore, the comments were arrived at in an irrational way, then this would be unlawful as a matter of public law.

99. Mr Goodman KC argued that there was *process* irrationality in that the Commission stated that it was only able to obtain partial records in relation to some payments, and that there was "insufficient evidence of the decision making in relation to some payments", when in fact there was further information that was readily available to the Commission had it sought it out or not ignored it. Mr Goodman KC contends that the Commission was under a duty at public law to take reasonable steps to obtain the relevant information, in accordance with the approach set out in *Balajigari* at [70], or

to follow reasonable trains of inquiry as per *DSD*. Furthermore, Mr Goodman KC contended that the observations made by the Commission about the 'top 25' clients were irrational in that they were inconsistent with the findings made by Falk J in her judgment, and there was no indication that those findings were grappled with by the Commission and why there was a divergence from the learned judge's findings.

100. With respect to the first of these submissions, I agree that it would be irrational for the Commission to make comments about the lack of evidence for decision-making around payments if it had not taken reasonable steps to obtain the evidence. First, it is trite law that a public body carrying out an inquiry must do so fairly and reasonably. Second, it is assumed from the text of the Report that the Commission looked at the material that was reasonably available to it.

101. At paragraph 41 of the Report, it is stated that 'The Inquiry has based its findings on the records that it was able to examine. Whilst the Inquiry was able to review substantial documentation, there were insufficient records for it to make findings in some areas. This is for two reasons. First, some of the Charity's records were destroyed at the time of its collapse. Secondly, it appears that some records may not have actually been created". The impression that this gives is that the Commission examined and reviewed all of the available records, but there were some records that were not available due to destruction and the fact that some were not created in the first place. That is, the Commission's "ability" to review or examine records was constrained by the destruction or non-creation, but not by anything else. This is the context in which paragraph 45 needs to be understood, and is bolstered by the fact that the Report contains similar language to that used in paragraph 41: referring to records or evidence that the Commission was "able to obtain" and "able to review".

102. Mr Goodman KC is correct in his submission that there were records - such as those kept on *Aurora*, as well as evidence that was presented to Falk J (see [555]-[557] of the judgment) – that could have been looked at by the Commission but which it did not examine. Nevertheless, that does not lead to a finding of irrationality if it was factually correct that evidence of the decision-making with respect to some payments was lacking. In those circumstances, there would be no irrationality in substance ('outcome' irrationality) or in process ('process' irrationality) because it could not be said that the Commission acted unreasonably in failing to follow a train of inquiry or failed to take reasonable steps to obtain the relevant information.

103. There is no detail in the Report as to how the Commission came to the view that it did about the insufficiency of evidence. Nevertheless, it is explained by Mr Hopkins in his Second Witness Statement where he refers to the information about the 'top 25' clients. I do not regard this as him correcting or adding to his reasons, but elucidating the process that the Commission undertook in making the observations that it did in this regard. Although I am mindful that the Court should be very cautious about entertaining such evidence (see *Ex p. Ermakov*), it is appropriate in the instant case as Mr Hopkins relies heavily on a document that was prepared for the Commission and deals specifically with the question of records of decision-making for the 'top 25' clients.

104. Mr Hopkins explains in his Second Witness Statement that reliance was placed on an accountancy report. Mr Hopkins noted that the report referred to several instances where no records were identified regarding clinical assessments or meetings to discuss the expenditure or justification of expenditure on particular clients. Additionally, the

report identified that no written documentary evidence in accordance with the Charity's policy for Distributing Financial Analysis was identified for the payments examined in the report or that no client records were found.

105. Mr Goodman KC criticised the reliance on the accountancy report. He submitted that that report relied on *Excel* ledgers and not case files; that it would have been possible for the Commission to have looked behind the ledgers to examine the primary records. I disagree. It is clear from the accountancy report, that case files had been looked at by the author of the report. The author, Iain Hewitt, refers repeatedly to looking at case files. In a summary of his findings, for instance, Mr Hewitt stated that "A view of the electronic and paper files of Kids Company recorded a persistent failure to carry out and/or record the necessary clinical expenditure". This implies that electronic and paper files had been looked at. Furthermore, within the body of the review report it is clear that Mr Hewitt examined the files of a number of beneficiaries. With respect to a beneficiary who is referred to in these proceedings as B1, Mr Hewitt recorded that "From a review of the information contained in B1's file I can see no evidence of how the decision to fund his rehabilitation support has been made."

106. Mr Hewitt made a number of other comments about B1:

> "In an internal email 25 June 2014 Emma (finance officer) confirmed that Ms Batmanghelidjh agrees to stop all payments for B1. Payments recommenced on 22 July 2014 (cash allowance of £150). There is no documentation on file as to why the allowances recommenced".
>
> . . .
>
> "Included in the information stored in cerise there is a copy of a care plan dated 7 April 2015 which notes that B1 is "now earning a good income". It was agreed that the allowance was no longer appropriate and would stop in 6 weeks. From a review of the nominal ledger it appears that allowances totalling £1,80[0] were paid to B1 subsequent to the end of the 6 week deadline (between 29 May and the close of the charity), however there is no documentation on file as to why the allowances continued".
>
> . . .
>
> "No written documentary evidence, in accordance with Kids Company Policy for Distributing Financial Assistance, has been identified for the payments detailed above. No clear explanations were found as to why cash was being paid to him rather than vouchers or payments to third parties despite concerns raised in 2011 that cash being provided by Kids Company was being used by B1 to buy drugs and/or alcohol, particularly as the policy advises no money will be distributed if there is reason to believe the Client is likely to spend the money on drugs or alcohol".

107. Mr Hewitt also referred to a beneficiary identified as B2 who received support in the amount of £89,518.81 over a 3 year period. This included "Kids Allowances – Cash" made up of 357 payments in the sum of £38,127.40. Mr Hewitt noted that:

> "I understand that when the review of individual's personal files was carried out, there was no file for B2 and therefore it is not possible to establish whether the charity has following its distribution policy. B2 was listed on the complete client list which was extracted by the OR from aurora and therefore there should have been a personal file for him. Some information was obtained during the review at Iron mountain."

108. With respect to another beneficiary, B3, Mr Hewitt noted that:

> "B3s file (on cerise) contain some intervention records (all before the dates covered by the report). However, there is no evidence of any clinical discussions having taken place, nor is there any evidence of regular reviews having been carried out, contrary to the charity's distribution policy.
>
> . . .
>
> No written documentary evidence, in accordance with Kids Company Policy for Distributing Financial Assistance, has been identified for the payments detailed above. No clear explanations were found as to why cash was being paid to Annie rather than vouchers or payments to third parties. Also I have seen no evidence of any budgeting assessment being carried out in respect of Annie."

109. With respect to another beneficiary, B4, who received support in the sum of £57,181.77, Mr Hewitt stated:

> "No records were identified regarding any clinical assessments or meetings to discuss the expenditure or justification of expenditure on [B4]. Furthermore no written documentary evidence, in accordance with Kids Company Policy for Distributing Financial Assistance, has been identified for the payments detailed above."

110. With respect to a beneficiary, B5, who received support in the sum of £52,173.34, including 147 payments of cash (Kids Allowances) in the sum of £24,630, Mr Hewitt wrote that:

> "No written documentary evidence, in accordance with Kids Company Policy for Distributing Financial Assistance, has been identified for the payments detailed above. No clear explanations were found as to why cash was being paid to [B5] rather than vouchers or payments to third parties. Also I have seen no evidence of any budgeting assessment being carried out in respect of [B5]".

111. With respect to B6, who received 279 payments of cash (Kids Allowance) in the sum of £15,745.Mr Hewitt noted that:

> "No written documentary evidence, in accordance with Kids Company Policy for Distributing Financial Assistance, has been identified for the payments detailed above. No clear explanations were found as to why cash was being paid to [B6] rather than vouchers or payments to third parties".

112. With respect to B7, who received support in the sum of £45,447.79 and 199 payments of cash (Kids Allowances) in the sum of £31,949.60, Mr Hewitt noted that:

> "No written documentary evidence, in accordance with Kids Company Policy for Distributing Financial Assistance, has been identified for the payments detailed above. No clear explanations were found as to why cash was being paid to him rather than vouchers or payments to third parties despite concerns raised in respect of Danny's continual lack of money due to the use of narcotics, particularly as the policy advises no money will be distributed if there is reason to believe the Client is likely to spend the money on drugs or alcohol."

113. Similar comments are made with respect to each of the other 'top 25' clients. It was, in my judgment, entirely reasonable for the Commission to rely on this review by Mr Hewitt for the statement in the Report that there was insufficient evidence of decision-making with respect to expenditure in relation to some of the payments to the 'top 25' clients (and by extension to the statement at paragraph 43, discussed above at paragraph 83 with respect to 'some beneficiaries'). It was also reasonable to rely on this review to justify the further statement at paragraph 46 of the Report that "Due to a lack of records, the Inquiry was not able to examine sufficient records to rest and come to its own conclusions as to whether the [Charity's] policies [relating to its payments to its beneficiaries] were adhered to in practice".

114. Nevertheless, the innuendo from paragraph 45 of the Report is that there may have been something problematic with the payments to the 'top 25'. This innuendo was, in my judgment, extremely unfair to the charity given what was said about the matter by Falk J in her judgment.

115. Falk J made a number of references to the 'top 25' clients in her judgment:

> "80. The allegations as originally put to the defendants, in letters sent in March 2017, included an allegation of causing or allowing Kids Company to incur inappropriate expenditure. That allegation was said to be demonstrated by an analysis of "Top 25" clients between 2013 and 2015 (see [546] below for an explanation of the "Top 25"). The allegation was later dropped, but Mr Tatham's report was already substantially complete by the date that the March letters were sent. All but four of the 39 clients covered were in the "Top 25" category during that period, and the others were either connected to them or there was a link to a member of staff.

> . . .
>
> 546. I am satisfied that the Trustees exercised regular scrutiny of kids costs. At their request (and initiated in particular by Mr O'Brien), an increasing level of detail was provided about expenditure on the "Top 25" individual clients, being the 25 individuals on whom most was spent in any particular year. I accept that there was frequent questioning about these clients, including discussion not only of the overall expenditure on individual clients but of particular categories of expenditure, particularly in the Finance Committee. That this was the case was also confirmed by Ms Lloyd in oral evidence. The minutes do not reflect the extent of these discussions."
>
> 547. For example, I saw schedules produced in November 2014 which analysed expenditure between January and August on the Top 25 by reference to a number of different categories, including allowances, clothing, education, food and housing. Ms Robinson confirmed that the Trustees' discussions about the Top 25 would have been informed by this sort of document, and that it was normal practice to discuss the Top 25 at Finance Committee meetings.
>
> . . .
>
> 552. It is also worth noting that there was evidence that average spend per client reduced whilst the number assisted increased, which provides an indication of restraint being applied (see [212] above).
>
> 553. In determining whether adequate scrutiny was exercised, is also important to bear in mind the question of materiality. For the period in question kids costs represented in the region of 16% to 18% of total expenditure. Spending on the Top 25, which was the focus of Mr Tatham's report (see [80] above), represented approximately 16% of total kids costs in 2012 and 10% in 2013 (based on management accounts figures). This represented around 2.7% and 1.6% respectively of the charity's total costs. For 2014, spend on the Top 25 represented about 18% of total kids costs, or about 3.2% of total expenditure, averaging around £30,000 per client. As Ms Robinson pointed out in interview, this is also considerably less than the average cost of keeping a child in care".

116. A reasonable reader of the Report would not know that Falk J had examined the matter in some detail and specifically found that appropriate scrutiny had been applied by the trustees to those payments, that the number of clients being assisted increased, and the spend on the 'top 25' was a very small percentage of the charity's overall expenditure, and was considerably less than the cost of keeping a child in care. The reference at paragraph 32.14(b) of the Report to the finding in the judgment of Falk J that "The trustees exercised real scrutiny over expenditure" was very general and did not

neutralise the innuendo from paragraph 45 which was dealing with a very specific part of the charity's activities: spending on the 'top 25' clients.

117. Given the findings made by Falk J that the expenditure on the 'top 25' clients had been scrutinised adequately by the trustees, the Commission's observations at paragraph 45 -- which give rise to the innuendo that the payments to the 'top 25' may not have been justified -- are unbalanced and one-sided. This is extremely unfair to the charity and the trustees. Although the Commission has a discretion as to what to include in the report of a statutory inquiry, that discretion must be exercised lawfully. Creating such extreme unfairness would not be lawful: in public law terms, it is irrational.

(iii) Operating Model

118. The Claimant makes a number of criticisms of what the Commission said about the charity's operating model. I consider that some (but not all) of the criticisms complained about were reasonably open to the Commission to make. There was plainly an evidential basis for description of the charity's operating model as being "high risk", as the model was referred to by Falk J at [805] as being "potentially high risk" (referring to the combination of the charity's dependency on donations, "the lack of reserves and the nature of Kids Company's charitable activities, with the bulk of its costs being staff costs that were not straightforward to cut"). The assessment made by the Commission that the charity prioritised the immediate and urgent needs of its beneficiaries at the expense of its longer-term sustainability was also supported by the evidence.

119. As for the Commission's opinion that it would have been "prudent" for the charity to "seek to build up reserves to provide it with a financial cushion in the event of unexpected expenses or an unexpected fall in income", Mr Goodman KC submitted that this was unfair and contradicted by Falk J's finding that the trustees approach to reserves was within the range of reasonable responses. I do not see any contradiction. The Commission was expressing a view as to what it considered to be "prudent". Falk J did not specifically find that the trustees had acted "prudently".

120. There is merit, however, in the challenge to the comment made in the Report about the consequences of the trustees' decision to operate with a low level of reserves. The Commission stated that "If the Charity had had a higher level of reserves, it may have been able to utilise these to weather this storm [of the criminal investigation] and thereby avoid insolvency and/or wind up in a more orderly fashion or merge with another organisation and therefore ensure ongoing care and support for its beneficiaries. *The trustees' decision to operate with a low level of reserves meant they could not do so*" (emphasis added). To the reasonable reader, the Commission was saying that, as a result of the decision to operate with a low level of reserves, Kids Company was not able to "weather this storm". That is, had the trustees adopted a different course of action with respect to reserves, they could have saved the charity by avoiding insolvency or could have wound up the organisation in a more orderly fashion or could have merged with another organisation and therefore ensure ongoing care and support for its beneficiaries. This is a clear criticism of the trustees and would be likely to have a materially negative impact on them, as the reasonable reader would view the Report as the Commission saying that they were, at least in part, responsible for the demise of the charity and the good work that it was doing.

121. It is correct as a matter of fact that if Kids Company had maintained a "higher level of reserves", sufficient to cover the charity's expenditure for the period of the investigation (from August 2015 to January 2016), or for a further six months after the completion of the police investigation (Falk J stated that there was "no reason to doubt" Ms Batmanghelidjh's evidence that she thought it would have taken a further six months to regain donor confidence: see [822]), then it may have been able to "weather the storm" and avoid insolvency or wind up in a more orderly fashion or merge with another organisation and therefore ensure ongoing care and support for its beneficiaries. Standing on its own, therefore, the observation made in the second sentence of paragraph 51 of the Report about the "higher level of reserves" is an accurate statement and it could not be criticised on public law grounds. However, the second sentence of paragraph 51, and the reference to "higher level of reserves" cannot be read in isolation. It has to be read with the final sentence: that "The trustee's decision to operate with a low level of reserves meant that they could not do so". The final sentence of paragraph 51, when read with the second sentence, amounts to a criticism of the trustees, implying that it was the result of the trustees' decision to operate with a low level of reserves that the charity was unable to "weather the storm", including by avoiding insolvency entirely.

122. This criticism of the trustees is, in my judgment, irrational insofar as it refers to weathering the storm and avoiding insolvency entirely. This criticism contradicts the finding made by Falk J in her judgment at [822], where the learned judge stated that she did not agree with the suggestion that "if it had had appropriate reserves, Kids Company would have been able to survive notwithstanding the unfounded allegations. That is not demonstrated by the evidence", and that "If the charity had built up reserves equivalent to three months of operating expenditure (. . . what I understood to be an uncontroversial aspiration) that would have been well short of what was required". There is nothing in the Report to explain why the Commission was reaching a different view to that expressed by Falk J.

123. There was no obligation on the part of the Commission to follow the decision of Falk J slavishly. Falk J was considering an application by the Official Receiver for disqualification under section 6 of the 1996 Act. The learned judge was testing the evidence against a different standard, looking to see if the trustees and the Chief Executive Officer were "unfit". Nevertheless, Falk J's findings cannot be ignored, and a decision-maker acting rationally is obliged to take those findings into account as a material consideration; and the findings needed to be grappled with. This is analogous to the way in which a Court deals with expert evidence; it does not need to be adopted by a Court, but where it is departed from the Court should explain why. Similarly, as submitted by Mr Goodman KC, this is analogous to the approach that should be taken by another quasi-judicial decision maker -- a planning inspector who is "free upon consideration to disagree with the judgment of another [inspector] but before doing so he ought to have regard to the importance of consistency and give his reasons for departure from the previous decision": see *North Wiltshire District Council v Secretary of State for the Environment* (1993) 65 P. & C.R. 137, at 145.

124. In his First Witness Statement, Mr Hopkins has explained the process undertaken by the Commission in arriving at the observations about reserves, and sets out the Commission's thinking. Mr Hopkins stated that:

> "The Current Team and I considered this response and other representations and noted the Claimant's assertion that £14 million in reserves would have been required to keep the Charity operating because of the criminal investigation which was concluded in 2016 with no further action being taken. Whilst we did not disagree with the assessment that a significant level of reserves would have been necessary both to cover the period of the Police's criminal investigation and a suitable period after that to regain donor confidence, the point being made in the report was more subtle than this and made clear that greater reserves could allow a more orderly winding up of the Charity even if was not sufficient for survival and not abrupt closure as happened here".

This explanation by Mr Hopkins does not address the statement made in the Report at paragraph 51 that a higher level of reserves may have enabled the charity to "weather this storm and thereby avoid insolvency".

125. Mr Hopkins comes closer to giving an explanation for the second and third sentences in paragraph 51 in his Second Witness Statement, where he states that:

> "It was the view of the second team (taking into account their combined professional judgement and Falk J's findings) that had the Charity maintained a higher level of reserves it may have been possible for it to delay the winding-up petition, or otherwise have explored other options (whilst utilising reserves) to merge with another charity or otherwise facilitate a more orderly closure of the Charity's services and activities. Whilst it obviously remains a matter for the Court, I maintain that was a reasonable and legitimate observation for the Inquiry to make in its Report".

Even here, however, Mr Hopkins does not actually address the wording of the Report that with "higher reserves" the charity may have been able to "weather this storm and thereby avoid insolvency". Mr Hodivala KC accepted in oral argument that this language may have been infelicitous. That cannot amount to a justification at public law for the language that was in fact used and which will be understood by the reasonable reader as forming part of the criticism of the trustees. The Commission was well aware that its report into Kids Company would be carefully scrutinised, both by the trustees and others involved with the charity but also more broadly. The Commission had, in these circumstances, an obligation to be very careful in the statements and observations that it made. In this respect, it failed to do so.

126. In his oral submissions, Mr Goodman KC contended that the Commission was wrong to say that the charity could have been wound down gradually as this would have amounted to a breach of the trustees' fiduciary duty, and the reference to merging was pure speculation. Mr Goodman KC supported his argument by referring to a *Maxwellisation* response from the solicitors for Ms Batmanghelidjh dated 11 October 2021, in which they referred to the language in a draft report that Kids Company was ending its operations "abruptly" and stated that "once the Charity had passed the point of no return it was incumbent upon the trustees to take immediate steps to cease trading

and to protect the interests of creditors, in order to avoid wrongful trading under s.213 of the Insolvency Act 1986. It would have been a breach of the trustees' fiduciary duties to do what you have suggested they should have done and to have wound down gradually". This representation is predicated on there being an *abrupt* ending to Kids Company's operations. That is not, however, the language of the Report itself. The reasonable reader of paragraph 51 would understand that what was being said by the Commission was that with a "higher level of reserves" an instantaneous decision might not have to have been made by the trustees once the criminal investigation commenced. Those reserves may have been able to provide the trustees with a cushion of time before operations had to cease and the claims of creditors had to be met. Accordingly, I do not find that this observation was irrational.

(iv) Financial Management

127. The one finding of mismanagement made by the Commission concerned the charity's "failures to make payments to HMRC, workers, and other creditors on time". It is said that this mismanagement in the administration of Kids Company would have "undermined confidence in the Charity and its management by trustees".

128. A finding of mismanagement by the Commission, the regulator for the charitable sector, is a serious matter. There is no doubt that this finding would have a materially adverse effect on those to whom it is directed. The reasonable reader of the Report will form the view that those responsible for this matter have fallen below the standards expected of them. With respect to this matter, therefore, the Court will apply a greater level of scrutiny than to a passing, or somewhat conditional, observation.

129. In my judgment, the finding of mismanagement made by the Commission was clearly one that was open to it to make in the Report. There was ample evidence available to the Commission that the charity had regularly failed to make PAYE payments to HMRC on time, was late (albeit by one day only) in making payroll in November 2014, and had not been prompt in its payment to self-employed workers. The evidence for this is set out at paragraphs 54-55 of the Report, and Mr Goodman KC on behalf of the Claimant did not argue that the references in those paragraphs are erroneous in any way.

130. Mr Goodman KC contended that these late payments were not criticised by Falk J in her judgment, and that it is not fair to regard these late payments as being mismanagement. With respect to the PAYE payments, Mr Goodman KC referred to the extensive correspondence between HMRC and the charity which demonstrated that HMRC was understanding of the situation that the charity was in: that arrangements were provided by HMRC for late payment and that no enforcement action was taken by HMRC with respect to these matters.

131. The leniency extended to the charity by HMRC may explain why Falk J did not regard the late payments as constituting incompetence or unfitness by the trustees, but that does not mean that objectively this was not mismanagement or that the Commission was not entitled to regard it as mismanagement. The making of PAYE payments on time is a fundamental feature of the revenue collecting arrangements in this country. The PAYE system imposes an obligation on the employer to make tax payments on behalf of their employees, so that employees do not have to make the payments directly to HMRC. The payments made are not of monies belonging to the employer, but are of monies that employees owe to HMRC.

132. Similarly, missing the payroll date for the charity's staff can reasonably be regarded as mismanagement. The payment of salary is a contractual obligation on the part of the employer, and a delay of even one day could have an adverse effect on members of staff, as they may well organise their financial affairs (eg. payment of rent or mortgage, credit card or other loan payments) on the understanding that they will be paid on a particular date. The same applies to late payment for self-employed workers. The judgment of Falk J refers to £100,000 being owed to 40 self-employed staff for July 2015, and to their "anxiety": [268]. These individuals presumably relied on prompt payment of their invoices for services rendered. The fact that these payments were not made at the appointed or expected time, is indicative of an organisation that has not arranged its affairs in such a way as to ensure that important debts are paid.

(v) Trustees and the CEO

133. In the section of the Report dealing with "The trustees and the CEO", the Commission made a number of general observations about the qualifications and experience of the trustees of Kids Company. The Claimant takes issue with only one set of observations: that none of the trustees had qualification or experience in the field of youth services or psychotherapy – the areas in which the charity was operating -and if some of the trustees had more such experience, they might have been better able to perform their role by questioning the decision-making of others, such as with respect to the clinical team's decision making.

134. In my judgment, there is no basis to challenge these observations. Far from being "scurrilous" as contended by Mr Goodman KC, the observations are well within the range of comments that the Commission, as the regulator for the charitable sector, was entitled to make. It is not unreasonable for the Commission to consider that a trustee with qualifications and experience in the field within which a charity operates may have a greater ability to question the practices and processes, and provide scrutiny and oversight over relevant decision-making, than trustees without such qualifications. Such an assessment seems self-evident. Indeed, it was even supported by the trustees, as the Board of Kids Company had itself identified a need to diversify the trustees so as to bring in someone with that background and experience.

135. The language used by the Commission with respect to this matter is not unduly critical. The reasonable reader of the Report would, in my judgment, understand that scrutiny and oversight of such decision-making, which was a key part of the services provided by the charity, would be better exercised if someone with expertise in that field was a trustee. There is no hint or innuendo that clinical decision-making was poor or inadequate.

136. The observation is also not inconsistent with any of the findings made by Falk J in her judgment. Whilst it is correct that Falk J commended the trustees, commenting that "Most charities would . . . be delighted to have available to them individuals with the abilities and experience that the Trustees in this case possess", the learned judge did not say that Kids Company had nothing to gain by bringing on a trustee with experience or qualifications in the charity's field of operations.

137. It does not seem to me that including this observation within the Report was something which ought not to have been done, that it somehow fell outside of the remit of the Commission and of the inquiry that it was undertaking. The scope of the inquiry was

identified as covering, among other things, "The administration, governance and financial management of the Charity", and whilst this *included* financial matters it was not confined to such matters. As already explained, the Commission has a broad remit and one of the proper functions of an inquiry and the report produced after the completion of the inquiry is to provide lessons for the wider charitable sector.

138. Given this remit, there was nothing remotely improper about the Commission expressing its view that there were some "skill gaps within the trustee body, including a knowledge of psychotherapy, youth services" (as set out in the conclusion to the Report) and that trustees having "a broader range of skills, including knowledge about the therapeutic process" might have meant that they were better placed to question the executive's decisions (as set out in the lessons learned "Issues for the wider sector").

(b) Overall irrationality

139. I do not consider that the Report, looked at as a whole, was irrational. The fact that the Report contains errors, and even a small number of irrational findings or observations, does not mean that the overall document is irrational. To decide that a report, as a whole, is irrational, it would be necessary for there to be irrational findings that went to the heart of the document; or where there were so many errors and irrational findings that the document could not stand. That is far from the case here.

140. I also reject the contention that the Report was irrational overall because it only contained criticisms of the charity, and did not explain that the focus of the Commission's investigation had narrowed greatly from what had initially been looked into. First, the general scope of the inquiry had not changed from the outset. Second, in any event, what is included in a report published pursuant to section 50 of the 2011 Act is a matter of judgment for the Commission. There is no reason why the report should reference all of the matters that had initially been the subject of investigation, even more so where events have been overtaken by the judgment of Falk J into the proceedings instituted by the Official Receiver.

141. I also reject the submission that the Report was irrational overall because the Commission failed to examine further evidence or carry out further investigation into the matters subject to the inquiry. Particular complaint was made by Mr Goodman KC about the failure of the Second Team to carry out interviews of its own, to examine all of the material that was before Falk J, and to refer to the notes that had been prepared on a daily basis by counsel who attended the hearing before Falk J. For the reasons already explained above with respect to the specific irrationality challenges that I have rejected, there was sufficient material for the Commission to come to the conclusion and/or make the findings that it did, and so it was not necessary to seek out or examine further evidence with respect to the matters addressed in the Report.

Conclusion on Ground 1

142. I have found that paragraph 45 of the Report is irrational in that no mention is made of Falk J's finding that the trustees applied an adequate amount of scrutiny to the 'top 25' clients. I have also found that the Report contained one observation that was irrational as a matter of substance: that is, the statement at paragraph 51 that "The trustees' decision to operate with a low level of reserves meant that they could not" avoid insolvency, which a reasonable reader would regard as a criticism of the approach taken

by the trustees to its reserve levels which resulted in them failing to save the charity from insolvency. (This irrational observation is essentially repeated in the Report's Conclusion at paragraph 73, where it was stated that "Higher levels of reserves may have allowed the Charity to avoid liquidation"). The other challenges on the ground of irrationality are rejected.

Ground 2: Predetermination

143. As for the Claimant's contention that the Commission acted unlawfully in that there was apparent predetermination as to the outcome of the Report, this is not made out. As already explained, there is a high threshold to substantiating an allegation of apparent predetermination and that threshold was not met in this case by a wide margin.

144. The fair-minded and informed observer would read the Report as a whole. In doing so, they would observe that, with the exception of not referring to Falk J's finding that adequate scrutiny had been applied to the 'top 25' clients, the Report fairly describes Falk J's judgment in the proceedings brought by the Official Receiver. As a result, a number of positive features of the work of the trustees, and the difficulties that they sought to navigate at the charity, were highlighted. A number of criticisms of the trustees and the charity's operation more generally are described but, save for the two matters which I have found to be irrational, there was plainly evidence available to the Commission to support the other criticisms that the Claimant complained about.

145. Furthermore, the criticisms were directed at matters which the Commission, as the expert regulator, was well within its discretion to decide were of sufficient importance to draw to the attention of the charity sector more broadly so that appropriate lessons could be learned from Kids Company's unfortunate demise. In spite of Mr Goodman KC's contention with respect to the reference to the 36,000 beneficiaries, this was not pernickety. The fair-minded and informed observer would not view the Report as reflecting a predetermined decision on the part of the Commission to find ways of doing down the charity and its trustees just for the sake of it.

146. Similarly, the failure of the Report to mention that the issues that had initially been the focus of the inquiry into Kids Company had narrowed following the conclusion of the proceedings brought by the Official Receiver would not be seen by the fair-minded and informed observer as reflecting a predetermined decision of the Commission to highlight the negative aspects of the charity's activities and operations. The fair-minded and informed observer would be aware that the Report is not merely negative about Kids Company, but contains a number of positive comments about the charity, as reflected in the description of some of Falk J's findings.

147. As for the process that was adopted by the Commission, this did not support the contention of apparent predetermination. I agree with the submissions made by Mr Hodivala KC on this matter (see paragraph 49 above), and consider that each of the matters that he referred to would, when drawn to the attention of the fair-minded and informed observer, negative the suggestion that the outcome was predetermined or was at real risk of being predetermined. Of particular note is the broad evidence base from which the Commission drew, as well as the extensive *Maxwellisation* process that the Commission undertook and which resulted in a number of changes to the draft. This would strongly suggest to the fair-minded and informed observer that the Commission was keeping an open mind as to what to include in the final report.

148. The fact that no reference is made to some of the matters that fell within the initial scope of the investigation does not lead to a contrary conclusion.

Conclusion

149. For the foregoing reasons, therefore, I allow the judicial review with respect to the two paragraphs in the Report which I have found to be irrational: (i) the failure to include within the Report the findings of Falk J with respect to the scrutiny by the trustees of expenditure on the 'top 25' clients (paragraph 45); and (ii) the implication at paragraph 51 of the Report that if the trustees had not made a decision to operate with a low level of reserves they might have been able to save the charity from insolvency (paragraph 51).

150. The remainder of the challenge is dismissed.