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Neutral Citation Number: [2020] EWHC 1675 (Admin)

Claim No: CO/4907/2019

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

Date of judgment: 26 June 2020

Before :

THE HONOURABLE MR JUSTICE FRASER

- -

Between :

The Queen on the application of
SOMERSET COUNTY COUNCIL
Claimant

- and –

THE SECRETARY OF STATE FOR EDUCATION
Defendant

- and –
(1) SWANMEAD COMMUNITY SCHOOL
(2) BRIDGWATER COLLEGE TRUST
Interested Parties

- -

Judgment

- -

Raj Desai (instructed by the County Solicitor Somerset County Council) for the Claimant
Leon Glenister (instructed by the Government Legal Department) for the Defendant
Owen Williams (solicitor advocate from Clarke Willmott LLP) for the Second Interested Party
The First Interested Party did not attend and was not separately represented

Hearing dates: 10 and 11 June 2020

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Mr Justice Fraser:

Introduction

1. In these proceedings, Somerset County Council ("SCC") seeks judicial review of a decision dated 16 September 2019 made by the South West Regional Schools Commissioner ("the Commissioner") to make an academy order permitting Swanmead Community School ("Swanmead") to become an academy, and join the Bridgwater College Trust[i] ("BCT"), which is a multi-academy trust or MAT. I shall refer to the decision in question as the Commissioner's decision. The Commissioner's decision was upheld by the National Schools Commissioner ("NSC") on 20 November 2019.

2. There are six different grounds relied upon by SCC in these proceedings, which seek to have Commissioner's decision declared unlawful. The Secretary of State, to whom I will refer simply as the Defendant, defends the judicial review proceedings on each of the six different grounds. Further, even if any of the different grounds are upheld, the Defendant challenges whether SCC is entitled to the relief it seeks in any event. This separate aspect of the proceedings is addressed in the section of this judgment headed "Relief" below. It only becomes relevant if SCC succeeds on any of the grounds that are advanced.

3. The permission stage which is necessary for all claimants to bring judicial review proceedings has been passed in this case, as Swift J granted permission to SCC on all six grounds in an order made by him on 13 March 2020. That was only very shortly before the national lockdown due to the Covid-19 crisis. The challenge by the Defendant in respect of relief to which I have referred at [2] above was argued before Swift J, at that stage being deployed by the Defendant in aid of a submission that permission ought not to be granted in any event (notwithstanding the reasonable arguability of the grounds) because the outcome of the proceedings would be academic. I also address this point further in the section headed "Relief".

4. Following the grant of permission, Swift J also made an order for directions so that an expedited hearing of the proceedings could be achieved. This hearing has taken place remotely using Skype for Business due to the ongoing Covid-19 crisis. I am very grateful to counsel for the parties, in particular, for the helpful and constructive way in which they have approached this hearing, and to the solicitors involved too, who have dealt so well with the difficulties presented by dealing with a hearing in this way.

5. The context in which these proceedings are brought is that SCC was, prior to the Commissioner's decision and during 2019, involved in a formal review of the education provision in the Crewkerne and Ilminster areas of Somerset (I shall refer to this as "the relevant area"). Swanmead is located within the relevant area. Currently, and this was the case both in 2019 and prior to that, the schools in the relevant area have been organised in an historic three-tier system, with first, middle and upper schools. Swanmead is one of these schools.

6. There are currently in the relevant area two middle schools, namely Swanmead and Maiden Beech Academy. As the name suggests, the latter was already an academy. Swanmead is the only middle school that is not an academy. Middle schools educate

children in years 5 to 8. There are seven first schools, which educate children from reception to year 4. The final tier in the three-tier system is upper schools. There is only one upper school in the relevant area, namely Wadham School. Upper schools educate children in years 9 to 13 (if they have a 6th form, which Wadham does), otherwise years 9 to 11.

7. There are other alternatives generally in education to the three-tier system, including (but not limited to) what might be seen by some as the traditional model of primary and secondary schools, but also other scenarios, including consolidated schools. Obviously, the same model will not apply across the whole country, which is why different councils have adopted different models. Also equally obviously, population demographics in different areas are different, and change over time. Numbers of pupils will not remain constant, or even approximately similar, over the years. The costs of operating schools can be high, and resources have to be organised in order to achieve efficiency in the provision of education. SCC has a statutory duty (dealt with in further detail below) under sections 13, 13A and 14 of the Education Act 1996 to secure the efficiency of education, to promote high standards and to ensure sufficiency of school places.

8. SCC accept that all six of the grounds advanced to challenge the lawfulness of the Commissioner's decision are inter-related, as indeed they are. At the heart of all the grounds is the following, which can be stated in summary only at this stage in this judgment, to put what follows in further context. SCC initiated a formal review process in early 2019 to consider the organisation of education generally in the relevant area. That review, which included a process of consultation of viable options for all the schools in the relevant area, was ongoing at the time of the Commissioner's decision. This review was undertaken due to existing problems and challenges in three-tier system in the relevant area. By making the decision when she did and on the material that she did, SCC submit that the Commissioner has had a prejudicial effect upon that review process, and indeed has severely curtailed SCC's options in terms of the entire re-organisation. SCC's position (and this is reflected in one of the specific grounds, Ground 5) is that Swanmead's application for an academy order was made specifically by that school to protect its own specific position within the review. Although Swanmead's position as a middle school will, by virtue of the academy order, be protected, SCC submits that it has wider duties in respect of the provision of education across the area and including all the different schools.

9. SCC also point out that by making the order and allowing Swanmead to become an academy, BCT (the MAT which Swanmead applied to join) would acquire a legal veto over significant changes to Swanmead which is not currently available. The Defendant relies upon a number of points, but submits that applications for academy status are what it terms "school led". The Defendant draws attention to the fact that the application for academy status was made by Swanmead itself, and also further submits generally that the Commissioner could not be expected to delay or defer any decision on academy status until the review into schooling in the relevant area had been completed. It is said on the Defendant's behalf that were the Commissioner to be required to do this it "would be providing SCC with an unlawful veto over [the Commissioner's] power". It also submitted at the hearing that had it delayed consideration of the application by Swanmead, that itself would have been potentially subject to judicial review by the school. It also relies upon co-operation by the MAT

following the academy order to meet the point that the legal effect of the order is to give the school (or more accurately, the MAT which it will have joined) a veto over future re-organisation across the whole area.

10. The final point by way of introduction is as follows. Judicial review does not exist as a mechanism to ask the court to substitute its own decision on the substantive issue that was before the Commissioner. The issue before the court is whether the Commissioner's decision was a lawful one. A great deal of the factual material was aimed at the underlying issues facing SCC generally in the relevant area, and also its re-organisation options. However, all of this can be distilled to the following points. SCC had already initiated a serious and wide-ranging review, and the first stage in that was an independent report (explained further at [14] below) which cost SCC £75,000. That report concluded that the existing three-tier structure was not viable. A number of potential structural changes were identified, but which of those options was to be adopted required consultation, discussion and hopefully consensus amongst the different key stakeholders. It was actually during that consultation process that the Commissioner made the academy order she did. It is this that lies at the heart of this judicial review. This case contains unusual facts.

The facts

11. I have evidence before me from Mr Farrow, the Head of Education Partnerships at SCC, and Mr De Rivaz, who is the Delivery Team Leader of the Defendant's Regional Delivery Directorate South West, of the Early Years and Schools Group. All of the evidence gives a comprehensive picture of the surrounding circumstances, and has certainly led to a depth of understanding on the part of the court of what occurred, over a period of about nine months in 2019, the period prior to the Commissioner's decision. Not all of the evidence is of direct relevance to the application for judicial review. It has to be remembered that the court is not making its own separate decision on whether Swanmead should, or should not, become an academy. The first question for the court is a rather different one, and it is whether the Commissioner's decision was a lawful one. If that is answered in favour of SCC, the next question is to what relief, if any, is SCC entitled.

12. As of the beginning of the 2018/2019 academic year, the schools available in the relevant area were organised in the following way. There were seven first schools and two primary schools, eight of which were Voluntary Controlled ("VC") schools. Of the two middle schools, Swanmead is a maintained community school, and Maiden Beech Academy was already an academy trust. Maiden Beech was permitted to join BCT on the same date as the Commissioner's decision in respect of Swanmead, which is challenged in these proceedings. The only upper school, Wadham School, is also a VC school. The VC school sites are typically owned by the Diocese of Bath and Wells.

13. Wadham School has a budgetary deficit, which was £646,301 at the end of the 2018/2019 academic year, and which is projected to be about £1 million at the end of the 2019/2020 year. It is growing year on year. Maiden Beech and Swanmead also have budgetary deficits. Each of Wadham, Maiden Beech and Swanmead is currently judged to be Good or better by Ofsted, the shorthand term for the Office for Standards in Education, Children's Services and Skills. Ofsted inspects services providing

education and skills, and also regulates services that care for children and young people.

14. Wadham School caters for Years 9 to 13, which translates into those children studying for their GSCEs (taken at the end of Year 11) and those in the 6th form (Years 12 and 13). SCC commissioned a review into school provision in the relevant area across all year groups. The first step in this review was in early 2019, SCC engaged an independent educational consultancy called Futures for Somerset ("FFS") to undertake a report. At the time the review was initiated, there were 60 pupils across both years in the 6th form at Wadham School. The accepted view (according to Mr Farrow) is that 100 pupils per year group are required for a 6th form to be viable and offer a broad and balanced curriculum. There are currently only 35 pupils in the 6th form at Wadham School.

15. Closing the 6th form at Wadham School would not leave the school in a viable state as it would only have three year groups there (Years 9, 10 and 11), given it is currently an upper school. Accordingly, and this could be seen as a cascade effect in a way, considering the future of Wadham School inevitably leads to consideration of the two middle schools, Swanmead and Maiden Beech, and with it consideration of whether the three-tier system should be continued across the relevant area. It could be said that there was and is no "one-school" solution, given the current organisation of the different schools in the relevant area. One point which must be borne in mind, in my judgment, is that the FFS Report was emphatically *not* the entirety of the review instituted by SCC. It was certainly an important part, but as the FFS Report itself made clear, the report was to be followed by a two-phase consultation process that was developed in accordance with the Department's "Consultation Principles Guidance 2018". The indicative programme was for Phase 1 to run from 1 July 2019 to 23 August 2019. Phase 2 was the formal consultation stage and this was to run from 26 August 2019 to 8 November 2019. These dates are clearly set out in the detailed FFS Report, under the heading "Key Consultation Stages".

16. Other features that are relied upon by SCC are that the surrounding areas (meaning areas around the relevant area) in Somerset and Dorset are all two-tier, and also that there are around 800 pupils in the relevant area aged 11 to 16 years of age, with no significant increase in these numbers of pupils expected. This is the size of a medium sized secondary school, and at the moment these pupils are spread across three schools (Swanmead, Maiden Beech and Wadham).

17. Two primary schools were judged inadequate by Ofsted in January and March 2019; due to the relevant legislation, the Defendant has no discretion in the matter and academy orders were made in respect of these two schools. Although the position of the parties in this respect, due to these proceedings, seems to have led to some delay, they were in fact converted to academies on 1 April 2020.

18. On 4 April 2019 SCC wrote to the Commissioner and asked her to defer making a decision on the application by Swanmead for an academy order until after the review that was being conducted had been concluded. The Commissioner decided that a decision on Swanmead's application should be deferred, and this was confirmed to SCC in a letter dated 23 April 2019. Swanmead had made its formal application in March 2019, after the FFS Report had been initiated.

19. That letter from the Commissioner also stated that there was a need to balance the timely application for the academy order with the knowledge of the different options, and their appraisals, that would be contained in the review. SCC also objected, and this was also included in the letter of 4 April 2019, to Swanmead becoming an academy at all. This was in addition to the concerns, also expressed by SCC, that changes to age ranges of pupils educated at Swanmead would also occur. That letter from SCC of 4 April 2019 states the following:
"I…..ask that you defer any decision in relation to applications by the schools to join the BCT until the Local Authority Commissioned Review into the provision of school places in the area is concluded.
…..
Following discussions with Headteachers and Governors of the schools in the area we have commissioned a review of provision with the intention of producing an options appraisal which will identify the most appropriate structure for the area to then take forward for public consultation. We expect the options appraisal work to be completed by the end of May and to have a proposed way forward by the end of the Summer Term."
In my judgment, the options appraisal work is what was being done in the FFS Report. This letter makes clear that public consultation would follow. The Defendant in its skeleton argument explains that this request by SCC was for a deferral until what it describes as "the FFS Review" was completed, but that is not in my judgment correct. The FFS Report was part of the review, but it was not the entirety of it.

20. As it happens, the FFS Report was not available at the end of May as expected in this letter, and it was not until early June that a draft became available. That delay was, in my judgment, de minimis and certainly does not explain what occurred later.

21. The theme that runs through SCC's challenge is that the direct consequence of making the academy order is that SCC lost its ability to control or re-organise education at Swanmead. This included the power to institute changes such as it no longer being a middle school, educating different age groups or even remaining open. I should record at this stage two points about potential changes to the ages of pupils educated at Swanmead. Mr De Rivaz makes the point in his evidence, and this is advanced also by Mr Glenister for the Defendant in his submissions, that changes to the ages of pupils to be educated at an academy school have to be separately approved by the Commissioner. In other words, simply because an academy order is made over a particular school, does not mean that any age changes to pupils educated at that school will automatically follow. The counterpoint to that is absent the agreement of the academy in question, no changes can be imposed upon it. It is therefore the case that considerations regarding age changes at Swanmead, and the approval required by the Commissioner to this, would only arise in Swanmead's case *if* it decided to seek age changes. In a way, each point is a different side to the same coin. Absent an academy order, no issue would arise in terms of an application to change age groups, as SCC could impose these on the school. If a school is an academy, this cannot be done by SCC. Consent of the academy or the MAT would be required, and only then would an application have to be made (in this case) by the MAT to change the age range educated at that school. If Swanmead decided to remain a middle school, nothing could be done about that by SCC.

22. SCC's had concerns generally about Swanmead's intentions. These originated in a press article quoting the views of the Chief Executive Officer of BCT, Mr Peter Elliott, who stated that after Swanmead and Maiden Beech joined BCT, an application would be made to change the age range of pupils educated at those two middle schools. In other words, the MAT may proceed with what would be essentially its own limited re-organisation of education in the relevant area in terms of those two middle schools alone. This would not necessarily match the intentions of SCC in terms of its wider re-organisation, and it would obviously lose control of the only middle school in the relevant area that it controlled (Maiden Beech being the other one, and an academy already). Mr Elliott seems to have disavowed those comments, but Mr De Rivaz's evidence states that "in relation to this article, I obviously cannot comment on BCT's intentions at the time or whether its views were accurately presented. However, I took on board SCC's concerns and contacted Mr Elliott and reiterated both the RSC's expectation of positive engagement by all parties in the review process, and also that the impact on local provision would be a key consideration in the RSC's consideration of any potential future applications to change age ranges."

23. Sitting in the wings was the sole upper school in the area, Wadham School, which is a Voluntary Controlled school with a strong link with the church. That school had already been approached by Mr Elliott of BCT to become an academy and join BCT. The headteacher and governors were not prepared to do so, being of the view that the Board of BCT did not share the school's values. Wadham is a VC school as I have explained, and its site is owned by the Diocese of Bath and Wells. It was following the failure of that approach to Wadham that the two middle schools Swanmead and Maiden Beech (the latter being an academy already) applied to join BCT.

24. Applications for academy status are considered by the Commissioner, who is supported in this function by the Headteacher Board or HTB of the relevant region, and the Commissioner chairs this meeting. After Swanmead made the application to the Commissioner to become an academy, the application was considered at the HTB meeting which was held on 10 June 2019. The application for an order was declined following that meeting, the choice for the Commissioner on any application being to approve or decline an application. The evidence of Mr De Rivaz is that the reasons for declining the applications were not connected with the review instituted by SCC. The reasons were concerned with governance concerns about BCT and its record and capacity to secure improvement at Key Stage 2. The draft of the FFS Report had been provided to the Commissioner's office and discussed with the Commissioner's staff prior to this meeting, namely on 5 June 2019. Its conclusions were not, however, among the reasons given for declining the application by Swanmead.

25. The two options with the highest score in the FFS Report identified by its independent authors were as follows:

> 1. Option 3B (which achieved a score of 0.583). This involved expanding the numbers at Swanmead to accommodate a 420 pupil two form entry primary school, which would be in line with the maximum number the Swanmead site can hold.

2. Option 4D (with a score of 0.408). This involved utilising the existing capacity at Swanmead to accommodate infant age pupils.

3. Another Option, 4A, included the closure of Swanmead. This option had a score of 0.229, but involved fewer total school closures across the relevant area.

26. The notes of the meeting on 10 June 2019 record, not only that the two applications (one for Swanmead and the other for Maiden Beech) were declined, but that there was to be a further meeting held in September between the Commissioner's office and BCT in September. It is nowhere recorded that it was intended that either of these declined applications were to be re-considered for approval by the HTB in September.

27. Jumping ahead a little, the applications were formally considered again in September, at the HTB meeting of 16 September 2019. They were recommended and the order was made that day. Mr Glenister submits for the Defendant that "it cannot be argued that the RSC had to delay further and/or indefinitely pending an outcome of SCC's review". It is not entirely clear what the Defendant means by "delay further" in this context. The decision was made by the Commissioner in April that the decision on the applications should be deferred to take account of the review; the draft of the FFS Report was available at the HTB meeting on 10 June 2019, but the application failed (or to use the accurate term, was declined) for other reasons. The consultation period that was to follow the FFS Report was already underway. An online consultation for parents was due to close at the end of August 2019. Even if it is correct to portray the requests by SCC to defer making a decision on the academy application until after the FFS Report (which is how the Defendant puts it) rather than the review, then the FFS Report itself makes clear a period of consultation was required in order properly to consider the options that the FFS Report contained.

28. If anything, at least three months of any delay had been caused by the failures or deficiencies in the application, alternatively concerns at the June HTB meeting about BCT's governance, at least so far as Mr De Rivaz's evidence is concerned. Given the application was declined at the June meeting for the reasons I have identified, I do not consider delay prior to June (or to be more precise, prior to satisfying the concerns in the application) can be laid at the door of SCC. The arguments advanced by the Defendant which I have summarised proceed as though endless delay had been caused by waiting and waiting for the review, and that such waiting could not go on indefinitely. That is not an accurate characterisation of the passage of the application, nor of what was going on at the time.

29. The Defendant also points to some communications between Mr De Rivaz and SCC in very late August/early September, wherein he was seeking to obtain up to date information on the review. These enquiries must be seen in the light of the following:
1. SCC was formally notified in a letter of 23 August 2019 that the applications would be formally reconsidered on 16 September 2019. That is not a great deal of notice in any event, putting entirely to one side that this was in the middle of August.
2. Other parties directly impacted were notified even later. The Diocese of Bath and Wells, in its representation paper for the HTB meeting of September 2019, stated "none of the schools in the area under review were aware, at the start of the academic year, that the middle schools [applications] were returning to the HTB in September".

This shows that even at the very beginning of September, not everyone had been told formal reconsideration would take place on 16 September 2019. In any event, that representation by the Diocese sought to have the decision delayed until after the review was completed.

3. Wadham School stated, in its representations of 4 September 2019, that it had only seen from the draft agenda for the HTB September meeting that reconsideration of the academy application was on that agenda. This is even less notice, and is somewhat indirect. Notwithstanding that lack of notice, Wadham made representations that the decision should be delayed and stated "to make a decision now about this change would seriously impact the ability to manage the change needed in a sensible manner". It also made clear that Swanmead's application was a defensive measure to preserve itself either in its current form, or as a very small and unviable school.

4. St Bartholomew's C of E First School stated in its letter of 5 September 2019 that it was "shocked and disappointed to receive notification second hand [that] reapplication had been made to the board." It urged that a decision should not be made "prior to the completion of the review" and also that a decision should not be made "before the final outcome of the independent review".

5. SCC made it clear, including in an e mail of 13 September 19, that there was a requirement to "explicitly address school organisational planning"; that its position remained as set out in its previous letter; and that "an area solution is necessary for academies and local authority maintained schools". It also recognised that government policy favours the development of MAT structures.

30. It should also be noted that Mr De Rivaz, in his e mail to SCC to which the e mail at [29](5) above was a response, stated that he knew meetings were ongoing over the summer "and that a consultation has been running on the LA's website, so I was keen to get some clarity on what the next steps are.". Those steps were clearly set out in the FFS Report itself.

31. There were some implied criticisms made by the Defendant of SCC in the evidence and submissions in these proceedings, including that there was "a lack of initial reply by SCC" and a "lack of any real clarity" in the responses that were sent by SCC in late August/early September. It is also said that SCC itself did not specifically ask in late August/early September that the decision be deferred. However, those submissions were made by the Defendant focussing on isolated passages in some of SCC's communications, which with hindsight could potentially have been worded differently. However, when all the documents are considered throughout the period leading up to the meeting on 16 September, not only from SCC but also the representations from the Diocese and Wadham as well, the following is in my judgment clear:

1. The whole structure of education in the relevant area generally was subject to the SCC review process.

2. The FFS Report correctly recorded that the existing three-tier structure was not viable and would have to change. This conclusion was available to all parties involved, including the Commissioner and her office, from June.

3. Consultation amongst all the key stakeholders was required to arrive at the conclusion to the review, which would identify the solution.

4. The consultation required for Phase 1 of that was underway and due to close at the end of August 2019.

5. A whole area solution was required.

6. The Commissioner was being asked not to make a decision on the application in isolation, and also not to make a decision on the application at the meeting of 16 September 2019, and to wait until the review had been completed.
7. The FFS Report itself included within it a specific and detailed timetable for the further steps. Formal consultation was to end on 8 November 2019, and this was set out in the FFS Report.

32. The structure of education in the relevant area generally was felt by SCC not to be viable under existing three-tier system. However, that option was not ruled out prior to instructing FFS to compile the FFS Report. This is made clear in the Executive Summary to that document, which states "Options considered were to include both three-tier and alternative two-tier; primary and secondary structures, based on the current locality system and wider national picture." The FFS Report was not directed in one particular way, and examined all the available future changes that might deal with the difficulties facing SCC in the relevant area. SCC knew, or felt, that the three-tier system would have to change, and that was why it initiated the review. This was to affect all the schools (although Maiden Beech, one of the two middle schools in the are, was already an academy). The FFS Report confirmed that, whichever option was chosen, the three-tier system could not continue.

33. The FFS Report itself is very detailed and runs to some 137 pages. It is not necessary to set out very extensive quotations from it in this judgment. The findings it made had been presented to SCC, both officers and councillors, representatives of the RSC's office and of the Diocese of Bath and Wells, on 7 June 2019 when it was made available in draft. The FFS Report is actually dated 12 June 2019. It identified, in passages quoted in the evidence of Mr Farrow which I consider to be relevant, that:
1. The maintenance of the existing structure was not viable. As stated in the report, "retaining the existing three-tier education structure…..is not an option". This was called the "doing nothing" option.
2. Re-structuring of education in the relevant areas is what was required. This was what the FFS Report called a "step change" in education.
3. The introduction of a MAT across the area could cause problems if an ad hoc process was taken to implementing that solution. By ad hoc, this means an isolated approach taken simply to those specific schools, rather than all of the schools in the relevant area.
4. Establishing a MAT with Swanmead and Maiden Beech (what Mr Farrow terms a MAT hub) would place a "significant constraint" on SCC's ability to pursue recommendations or preferred options from the report.
5. Structural change would be harder to achieve if the change was not pre-agreed with the MAT, or implemented first. There would be increased complexity, an increase in the number of stakeholders and competing aspirations, which would increase the chance that the current challenges would remain unresolved into the future. The introduction of a MAT could also result in "significant worsening of other schools in the area due to student migration and potential age range changes".

34. SCC made it clear that it was not opposed to a MAT across the relevant area. One of the documents sent to parents as part of SCC's notification involved in the consultation referred to government policy in this area. That document was a research report commissioned by the Defendant entitled "Running small rural primary schools efficiently". SCC's letter referred to the preferred option for small rural schools being

within a single MAT. In post-hearing clarification, the Defendant stated that he "wishes to make clear that the report does not give an express preference for a single MAT in a locality, and his policy is that MATs are the preferred school structure for school organisation (both for small rural schools and otherwise), but there is no policy that there should be a single MAT for an area". SCC took no issue with that clarification by the Defendant.

35. SCC's preference for a single MAT forms the subject matter of one of the grounds, namely Ground 3. Various matters led to both SCC and other parties (such as those involved with Wadham) to have doubts about BCT's ability and willingness to become a central part of the solution, rather than exacerbating the existing problem. Whether those doubts were well founded or not, meetings were held between Mr De Rivaz and representatives of BCT, including Mr Elliott, leading up to the decision in September 2019. As late as 12 September 2019, just a few days before the meeting, Mr De Rivaz sought further assurances from Mr Elliott that BCT "would work with and support structural changes if that was the agreed outcome of the LA [ie the SCC] review". Mr Elliott's response stated that the BCT Board "acknowledged their responsibility to work alongside other local stakeholders". This appears to have been sufficient assurance, and some of the papers put before the HTB made clear that local structural change was potentially in the air, that consensus would be needed, and that "the BCT remain of the view that the future of all three schools would best be secured by close collaboration working within a single MAT". In my judgment, that reinforces that BCT would have the future of its own schools centrally in mind in terms of structural reorganisation.

36. This, in my judgment, underscores the point advanced by SCC generally in these proceedings, and is the reason why SCC commenced these judicial review proceedings. By making an academy order in respect of Swanmead, both the middle schools in the relevant area were out of its control, and BCT (the MAT which it sought to join) would have the future of Swanmead and Maiden Beech as their central consideration.

37. There are other factual matters that are heavily debated by the deponents on both sides, such as the degree of notice SCC was given of the re-consideration of the application taking place, and whether the decision to reconsider the applications in at the meeting on 16 September 2019 derailed the process of public consultation SCC was holding at the time into the restructuring across all the schools. Certainly, the online consultation was due to end on 31 August 2019. This was to include head teachers, chairs of governors as well as parents. That consultation part of the review has obviously not progressed since the academy order was made. Rumours and articles in the press, including the plans that BCT had, are said to have added to what might be described as a general loss of confidence in the organisation of education in the relevant area, what the structural change required might be, and whether it could be achieved at all.

38. Suffice it to say that whilst these legal proceedings have been unfolding, uncertainty remains in the relevant area about its school provision, with all that entails for SCC, staff, parents and pupils of all the schools, as well as BCT. SCC is aware it must reorganise the structure of schools, hence the instigation of the review, and the commissioning of the FFS Report as part of that. The fundamental difficulty with that

whole review process at the moment, however, is that once the academy order was made for Swanmead, one of only two middle schools in the relevant area (and the only one that was not an academy trust already), Swanmead was effectively taken out of the equation as to how SCC organises its educational structure. SCC submits that BCT acquired what SCC refer to as a "legal veto" over SCC's plans. The Defendant accepts that in technical terms (which means in law) BCT did acquire this as a result of the academy order, but relies on co-operation by BCT in answer to this point, as well as maintaining that the decision on the application was a lawful one.

39. All of the options that were identified by FFS require significant changes to Swanmead, ranging from age range changes to potential closure. There is a mixed educational landscape in the relevant area, as there are different types of schools and not all of them are controlled by SCC. It is not therefore solely within the hands of SCC to dictate the ultimate outcome of the review process. Instead, this must be the product of a consensus reached among relevant stakeholders in the area following a process of dialogue. SCC submits that the decision to enable Swanmead to become an academy and to join BCT prior to the completion of the on-going review, risks both prejudice to that process, and also forecloses key options that were under on-going consideration in the review process which was actually taking place at the time of the Commissioner's decision.

40. I would also add that the Defendant seeks to rely, in defending these proceedings, upon the failure by SCC to challenge the decision in respect of Maiden Beech that permitted it to join BCT to become part of a MAT. That decision was taken at the same time as the one under challenge in respect of Swanmead. SCC wrote a letter of complaint concerning Maiden Beech to the National Schools Commissioner on 23 October 2019, and also sent a letter of claim under the judicial review pre-action protocol on 20 November 2019. Before any answer was received to that letter of claim, the transfer of Maiden Beech to BCT was in fact completed on 1 December 2019. Although this was a Sunday, I was told that transfers always take place on the first day of any month. The senior management team of SCC only learned of that on 27 November 2019 (the Wednesday before). The transfer therefore took place actually during the pre-action protocol period which is, in my judgment, somewhat unseemly. It also potentially undermines the purpose of the judicial review pre-action protocol itself. However, and in any event, Maiden Beech was an academy already even before the order of 16 September 2019. The consequences of the transfer to BCT of an existing academy are not the same as the consequences of Swanmead becoming an academy in the first place. I find further that the lawfulness or otherwise of the decision which is being challenged in respect of Swanmead, is not affected by any failure by SCC to undertake a separate judicial review challenge in respect of Maiden Beech. The order made on 16 September 2019 regarding Maiden Beech simply allowed an existing academy trust to join BCT. In any event, any failure by SCC is understandable given the lack of timely and proper notice to SCC by the Defendant following the letter of claim sent by SCC. This point is relied upon further by the Defendant in its separate challenge to relief, if any of the grounds are made out. It will therefore be considered further in that section of this judgment.

The Statutory Framework

41. The following statutes provide the framework for education generally, and also within which the Commissioner makes her decisions in terms of academies. Section 13(1) of

the Education Act 1996 imposes a duty on SCC to secure efficient education in the following terms:

"s.13 General responsibility for education

(1) A local authority shall (so far as their powers enable them to do so) contribute towards the spiritual, moral, mental and physical development of the community by securing that efficient primary education and secondary education and, in the case of a local authority in England, further education, are available to meet the needs of the population of their area."

42. Section 13A imposes a further duty in respect of persons under the age of 20 (and persons over that age for whom an Education and Healthcare plan is maintained) to "ensure that their relevant education functions and their relevant training functions are (so far as they are capable of being so exercised) exercised by the authority with a view to- (a) promoting high standards, (b) ensuring fair access to opportunity for education and training, and (c) promoting the fulfilment of learning potential by every person to whom this subsection applies".

43. Section 14 imposes a mandatory duty on local authorities to secure sufficient primary and educational places in their area in the following terms:

"(1) A local authority shall secure that sufficient schools for providing—

(a) primary education, and

(b) education that is secondary education by virtue of section 2(2)(a),

are available for their area.

(2) The schools available for an area shall not be regarded as sufficient for the purposes of subsection (1) unless they are sufficient in number, character and equipment to provide for all pupils the opportunity of appropriate education."

(emphasis added)

44. The section 14 duty is a "target duty"; ***R v Inner London Education Authority, Ex p Ali*** (1990) 2 Admin LR 822 at 828-9, per Woolf J. He stated "…it is important to recognise that the duty which is placed on the [local authority] is in very broad and general terms". He went on to described it as the "counter-part of the even wider duty placed on the Secretary of State under s.1 [of the Education Act 1944]. It is the type of duty which is a common feature of legislation which is designed to benefit the community".

45. The Secretary of State's broad counterpart duty is no longer found in the 1944 Act and is now to be found in sections 10 and 11 of the Education Act 1996. Section 10 provides that "the Secretary of State shall promote the education of the people of England and Wales". Section 11 provides that the Secretary of State must exercise the powers which he or she has in respect of publicly funded bodies which have responsibility for the provision of education "for the purpose of promoting primary, secondary and further education in England and Wales and in particular with a view to improving standards, encouraging diversity, and increasing opportunities for choice".

46. SCC is a local authority and has powers both to publish and consult on proposals for alteration or discontinuance of a maintained school, and to make significant changes. These powers are found both in sections 15, 16, 18 and 19 of the Education and

Inspections Act 2006 ('the 2006 Act'). Section 19(1) of the 2006 Act provides that where (a) the local authority propose to make a prescribed alteration to a maintained school, and (b) the prescribed alteration is one that under section 19(2) is capable of being proposed by a local authority the authority must publish their proposals under this section. There are a broad range of changes which any local authority can make, and these are included in secondary legislation, namely The School (Organisation (Prescribed Alterations to Maintained Schools)(England) Regulations 2013 ('the 2013 Regulations').

47. The changes or alterations include enlargement of premises, alteration of upper or lower age limit of a community school, transfer to a new site and discontinuation of use of a site.

48. Under sections 15 and 16 of the 2006 Act, a local authority is able, following consultation and subject to having regard to a number of mandatory material considerations and statutory guidance, to discontinue a maintained school by publishing proposals. None of these powers on the part of SCC are in issue in these proceedings. However, an academy is not a maintained school and is therefore not subject to these local authority powers, Accordingly, conversion to an academy takes a maintained school outside the scope of the SCC's powers. It is this that lies at the heart of these proceedings.

49. Pursuant to s.1 of the Academies Act 2010 ('AA 2010'), the Defendant may enter into what are called "academy arrangements" with any person. That person could be an existing academy trust (in which case becoming part of a MAT) or a single academy. These arrangements take the form of either (a) an academy agreement, or (b) arrangements for academy financial assistance. The person entering into the academy agreement or arrangements must undertake to establish and maintain an educational institution in England which meets the specified requirements of the AA 2010 (which specify the characteristics of an academy), and "to carry on, or provide for the carrying on, of the institution" as set out in section 1(5) AA 2010. The Defendant makes payments to the other party to the academy arrangements. Essentially, the funding of the academy goes directly to the academy from the Department of Education, and the school will thereafter sit outside the control of the local authority.

50. An Academy School is an independent educational institution that has a curriculum satisfying the requirements of s.78 of the Education Act 2002 (which requires a balanced and broadly based curriculum), provides education for pupils of different abilities, and also provides education for pupils who are wholly or mainly drawn from the area in which it is situated. An academy order made by the Defendant is required to permit a maintained school to become an Academy School. Section 3(1) AA 2010 provides that the governing body of a maintained school in England may apply to the Secretary of State for an academy order to be made in respect of the school.

51. Section 4(1)(A) AA 2010 provides that the Secretary of State "<u>may</u> make an Academy order in respect of a maintained school in England if - an application in respect of the school is made under section 3" (emphasis added). In other words, it provides a discretion whether or not to do so upon an application by the school. Schools that are judged inadequate by Ofsted are dealt with differently but it is not necessary to examine that separate, non-discretionary, process at this stage.

52. The Secretary of State has authorised Regional School Commissioners ('RSCs', in this case referred to as the Commissioner) to decide applications for academy orders under section 3(1) AA 2010, assisted by advice from the Headteachers Board or HTB. The Commissioner's functions and guidance on his or her decision-making are set out in guidance published by the Secretary of State entitled 'Regional Schools Commissioners Decision-making Framework' issued December 2016 ('the Commissioner's Guidance').

53. Before a maintained school is converted into an academy, its governing body must undertake a consultation of such persons as it thinks appropriate as to whether the conversion should take place. This can take place before or after the application for an academy order is made, as set out in section 5(1) and (3) AA 2010. The effect of such an order in respect of a maintained school is that a local authority must cease to maintain the school on the conversion date on which the school that replaces it opens as an academy. It thereafter becomes an independent school as I have explained.

54. The Commissioner's Guidance makes it clear that Commissioners are civil servants, and this means that the Defendant remains accountable for, and has power to overturn, their decisions. It is the Commissioner who is the decision-maker, but he or she is informed by the views of the HTB. Members of the HTB are non-executive and their role is to provide advice, scrutiny and challenge to the Commissioner's decision-making. The Commissioner's role concerning applications from maintained schools to convert to academy status is to approve or decline applications. This has to include consideration of "the academic and financial performance of the school, as well as viability", a passage taken from the guidance.

55. There is no dispute between the parties about the legal landscape within which schooling generally is conducted, and academy orders are made. Nor is there any appreciable difference about the principles contained in the relevant authorities. There did appear, at least on the written skeletons, to be a difference in approach under Ground 5, and whether the Defendant's duties under the Academies Act should be exercised consistently with SCC's duties under the Education Act 1996. However, when that was explored in oral submissions, the Defendant accepted the following. The Defendant has counterpart duties under the Education Act 1996 to those of SCC, which are target duties. The Defendant's duties under the Academies Act have to be exercised consistently with the Defendant's duties under the Education Act 1996. This clarification of position by the Defendant does have some consequences in terms of how Ground 5 is advanced by SCC and considered, but this is dealt with under Ground 5 below. SCC portrayed this as a "concession" by the Defendant, but I am not sure that is a necessary description. Whether it was a concession or not, it does mean that the Defendant accepts (rightly, in my judgment) that decisions on academies have to be made consistently with his other statutory duties in respect of education generally.

The Commissioner's Decision

56. The concerns by SCC about Swanmead's application were communicated to the Commissioner in advance of the HTB meeting, and decision, on 16 September 2019. The phrase used by Mr Farrow in his evidence is that by Swanmead becoming an academy this would create an "additional impediment to restructuring". Another

statement which accurately sums up SCC's concerns is that SCC was concerned "that the two middle schools were trying to take themselves out of the debate about a viable whole area solution". Whether that was the specific intention of both of the schools themselves, in a sense Maiden Beech was (as an academy) "out of the debate" to some extent already. However, Swanmead was not, but would become so if its application for academy status was successful. As I have identified above, SCC was only notified in late August 2019 that Swanmead's application for academy status would be considered at the HTB meeting on 16 September 2019. SCC response on 3 September 2019 stated that it "recommended that a single organisational solution is provided for all schools in the area." This is consistent with its stance prior to learning that the application would be reconsidered at the September meeting.

57. I will return to the apparent haste with which the application was reconsidered at the end of this judgment at [180]. The evidence for the Defendant, and to a limited extent the submissions as well, maintain that the Commissioner could not delay a decision indefinitely, and was under a duty to consider the application by Swanmead in a timely fashion. That is correct as far as it goes. However, those points, both evidential and in submission, ignore two important matters, which is that the application had been already considered in June 2019, and had been declined for reasons unconnected with the review that was underway. If it were right for the Commissioner to be concerned about delay – and it is correct that applications have to be considered within a sensible timescale – then delay can only sensibly be considered from the period after June 2019. The application made by Swanmead was found, in June 2019, to be deficient, or certainly not to be in a state fit to be approved. Secondly, what is a sensible or timely period within which to consider applications has to be considered in all the circumstances. Those circumstances here included the ongoing review being performed by SCC, and the current structural non-viability of the existing three-tier system in the relevant area. The circumstances also included that Swanmead is a middle school, and was the only middle school in the relevant area that was not an academy.

58. The communication to the SCC in late August that the application would be considered at the meeting of 16 September 2019 does seem, on the face of it, to be somewhat precipitate in all the circumstances. That is not determinative of, or even necessarily relevant to, the application for judicial review. However, given the dates of what had occurred, it was unrealistic to expect that the SCC review exercise would – or even could – suddenly be completed by the time of that HTB meeting. The skeleton argument for SCC refers to "the complex, sensitive and time consuming process of dialogue and consensus building for all relevant stakeholders to seek to reach agreement on a whole area solution"**.** The FFS Report had been published on 12 June 2019, which is obviously towards the end of the summer term. Phase 1 of the consultation process which followed was only to be concluded at the end of August 2019. The FFS Report made clear that to comply with the Department's own guidance on consultation, that was to be followed by Phase 2, formal consultation.

59. SCC was not the only stakeholder that sought deferral of the decision on Swanmead's application pending the outcome of the review. There were a number of representations from other stakeholders including the Diocese of Bath and Wells and some of the other schools, which sought deferral of the decision pending conclusion of the review. These representations were made to the Commissioner who was

apprised of them. They stand entirely separate from the FFS Report itself, which within it contained a great deal of detail about what was to follow. The FFS Report however was not before the HTB Board at the 16 September meeting.

Material before the decision maker

60. The authorities make clear that the material before the decision maker must be identified. This was as follows, and the following list was expressly confirmed with counsel for both parties during the hearing.
    1. The Project Template.
    2. The Update Memorandum.
    3. Representations by stakeholders.
    4. The applications themselves.
    5. The MAT Sponsor Template.
    6. An oral update provided by Mr De Rivaz.

61. The Update Memorandum was headed "Update from June HTB" and summarised the review process in the following terms:
    "Wider context: Ilminster and Crewkerne school system review.
    Since the June HTB meeting, limited progress has been made in moving from the Futures for Somerset options appraisal towards a preferred option for any structural changes to the local school system. A number of schools have challenged factual aspects of the report; there appears to be little local appetite (including from the LA and the Diocese) for the more radical options that would involve multiple closures; and it is apparent that many of the options would carry a high capital cost."
    I do not consider that passage in the memorandum to be an accurate summary of what had occurred between June and September. The document moves on to refer to a meeting that was held in June, and also that the two schools wished to continue with their applications to join BCT. However, it wholly omits any reference whatsoever to the consultation process commenced by SCC that had ended on 31 August 2019. It also suggests that the review process had almost ground to a halt. By using the phrase "limited progress…..towards a preferred option for *any structural changes*" (emphasis added) it suggests that the conclusion of the FFS Report, namely that retaining the three-tier system ("doing nothing") was not a feasible way forward, was a potential if not the likely outcome.

62. Mr Glenister for the Defendant submitted that there was no specific ground dealing with this inaccurate summary in the Update Memorandum, and Mr Desai in reply stated that he would, if necessary, amend the Grounds, which he maintained was not unusual. He also submitted that this was simply a pleading point being taken against SCC. The proposed amendment to the Grounds was not identified. He had however previously identified that this arguably fell for consideration under Ground 2. I consider that Ground 2 does require consideration of the material that was before the decision maker.

63. So far as Wadham is concerned, the Project Template put before the HTB made the following point:
    "The LA [which means SCC] and the Diocese have both reported that the local perception will likely be that approval of the current applications for Swanmead and Maiden Beech to join BCT will inevitably lead to the change in age range that the local press has reported to be BCT's intention. There is a risk that this could

undermine the current review into the 3-tier system, and that it could negatively impact on pupil numbers at Wadham (if parents consider its future to be at risk). We have been clear that any age range change would require a public consultation and separate application….."

64. The material made it clear that the concerns that had led to the application being declined in June had been resolved, and the HTB recommended that the application be approved. That recommendation led to the order being made immediately.

65. Although the reasons for that decision, and adequacy (or inadequacy thereof) are part of the challenge under Ground 6, it is convenient to summarise them here, as this is where they fit in the chronology. There are two documents relied upon by the Defendant in this respect, a post-decision letter dated 19 September 2019 to SCC, and also another one prior to the decision which is dated 6 September 2019. I will deal with the letter of 19 September 2019, as that is the one primarily relied upon and also because the other one came 10 days before the Commissioner's Decision itself.

66. The letter of 19 September 2019 is fairly brief, very slightly longer than one page. Omitting those passages that serve as introductory paragraphs or state a willingness to attend a meeting with SCC, the two operative paragraphs are as follows. I will set them out in full:

"I understand that some concerns have been raised locally regarding the applications from Swanmead and Maiden Beech, because of the perceived potential implications for the recent review of [the relevant area] school system. I would like to reassure all local stakeholders that, as we have previously discussed, the development of multi-academy trust (MAT) structures should not present an impediment to school organisational planning or change, to the continuation of local partnership working across and between MATs and between academies and local authority maintained schools. It is my expectation that MATs should be working with each other and with the local authority across an area to ensure sufficient good school places and strong outcomes. Structural changes to academies also require both consultation and RSC approval through the Significant Change process. As such I am confident that, if and when there is a shared view that changes are needed to the local school system, the fact that these two schools have joined the Bridgwater College Trust should present no barrier to this.

I read with interest your letter of 13 September regarding next steps following the review and thought it important to clarify my position. We have discussed the local authority's preference for all schools within the local three tier system to be within a single organisational structure. I understand your reasoning and have agreed that should I receive further applications from local schools to join a MAT I will consider such applications in the context of the local authority's preference. However, we have also discussed the fact that individual schools have the freedom to apply to join the MAT of their choice and that my office cannot direct schools on that point unless they are the subject of formal intervention (although it is open to me to decline an application). As such, I would not want to give the impression that, having approved these two schools to join Bridgwater College Trust, a decision has thereby been taken at this time that all schools in the local area will necessarily join that same MAT."

67. The Defendant argues that the letter should not be read not "with hypercritical scrutiny seeking to find fault." I agree; it is not a legal document and it has to be read

in a sensible fashion. Hypercritical scrutiny, or attempting to find fault, would be the wrong approach to considering such a document. However, even on a fair and sensible reading, taking account of the fact that it was written by the Commissioner and is not a legal pleading, the following points can be made regarding this letter. It is relied upon by the Defendant as containing the Commissioner's reasons for the decision being made as it was, when it was. It shows that:

1. It refers to "the recent review". There is no reference to the ongoing consultation stage of that review, which was still underway.
2. It refers to "if and when there is a shared view that changes are needed to the local school system". This is also puzzling as the FFS Report, and SCC which has statutory duties in respect of education generally in the area, had specifically concluded structural changes were needed.
3. It refers to "all schools within the local three tier system" but fails to identify that the local three tier system was to be changed.
4. No distinction is made between the decision to allow Swanmead to become an academy, and Maiden Beech (already an academy) joining BCT. For the reasons set out in the Statutory Framework section of this judgment, there is a significant difference between those two decisions. The decision regarding Swanmead would take it outwith SCC's control and direction regarding changes necessary for all the schooling in the relevant area.
5. The sentence "the development of multi-academy trust (MAT) structures should not present an impediment to school organisational planning or change, to the continuation of local partnership working across and between MATs and between academies and local authority maintained schools" shows a failure to appreciate the significance of granting Swanmead academy status.
6. The sentence "the local authority's preference for all schools within the local three tier system to be within a single organisational structure" attempts to deal with one of the concerns expressed by SCC, but does not address what SCC was also seeking to achieve, namely deferral of the decision until the SCC's review (itself in the consultation stage from mid-June 2019) was completed.
7. There is nothing in this letter that explains why the decision had to be taken on 16 September 2019.
8. The sentence "if and when there is a shared view that changes are needed to the local school system" also demonstrates a lack of understanding on the part of the Commissioner of the subject matter of the ongoing review and consultation process. It was not a question of "if" there were to be changes across the relevant area, or that the view of SCC had to be a "shared view" with BCT. This is express in the FFS Report itself, which stated in terms "It is the view of Local Authority officers that the current system is not sustainable, and that the Local Authority (working with the schools) should look to move to a different structure in the area."

68. Turning to the letter of 6 September 2019, this does not on its face include any reasons for the decision. That is perhaps not surprising, as the decision was not to be made until 10 days after it was written. It states:

"Thank you for your letter of 3 September. I can assure you that in reaching a decision at the September HTB [on the applications], I will take account of the recent review and the local authority views that you have shared with me.

I would also, however, like to reassure you that whilst I appreciate it can bring added complexities, the development of [MAT] structures should not present an impediment to school organisational planning or change, or to the continuation of local partnership

working across and between MATs and between academies and local authority maintained schools. It is my expectation that MATs should be working with each other and with the local authority across an area, and I would be concerned in any instance that this were not the case."

69. This letter again demonstrates that there was no differentiation between the applications (and existing status) of Swanmead and Maiden Beech (the latter already an academy); no awareness of the significance of the consequences of granting Swanmead academy status; no explanation of why a decision had to be taken without completion of the exercise undertaken by SCC which had already started earlier in 2019; together with a lack of understanding of the subject matter of the review and consultation exercise.

70. On 23 October 2019, SCC wrote to the National Schools Commissioner to complain about the academy order, stating the following:

> "we are clear that this premature decision, in relation to the two middle schools, conflicts with the local authority's duty to have effective pupil place planning and the DfE's duty to co-operate through its decision making."

71. The National Schools Commissioner did not agree. The reply is dated 20 November 2019 and states the following:

"As I know you discussed with Hannah, and whilst we recognise there is significant disquiet locally, we remain of the view that the decision-making relating to the applications from Maiden Beech Academy and Swanmead Community School to join the Bridgwater College Trust was robust, and that this decision should not prevent the LA from fulfilling its sufficiency duty or conducting effective school organisational planning. No academy is able to implement change in age range without first consulting with local stakeholders and submitting a significant change application; and in reviewing any such application, the views of the local authority and the potential impact on other local provision are carefully considered. All Regional Schools Commissioners, and their teams, are committed to working closely with local authorities in relation to school organisational issues."

72. The letter again relies upon the fact that any change in age range would require a separate application and approval. It does not deal with the point that no such application would be required if Swanmead simply decided to remain a middle school, nor with the fact that the "organisational planning" that flowed from the FFS Report was that the three-tier system could not continue.

73. Finally, before turning to the detailed grounds, nowhere in the material available relied upon by the Defendant pertaining to the Commissioner's Decision is there anything that considers, or takes into account, the publicly stated position of BCT itself concerning the future reorganisation of the schools in the relevant area. This position is carefully worded, and the same terms are not used throughout, but could broadly be summarised as a reluctance by BCT to commit to any changes which SCC might, following the consultation, itself conclude were required to all the schools in the area.

74. I will deal with the Defendant's position in respect of each of the grounds when I deal with them below. However, in a sense the Defendant's position is best taken in summary from the skeleton argument lodged on his behalf, which states the following:
"SCC's objections to the Academy Order centre on discussions, separate to the application for the Academy Order, in relation to the future structure of schooling in the area."
(emphasis added)

75. This essentially captures that the Commissioner, and the Defendant, consider that the process whereby the SCC was reviewing, and consulting upon, the future of the three-tier structure across the relevant area, was separate to Swanmead's application to become an academy. In a sense, this description summarises the two different approaches. The Defendant maintains that the application by Swanmead for academy status was separate to the ongoing changes to the structure of education in the area.

76. The Defendant also, in supplementary evidence from Mr De Rivaz, relied upon the fact that SCC, during these proceedings, has effectively approved one of the first schools seeking to change its age range. That school is called Hinton St George, and as at February 2020, when it sought to change its age range, had pupils in Years 1 to 4. It sought to change that to include Year 5 from September 2020, and Years 5 and 6 from September 2021. Curiously, that decision attracted a threat of legal action in a pre-action letter from BCT dated 9 April 2020. Hinton St George is said to be a "feeder" school to Maiden Beech, now part of BCT.

77. The Defendant relies upon this to demonstrate that SCC is inconsistent in these proceedings, given its approval of this age change for Hinton St George. It is also said that this age change may be detrimental to other schools (including Maiden Beech). I do not consider that these are strong points in the Defendant's favour. This is because expanding the age range in the way that has been done is entirely consistent with the view that the three-tier structure is not viable. Further, the statutory duty upon SCC is in respect of education generally in its area. It does not have a separate free-standing duty to consider the individual pupil numbers at Maiden Beech (or any specific academy or MAT, for that matter). This does however demonstrate an outbreak of interest in judicial review concerning education in this particular area of Somerset. It also puts some flesh on the bones of SCC's concerns about co-operation (or more accurately, lack of it) being given by BCT in respect of structural changes. I will return to that point further.

The Gounds Relied Upon

78. These are as follows. Some are free-standing, so for example Ground 6 pertains to reasoning. Some of the grounds are simply different ways of putting the same point. I shall set each of the six grounds out below and then deal with the subject matter of those that are more closely interlinked, for example Grounds 1 and 2, such that the grounds are more conveniently dealt with together.

79. Ground 1: Failure to have regard to the prejudicial impact upon the on-going SCC review process. The Defendant argues that the Commissioner addressed the impact of the decision in her letter to SCC of 19 September 2019 (and also relies on the pre-

decision letter of 6 September 2019). The pertinent contents of both of these letters have been addressed above.

80. Ground 2: Irrational conclusion of no negative impact on the on-going SCC review process and/or insufficiency of inquiry into this impact. This is an alternative to Ground 1. The Defendant argues that it was rational to conclude that there was, or would be, no negative impact due to her expectation of cooperation between MATs/Academy proprietors and other stakeholders. The Detailed Grounds of Resistance do not address the second limb of this ground (i.e. the failure to take steps to identify BCT's position on the structural options in the FFS report under consideration). There were some indications generally by BCT of a generally cooperative approach in respect of any option agreed by all stakeholders. However, that is what I have termed careful, or non-committal, wording.

81. Ground 3: Failure to have regard to the departure/negative impact on SCC's preference for a single MAT solution. The Defendant relies on the content of the 19 September 2019 letter. SCC submits that the letter discloses a failure to appreciate that, due to earlier decisions by the Commissioner permitting two schools in the area to join a different MAT, the decision to allow Swanmead to join BCT constituted a departure from SCC's preference for a single organisation solution.

82. Ground 4: Failure to have regard to, and absence of justification for departure from, the requirements for assessment of viability under the Defendant's published policy, which it is not possible to comply with until the outcome of the review process given the uncertainty as to Swanmead's future. The Defendant denies that there was a departure from published policy and also argues that, if there was, such departure was justified.

83. Ground 5: Grant of the academy order for an improper purpose by thwarting SCC's on-going review and/or failure to have regard to the wider public interest by not undermining a whole area solution. The Defendant submitted in its grounds of resistance and skeleton that the Commissioner's decision-making complied with the purposes of the Academies Act 2010; that the purposes of the Education Act 1996 cannot be relied on in respect of decision-making under the Academies Act 2010; and that these purposes were in any event not defeated by the decision. As I have explained at [55] above, the Defendant now accepts that the exercise of his duties under the Academies Act 2010 must be consistent with his duties under the Education Act 1996.

84. Ground 6: Failure to give adequate reasons. There are two issues under this ground, namely whether a duty to give reasons arose at all; and whether the reasons in the 19 September 2019 letter were sufficient. The Defendant contends that although there is a statutory duty to give reasons where an application is declined, no such express duty arises where an application is approved. Further, the Defendant submits that there is no room for the interposing of reasons required under common law.

85. Before I turn to the individual grounds specifically, it is worth recording that the purpose of this judgment is not to substitute the court's view of whether Swanmead should become an academy trust, with that of the Commissioner. That is not the

function of judicial review. These proceedings are concerned with the lawfulness of the Commissioner's decision.

86. In ***R (Campaign against Arms Trade) v Secretary of State for International Trade*** [2017] EWHC 1754 (Admin) a group concerned with the arms trade brought a challenge to the grant by the Secretary of State of export licences for arms sales to Saudi Arabia. The Divisional Court (Burnet LJ and Haddon-Cave J, as they both then were) gave valuable guidance at [209] on the approach of the courts in situations where there was such a fine balance between competing issues. They referred to anxious scrutiny, verging on anguished scrutiny in that case, and made clear that the courts will recognise the institutional competence of decision makers. The court made clear that "such self-evidently finely balanced judgements are paradigm matters for evaluation and decision by the Executive". That is no doubt a classical statement of the approach of the courts to such matters, and I follow it without hesitation. The court will also give due deference to the expertise of the decision-maker. In the instant case, it demonstrates how important it is that the different matters on either side of the balance are considered.

87. There is also a distinction to be made between whether something is a material consideration at all, and the weight to be given to that. The latter is for the decision maker, subject to rationality. This statement is again a classic one, set out in numerous authorities including the House of Lords in ***Tesco Stores Ltd v Secretary of State for the Environment*** [1995] 1 WLR 759, 780 per Lord Hoffman. The former is a question of law and the latter is a matter of judgment (in that case planning judgment, but the principle remains the same).

88. Mr Williams for the Second Interested Party allied himself with the submissions made by Mr Glenister for the Defendant, and made no separate submissions. The Second Interested Party, BCT, did however seek to have the academy order upheld. SCC drew attention to the fact that there was no separate evidence from BCT, but that was because it relied upon the Defendant, its evidence and submissions. It could have served its own evidence, but chose not to do so.

Grounds 1 and 2

89. These are an alleged failure by the Commissioner to have regard to the prejudicial impact upon the on-going SCC review process; an irrational conclusion of no negative impact, and/or an insufficient inquiry into this impact. The Defendant relies upon the letter to SCC of 19 September 2019 to demonstrate that there was no such failure. The Defendant also argues (in response to Ground 2) that it was rational to conclude that there was, or would be, no negative impact due to her expectation of cooperation between MATs/Academy proprietors and other stakeholders. and also relies on the pre-decision letter of 6 September 2019. The pertinent contents of both of these letters has been addressed above.

90. The Defendant submits that the Commissioner specifically addressed the impact of the decision in her letter to SCC dated 19 September 2019. The Defendant maintains that "the crux of this ground" is a disagreement over the impact of the academy order, on which the conclusion of the Commissioner is rational. The Defendant also (correctly) identifies that Ground 2 is what is called a fallback to Ground 1, and that the Commissioner's reasons why a change in governance would not cause a

significant impediment to structural change are wholly rational. Further, it was not irrational for her to go through the individual options in the FFS Review with BCT.

91. The Defendant relies upon entries in the documents, leading up to the HTB meeting in September, and also the documents available at that meeting, to demonstrate this neither of these grounds are made out. It is said that the Commissioner sought specific assurance from BCT in relation to the FFS Review. On 18 June 2019, her officials met BCT. At that meeting, the FFS Review was discussed, and BCT acknowledged that it would take the FFS Review into account going forward and that it would work with stakeholders. In a letter dated 28 June 2019 from Ms Gordon to BCT following the meeting, she stated:

> "…I recognise, however, that as a Trust you wish at this point to take some time to review your strategy regarding sough Somerset, in light of the recently released Futures for Somerset options appraisal…[at the meeting], there was discussion of the wider context of the LA's review, and we do take the view that the review must form a key part of future decisions regarding the local school landscape. I was pleased to hear Peter confirm that you wish to work with other stakeholders to move this forward and achieve a shared vision for the future. We consider that a MAT structure should be at the heart of the solution, and ideally the middle schools and Wadham would be within a single MAT. The Diocesan context is therefore another relevant issue, and Giles has passed on contact details for Ed Gregory at the Diocese of Bath and Wells, in order for Peter to make contact and explore the issue of adopting mixed MAT articles."
> (emphasis added)
> "Peter" is Mr Peter Elliott, the CEO of BCT.

92. Following an email from Mr de Rivaz which specifically asked whether BCT "would work with and support structural changes if that was the agreed outcome of the LA review", Mr Elliott responded on 12 September 2019 stating the following:

> "The Board is aware that this is a moving beast and that structural change is likely to happen in the pipeline – given that the risk of school closure is absolutely minimal, as I have previously mentioned, they acknowledge their responsibility to work alongside local stakeholders – namely Wadham – to deliver a locality wide solution."

93. The position of BCT is also said to have been considered at the HTB meeting. At paragraph 27 of his statement, Mr de Rivaz states that these issues concerning BCT and its intentions were discussed by the HTB at the September meeting, including the local perception that BCT sought to change the age ranges.

94. The papers set out:

> "In our recent discussions with BCT, the CEO has given assurances that the MAT will work collaboratively with other stakeholders should a consensus be reached on any local structural change. BCT remains of the view that the future of all three schools would best be secured by close collaborative working within a single MAT."
> (emphasis added)

95. In addition, the Project Template, which was presented to the HTB, specifically made clear that any age range change would require consultation and application:

> "The LA and Diocese have both reported that the local perception will likely be that approval of the current applications for Swanmead and Maiden Beech to join BCT will inevitably lead to the change in age range that the local press has reported to be BCT's intention. There is a risk that this could undermine the current review into the 3-tier system, and that it could negatively impact on pupil numbers at Wadham (if parents consider its future to be at risk). We have been clear that any age range change would require a public consultation and separate application…"
> (emphasis added by the Defendant)

96. The emphasis added by the Defendant for the purposes of these judicial review proceedings counsel in the preceding passage from the Project Template is of some interest. This is because it immediately follows an important sentence, namely "There is a risk that this could undermine the current review into the 3-tier system, and that it could negatively impact on pupil numbers at Wadham (if parents consider its future to be at risk)." This statement relates back to the one in the previous sentence, namely approval of the applications by Swanmead and Maiden Beech, and not the change in age range. In other words, the risk of undermining the review and the negative impact on Wadham is identified as potentially flowing from the approval of the application, not from the change in age range. It is correct that any change in age range which BCT wished to achieve would require a separate application and consultation. However, absent such an age range change, it would remain a middle school.

97. Maiden Beech was already an academy – hence cannot be directed by SCC – and was the only other middle school in the area.

98. In my judgment, both the Commissioner at the time, and the Defendant in his opposition to these two grounds, elide two entirely different things, and approach them as though they were one and the same. These two different things are the effect upon the review process of making the academy order before the review was completed; and whether by making the academy order, Swanmead and Maiden Beech could change their age ranges. It is correct that the latter would require a separate application by the MAT. Absent permission from the Commissioner (following a separate application, if one was made) Swanmead would not be allowed to change the age range of its pupils. However, that is not an answer to the former. The change of age range at Swanmead, and the fact that approval would be required, is treated throughout by the Commissioner and her office as being an answer to the difficulties caused to the review process by making an academy order at all.

99. Further, it ignores that absent a positive decision by Swanmead to change its age range (and hence lead to such an application being made at all), it would simply remain a middle school, part of an existing three-tier system. It was the very existence of the three-tier system that SCC had concluded, prior the application being considered, was not viable for the reasons explained earlier in this judgment.

100. This confusion, or elision, between these two matters was carried over into the answer provided by the National Schools Commissioner, who in dismissing SCC's complaint stated:
> "As I know you discussed with Hannah, and whilst we recognise there is significant disquiet locally, we remain of the view that the decision-making relating to the

applications from Maiden Beech Academy and Swanmead Community School to join the Bridgwater College Trust was robust, and that this decision should not prevent the LA from fulfilling its sufficiency duty or conducting effective school organisational planning. No academy is able to implement change in age range without first consulting with local stakeholders and submitting a significant change application; and in reviewing any such application, the views of the local authority and the potential impact on other local provision are carefully considered. All Regional Schools Commissioners, and their teams, are committed to working closely with local authorities in relation to school organisational issues."
(emphasis added)
This answer demonstrates that, again, the approval mechanism for a possible age range change at Swanmead is used to explain the effect upon the on-going review process of making an academy order at that stage in September.

101. The Defendant in its written submissions describes this challenge in the following terms. "The crux of this ground is not a failure to consider the negative impact, but a disagreement between the parties as to the actual impact of the academy order on the structural change." I disagree with that analysis of this ground. I consider that there was a failure to consider the negative impact at all. The Commissioner failed to have regard to the prejudicial impact of making the order. That prejudicial, or negative, impact, was as follows:
1. Swanmead Middle School would become an academy as a middle school.
2. SCC would lose its ability to exercise its statutory duties to control and direct Swanmead in accordance with the educational requirements of the relevant area.
3. SCC, based upon the FFS Report, had concluded that the existing three-tier structure of the system (comprising middle schools as an integral part) had to change.
4. The three highest scoring options within the FFS Report all involved significant change to Swanmead, including potential closure.
5. None of those retained Swanmead in its existing guise, as a middle school.
6. All those potential changes became subject to the legal veto of BCT as a result of making the academy order.

102. The Defendant's answer to the points above is a simple one. The Defendant accepts, in technical terms, that each of them is factually and legally correct. What the Defendant does is to minimise the effect of the "legal veto" point by the assertion that Swanmead and BCT would co-operate with the ongoing review by SCC. It is also suggested in the Defendant's evidence (although a little half-heartedly) that the review had not resulted in any specific positive final recommendation by 16 September 2019. It rather ignores that the FFS Report set out a detailed timetable for the continuation of the review process, with consultation to follow in two stages. It also ignores that the FFS Report was not before the HTB.

103. The difficulty with the Defendant's position is as follows. Firstly, it is clear that Swanmead made its application to become an academy in an effort to protect its future from the effects of the review. The review was wide-ranging, and all the schools in the relevant area would be affected, but Swanmead, as the only middle school not already an academy, was likely to be affected more than most. Any changes to the structure that involved a change from the three-tier system would lead to no future for middle schools as middle schools. This made any necessary co-operation and consent far from likely.

104. Secondly, given Swanmead did not apply to become a single academy trust, but applied to join BCT as part of a MAT, the co-operation and consent required was not limited to coming from Swanmead, but would include the Board of BCT.

105. Thirdly, the statements of intent from BCT, including those provided to Mr De Rivaz in the period running up to 16 September 2019, if read carefully, fall far short of providing any reassurance or grounds for optimism in this respect. All they do, in my judgment, is to reword the existence of the legal veto in careful terms.

106. Fourthly, prior to making the academy order, BCT did not have a role in the re-organisation and restructuring of the relevant area. Given the conversion of Maiden Beech to part of the BCT MAT on 1 December 2019, in the circumstances I have explained at [40] above, this ground has less relevance now, as at the date of the hearing, than it did in September 2019. However, in any event SCC would have had to deal with Maiden Beech as a single academy trust, rather than with BCT as it does now.

107. Finally, re-organisation of the structure of education in a particular area, such as this one, is always going to face some challenges. Not all involved parties will be content with the outcome. There was no reason to assume that BCT would agree to any changes required.

108. What has happened since could be said to justify SCC's concerns in this respect, although of course this was not known about in September 2016 and therefore does not go to the lawfulness of the Commissioner's Decision. SCC has been threatened by judicial review proceedings by BCT for adding two years of children to those currently educated at Hinton St. George (one year group in 2020 and another one in 2021). This is a decision which BCT considers adversely affects Maiden Beech. This is because it is said that pupils who would otherwise go there will now remain Hinton St. George. I was told at the hearing this will affect 4 pupils this year. That does not immediately strike one as being consistent with an assumption that full co-operation and consent would be forthcoming from BCT regardless. In any event, Mr Elliott had already made this clear in his e mail of 12 September 2019 when he stated that "the risk of school closure is absolutely minimal". Swanmead had applied to join BCT to protect itself during the review; consent would not have been likely to come from either of those entities for closure in those circumstances.

109. SCC submits that these points in favour of this ground are reinforced when one considers the letter of 19 September 2019, the letter that explains the Commissioner's reasons. There is said to be no recognition or engagement with the issues in the FFS Report at all. The contents of the letter, including (but not only) use of the phrase "if and when", demonstrate that the whole issue has been entirely missed, and demonstrates a wholesale failure to grapple with that issue. There was no engagement with the fact that making the order would give BCT a power of veto over any changes to Swanmead that might be required as a result of the structural reorganisation of education across all the schools in the relevant area. The Defendant maintains that the review process was central to the decision to make an academy order, the FFS Report was also central, and the Commissioner went "to great lengths" to find out the state of the review prior to making the decision on 16 September 2019.

110. I am unable to accept those submissions on behalf of the Defendant, even though they were advanced most attractively and persuasively. In my judgment, SCC is correct and the prejudicial impact upon the review was not addressed at all.

111. In my judgment Ground 1 is made out in favour of SCC in this judicial review. There was a failure by the Commissioner to have regard to the prejudicial impact that making an academy order in respect of Swanmead would have upon the on-going SCC review of the educational structure of the relevant area.

112. However, in case I am wrong about that, and the prejudicial impact *was* considered, then one would move to consider the alternative on this point which is Ground 2, namely (at least on its first limb) the complaint by SCC that the Commissioner came to an irrational conclusion that there would be no negative impact. There are two limbs to this. The first is that the Commissioner reached an unsustainable conclusion that there would be no impact on the on-going review process. The second is an alleged breach of the duty of inquiry.

113. I will deal first with the unsustainable conclusion, which is also termed a rationality challenge to her conclusion. SCC argues that if the Commissioner did have regard to the negative impact under Ground 1 – and I have found that she did not – it was logically unsustainable to conclude that there would be no additional impediment or difficulty for the on-going local whole area solution. This conclusion was reached on the basis of an unenforceable, general expectation of mutual cooperation by BCT. Given BCT is a legally autonomous body, and was not subject to "any duty (or power of direction)" from others, it did not have to agree to any outcome that did not suit its own strategic vision.

114. SCC also described the Commissioner as making "a glib and unsustainable rejection of the careful and cogent analysis in the independent FFS report". That report expressly stated that there would be additional challenges were the order to be made. SCC states that these were "objective legal realities resulting from the creation of a veto over changes to Swanmead that did not formerly exist".

115. I shall set out three specific passages from the Defendant's skeleton argument to demonstrate the points relied upon by the Defendant to make out this claim of rationality.

> "1. It is rational to find that the development of MAT structures should not be an impediment to school organisational planning or change and local partnerships, as MATs should work with each other and with the local authority to ensure strong outcomes.
>
> 2. It is rational to find that the statutory scheme permits individual schools to join the MATs of their choice, and that principle is not changed by a structural review.
>
> 3. This conclusion was reached after specific discussions with BCT as to the future structure of schooling in the area, set out above."

116. I do not accept that any of these points provide an answer to the substance of this ground as advanced by SCC. In my judgment, point (1) is correct in general terms only, and subject to specific instances where the contrary could be the case. The specific instances here that are relevant here is that SCC had decided that a full review was required of all the schools in the area, because three-tier education was not viable. FFS independently considered all the options, and concluded a structural reorganisation was required. The only middle school under SCC's direction chose to apply to become an academy, giving it the power to ring fence its own future (at the expense of adoption of any option for the whole area that would not retain it as a middle school). The aspiration that MATs would work with each other and with SCC does in those circumstances appear to be precisely that – just an aspiration.

117. The point at (2) encapsulates the issues between the parties on these proceedings. It is consideration of the structural review and how, if at all, it was taken into account by the Commissioner when making her decision upon Swanmead's application, that is in issue under Grounds 1 and 2. However, the point at (3) is where the Defendant has the greatest difficulty. This is because none of the "specific discussions with BCT" dealt in necessary (or any) detail with the different options in the FFS Report. Further and to the contrary, the careful statements made on behalf of BCT that reassured the Commissioner really boil down to BCT stating it would cooperate if it agreed.

118. The Commissioner's expectation of cooperation between MATs/Academy proprietors and other stakeholders was not a rational reason why a change in governance at Swanmead, the only middle school over which SCC had control, would not cause a significant impediment to structural change of the three-tier system across the relevant area. The change in governance at Swanmead from a maintained school, under the direction of SCC, to an academy, would in my judgment present of itself a significant impediment to structural change in all the circumstances. This significant impediment is not answered by pointing to various statements from the CEO of BCT that attempt to walk a fine line between reassuring the Commissioner on the one hand, and keeping all of the MAT's options open in the future on the other.

119. Turning more specifically to the second limb of this ground, there were options set out in the FFS Review which SCC maintain the Commissioner was under a duty to consider with BCT pursuant to what is called its ***Tameside*** duty, which were set out in ***Secretary of State for Education and Science v Metropolitan Borough of Tameside*** [1976] 3 All ER 665. The name of that case is used as shorthand for the relevant legal principles, and includes a question identified by Lord Diplock at 696, which stated that "the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?". The requirements of this duty were more recently summarised by the Divisional Court in ***R (Plantagenet Alliance Ltd) v Secretary of State for Justice*** [2014] EWHC 1662 (QB), [2015] 3 All ER 261 at [100]. That case concerned an exhumation licence and all of the associated legal issues concerned with the remains of Richard III. These remains had been discovered during excavations for that purpose by the University of Leicester, which was a defendant, together with Leicester City Council. Certain church interests (both in Leicester, and York) were interested parties. Four of the six principles listed at [100] in that case were relied upon by the Defendant. They are the first four in the following list, although I will include all six as they are set out in [100] itself:

"1. The obligation upon the decision-maker is only to take such steps to inform himself as are reasonable.
2. Subject to a *Wednesbury* challenge, it is for the public body, and not the court to decide upon the manner and intensity of inquiry to be undertaken (*R(Khatun) v Newham LBC [2005] QB 37* at [35], per Laws LJ).
3. The court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision (*per* Neill LJ in *R (Bayani) v. Kensington and Chelsea Royal LBC (1990) 22 HLR 406*).
4. The court should establish what material was before the authority and should only strike down a decision by the authority not to make further inquiries if no reasonable council possessed of that material could suppose that the inquiries they had made were sufficient (*per* Schiemann J in *R (Costello) v Nottingham City Council (1989) 21 HLR 301* ; cited with approval by Laws LJ in *R (Khatun) v Newham LBC* at [35]).
(5) The principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant, but from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion (*per* Laws LJ in *(R (London Borough of Southwark) v Secretary of State for Education (supra)* at page 323D).
(6) The wider the discretion conferred on the Secretary of State, the more important it must be that he has all relevant material to enable him properly to exercise it *(R (Venables) v Secretary of State for the Home Department* [1998] AC 407 at 466G)".

120. I consider that the third of these principles is the one upon which SCC has the strongest argument. The Commissioner accepts that she was required to make enquiries, and these included enquiries of BCT. I consider that, based on the enquiries and the answers that were obtained, no reasonable authority could have been satisfied that it possessed the necessary information for the decision that was made. The material before the Commissioner on this matter consisted of the statements from BCT that it would work collaboratively "should a consensus be reached". Given its agreement would be necessary to reach consensus, these statements by BCT were wholly circular. No reasonable authority could have been satisfied on the basis of the inquiries made that she possessed the information necessary for the decision. There were also doubts on the Commissioner's part at the time, running almost right up to the date of the decision, and these are shown by the fact that Mr De Rivaz himself was seeking these until very shortly before the meeting. As late as 12 September 2019 (as set out in [88] above) the CEO of BCT stated that "the risk of school closure is absolutely minimal". That statement does not sit with the different options being considered that were included in the FFS Report; and it does not sit with any sensible or rational expectation that BCT would co-operate with the conclusions that would be reached in the review that was still underway. Rather to the contrary, in my judgment, it reinforces the power of the legal veto.

121. The fact of the review was known about by the Commissioner and her office. The FFS Report included detailed options, and this had been before the HTB in June. Each

of the options, and at the very least the three highest scoring options, should have been specifically discussed with BCT so that the Commissioner knew, in specific terms, what BCT's position was in respect of them. It could not reasonably be supposed that the inquiries that were made of BCT were sufficient. The very general and inadequate inquiries made of BCT resulted in very general and inadequate answers. Even then, and this is clearly demonstrated in both the letters relied upon by the Defendant, the Commissioner simply concluded (and recites an assertion) that making an academy order in respect of the application by Swanmead "should not present an impediment to school organisational planning or change". SCC, and indeed any of the other stake holders, could very sensibly ask the simple question "why not?". Certainly that question was specifically posed by SCC in oral submissions in these proceedings, in express terms, on more than one occasion. The answer to it from the Defendant is that relationships are important, and BCT and the Commissioner have to work together in the future. I do not consider that to be an adequate answer.

122. SCC has far wider responsibilities than do the Board, and the CEO, of BCT. "School organisational planning and/or change" was being considered at the time by SCC specifically because a number of schools in the relevant area, though scoring highly by Ofsted, were facing significant financial challenges and changing pupil demographics. There were very specific options identified in the FFS Report for a viable way forward. The three-tier system was considered no longer to be viable. The effect of the academy order in respect of Swanmead would mean that Swanmead, a middle school, would remain a middle school, unless Swanmead and/or BCT took a positive decision to change from a middle school by making a separate application to change age-ranges. BCT's specific intentions and views on the different options were somewhat crucial, and certainly central to re-organisation of all the schools. The difficulties and impediments inherent in making an order without knowing this are, in my judgment, somewhat obvious. Simply saying there are no such impediments does not mean that they do not exist at all, or that they disappear. The Defendant maintains that this view was wholly rational, but I do not agree.

123. This ground too, Ground 2, would also - in that alternative - be made out. The second limb of Ground 2 is itself a further alternative to the first limb. I consider both the two limbs to be well made by SCC, admittedly in the alternative. The second limb, breach of the duty to make inquiry, may go some way to explain why this occurred.

124. My conclusions on both Ground 1 and, in the alternative, Ground 2 are, in my judgment, reinforced when one considers the reasons relied upon by the Defendant to demonstrate that such impact *was* considered, namely the letter of 19 September 2019, and also the pre-decision letter of 6 September 2019. Nowhere in either of those documents does the Commissioner come close to demonstrating that this has been considered at all. The Commissioner fails to grasp both the impediment itself, and also the legally independent nature of an academy compared to the direction and control of Swanmead's future available to SCC (as a maintained school). Those letters are relied upon as reasons by the Defendant. The other documents available from the HTB meeting of 16 September 2019 do not address or consider the prejudicial impact, properly or at all.

125. Therefore in my judgment, Ground 2 would also be made out in SCC's favour. The failure of the duty of inquiry, which is a failure to take steps to identify BCT's

position on the structural options in the FFS report under consideration, is just another way of challenging any conclusion by the Commissioner that all would be well because she expected BCT to co-operate.

Ground 3

126. This is that the Commissioner failed to have regard to the departure from, or negative impact upon, SCC's preference for a single MAT solution. The Defendant again relies on the content of the 19 September 2019 letter. SCC submits that the letter discloses a failure to appreciate that, due to earlier decisions by the Commissioner permitting two schools in the area to join a different MAT, the decision to allow Swanmead to join BCT constituted a departure from SCC's preference for a single organisation solution.

127. I consider this ground to be somewhat weak. I also consider that it undermines the arguments advanced on SCC's behalf on the other, stronger, grounds. SCC submitted that all the grounds were interlinked to some extent, and Mr Glenister in his oral submissions grouped his submissions on Grounds 1, 2 and 3 together. The grounds are interlinked, and there is overlap between some. Some are different ways of putting the same point. This, however, can be considered as a separate and stand alone ground.

128. The starting point for consideration of this ground is that for a school such as Swanmead, with the Ofsted classification it has (which is Good), becoming an academy is a matter of the school deciding to apply, and the Commissioner considering as a matter of discretion whether that application ought to be approved or declined. The phrase used in the Defendant's skeleton argument is that this is a "school-led" process. That phrase should not be taken as meaning it is entirely up to the school, as approval by the Commissioner is required. This ground suggests that the process in question should be subject to a further level of scrutiny by the Commissioner, namely which particular MAT the school should join, regardless of the subject matter of its application and the school's wishes in this regard. I do not consider there is any basis for such a level of decision making. In any event, applications for academy trust status can proceed without the particular applicant school seeking to join any MAT at all; such schools are called single academies.

129. It is correct that SCC had expressed a preference for a single MAT solution across the relevant area. There would be some advantages to that. However, not all the schools in the relevant area have applied to be academies in any event. The Commissioner stated in her letter of 23 August 2019 that "individual schools have the freedom to apply to join the MAT of their choice and we can only influence, not direct, them (unless they are the subject of formal intervention)." Rather curiously, she then goes on to state that "for any further applications from schools in the [relevant area] I would consider any such application in the context of the Local Authority's preference" for a single MAT. The reason that this is curious is there does not seem to be an obvious reason why future applications should take into account SCC's preference for a single MAT, but the applications considered on 16 September 2019 should not.

130. However, notwithstanding this curiosity, which is not adequately explained, I do not consider that the failure to take into account SCC's preference for a single MAT renders the decision of 16 September 2019 unlawful.

131. It is the status of Swanmead as an academy after the order was made, namely an independent school outside the direction of SCC, that creates the impediment to which I have already referred. This is no less persuasive if the single MAT solution had been at the forefront of the Commissioner's mind, or in her mind at all. In my judgment the challenge on Ground 3 fails.

Ground 4

132. This is the failure to have regard to, and absence of justification for departure from, the requirements for assessment of viability under the Defendant's published policy, which is submitted it is not possible to comply with until the outcome of the review process, given the uncertainty as to Swanmead's future. The Defendant denies that there was a departure from published policy. In the alternative, the Defendant also submits that even if there were, such departure was justified.

133. The first point therefore under this ground is to consider what the published policy is, and whether there was a departure from it.

134. The Decision-Making Framework dated December 2016 published by the Department of Education for Regional School Commissioners (of whom this Commissioner is one) states the following:
The Commissioner's "role is to approve or decline applications from maintained schools to convert to academy status. The decision about whether or not to issue an Academy Order includes consideration of the academic and financial performance of the school, as well as viability."
(emphasis added)

135. The Defendant published guidance entitled 'Due Diligence in academies and maintained schools' dated February 2019 to which I shall refer as the "Due Diligence guidance". This imposes responsibility for undertaking due diligence steps on the MAT. However, the SCC submits that it is also clear from the Guidance itself that this process is intended to inform the Defendant's decision-making under the Academies Act 2010. For example, on page 3 the Due Diligence guidance states:
"The due diligence process is an important element of the risk management of any conversion or transfer, with the findings of the work informing the decision making process of respective stakeholders; the incoming school, the incoming trust and the Department for Education (DfE)"
(emphasis added)

136. SCC's case in this respect can be put in a nutshell. It is said that the inability to predict what would occur at Swanmead in terms of pupil numbers, future of the school and so on, made this consideration of due diligence, taking into account financial performance and viability, effectively impossible. Express requirements taken from the guidance that ought to be included in this due diligence include the following:

    a. "Educational provision – detailed information including analysis of trends and analysis of effectiveness of school improvement strategies"
    b. "Numbers in different year groups and future pupil number expectations"
    c. "Pupil number forecasts and historical trends"

d. "Finances and historic and future budget forecasts including;
    i. income and expenditure
    ii. metrics such as staff expenditure as a percentage of total income and contact ratio,
    iii. basis of funding and comparisons with similar schools."

137. The Defendant maintains that due diligence can be considered after the order is made, but prior to conversion, and does not have to be considered before the application for academy status is approved. The Defendant also submits that "the only policy expectation is that [the Commissioner] will consider viability, and the information that is required to answer that question is for the [Commissioner]".

138. This submission by the Defendant therefore accepts, as given the terms of the Decision-Making Framework it must, that viability must be considered by the Commissioner. That Framework makes it clear that the following three things must be considered:
1. Academic performance of the school;
2. Financial performance of the school;
3. Viability of the school.

139. The third of those, viability, includes looking forwards. The Defendant also submits that the Commissioner "made enquiries on the viability of Swanmead joining BCT, and the degree to which the Board assured itself of any associated risks, and viability was something specifically considered by the HTB prior to [the Commissioner] making the Academy Order". The Defendant also submits that it was rational to consider conversion of Swanmead into an academy "prior to any final plan for structural change, particularly where BCT was fully appraised of the present circumstances of the restructure."

140. The Commissioner was required to have regard to and understand the requirements of the Defendant's published guidance; to appreciate when there had been a departure from this; and only to depart from policy requirements for good and properly articulated reasons. This is clear from a number of different well-known cases. In ***R (Lumba) v Secretary of State for the Home Department*** [2011] UKSC 12, [2012] 1 AC 245 at [26] Lord Dyson stated "a decision-maker must follow his published policy (and not some different unpublished policy) unless there are good reasons for not doing so". This is so that policies are applied consistently, fairly and not in an arbitrary way. The same point is made by Woolf J (as he then was) in ***Gransden v Secretary of State for the Environment*** (1987) 54 P & CR 86 who stated the following at 87:
"policy statements of the Secretary of State are material considerations to which regard should be paid in considering the outcome of a planning application or a planning appeal, and they also make it clear that if there is to be departure from such a policy statement then clear reasons should be given as to why there is to be departure from the stated policy."
In ***R (Lichfield Securities Ltd) v Litchfield DC*** [2001] EWCA Civ 304, [2001] 3 PLR 33 the Court of Appeal per Sedley LJ at [13] made clear that a policy does not have to be "slavishly followed", which is another way of saying it can be departed from, but clear reasons have to be provided as made clear in the cases to which I have referred above.

141. The requirement to consider the matters identified in the Department of Education's own documents was recognised, at least by the MAT, because BCT tried to consider future viability, or at the least considered whether it could do so or not. For example, Peter Elliott, the CEO of BCT, informed the Commissioner on 12 September 2019 that it was "of course impractical to complete a sensitivities analysis of what a future schools structure might look like given there is no clarity whatsoever on the direction of travel here." BCT therefore expressly recognised that this important exercise could not, in the circumstances of what was going on at the time that Swanmead's application was considered, be performed. However, that statement by BCT does not deal with what was actually required. The application by Swanmead did not need the applicant, or BCT, "to complete a sensitivities analysis of what a future schools structure might look like". What was needed was consideration by the Commissioner herself of the viability of the school; this would be based upon, but need not be limited to, the information available from the due diligence required of BCT as part of the application. BCT considered it was "impractical" for it to do this. That does not mean that the Commissioner did not need expressly to consider viability. The Decision-Making Framework makes it clear, expressly, that she did.

142. A short way of expressing this ground is that there was, to use the CEO's own words, "no clarity whatsoever" regarding all those features specifically required to be considered as part of Swanmead's viability. In those circumstances, SCC submitted that a decision could not be made taking those factors properly into account, given viability depends so centrally on factors that were unknown. due to the uncertainty. SCC submits that it "was quite simply impossible" to consider financial viability, the future sustainability of educational provision, school improvements, numbers in different year groups and future pupil expectations, pupil forecasts, and future budget forecasts given the major structural changes under consideration.

143. There are different ways in which the Commissioner could have considered the viability of Swanmead, as she was required to do. One would have been to consider its viability against each of the options proposed in the FFS Report, or at least (say) against the highest scoring options. This would not have been to prejudge the outcome of the review; rather, it would be satisfying herself of this specific requirement against a number of potential outcomes. The other way to have considered viability would have been to accept, as at 16 September 2019, that there was insufficient information available on this specific matter, and to have identified a point in the future when that information would be available.

144. Another way forward would have been to identify whether there were good reasons for not considering or addressing viability – thus departing from policy – and thereafter to proceed, having identified what the good reasons were for that departure.

145. None of these ways forward, or any alternative ones, were adopted. Even if "a sensitivities analysis of what a future schools structure might look like" is to be equated with analysis of the viability of Swanmead, which is putting it at its most favourable for the Defendant, BCT made clear that it could not provide that. The Commissioner therefore needed either to perform her own consideration of viability, or to have specifically required BCT to do so, in order that viability could be

considered by her. This is of further importance given the SCC review process was underway, and the FFS Report itself had stated that:

"Any MAT entering the Crewkerne and Ilminster area at this current date will be operating within an Education Structure and Funding Arrangement that is not viable or sustainable into the future."

This positive statement that the existing arrangement was not viable makes consideration of the viability of Swanmead of particular importance.

146. I accept the submissions by SCC on this ground. I also accept the submission made by SCC that given the uncertainty caused by the conclusion that the three-tier system could not continue, this assessment of viability was more important, not less. In my judgment this ground is made out in SCC's favour as well as the earlier grounds to which I have already referred.

Ground 5

147. This is that the grant of the academy order was for an improper purpose by thwarting SCC's on-going review and/or a failure by the Commissioner to have regard to the wider public interest by not undermining a whole area solution. The Defendant submitted that the Commissioner's decision-making complied with the purposes of the Academies Act 2010; that the purposes of the Education Act 1996 could not be relied on in respect of decision-making under the Academies Act 2010; and that these purposes were in any event not defeated by the decision. At the hearing, the Defendant accepted that the duties under the Academies Act 2010 had to be exercised with the Secretary of State's own duties under the Education Act (which are counter-part duties to those of SCC).

148. This clarification by the Defendant during the hearing rendered less important analysis of the terms of the Academies Act itself to consider whether the duties under that Act permitted the Secretary of State to act in such a way that defeated the duties within the Education Act. That argument by SS in any event faced something of a formidable hurdle. This is because it effectively amounts to a submission that the Defendant was unable to exercise his own statutory power without defeating that of SCC. The difficulty of this approach was set out in ***R (One Search Direct Holdings Ltd) v York City Council*** [2010] EWHC 590 (Admin) at [24], where there was specifically acknowledgement of that such cases are very rare. That judgment of Hickinbotham J (as he then was) stated:

> "24. As a matter of principle, although it may be easier in practice to show that Parliament could not have intended the grant of a power in a statute to defeat the very purpose of that same Act, I do not see why a court might not conclude that Parliament could not have intended that a power in one statute be exercised in a way that would utterly defeat the purpose of another statute: although that would be very much dependent upon the circumstances of a particular case, including, most importantly, the wording and even (possibly) timing of the specific statutory provisions. The dearth of examples from the authorities shows just how rare such cases might be, and the caution with which the courts would infer such an intention. Mr Fordham was unable to provide any such examples; but, as a matter of law, such a construction is not impossible and, as statutory schemes and

relationships become more complex, it may be that such a construction is more likely to find favour. However, intellectually, it requires the court to conduct the same exercise as that performed in *Padfield's* case, namely one of construing the intention of Parliament through the words they have used in the relevant statutory provisions."
(emphasis added)

149. This case sets out the high hurdle that would have to be cleared by SCC for the Commissioner to have failed this test. It must be shown that by making the order, the Commissioner and the Secretary of State had "utterly defeated" SCC's target duties to provide education in the local area. The Defendant submitted that it cannot even be sensibly argued this is the case, as the academy order does not *prevent* education in the area.

150. I consider that some of the necessary building blocks for SCC to succeed on this ground are present. The making of the academy order would substantially impede SCC's ability to achieve its target duties in so far as exercise of that ability needed to impose upon Swanmead changes to which it would not agree. It would also substantially impede efficient organisation of education in the relevant area across all the schools, and also the organisation of education of pupils in the secondary age range in particular, given Swanmead was the only middle school in the relevant area that was not an academy already, and which could therefore be directed by SCC. However, I do not consider that these substantial difficulties and impediments could be said to "utterly defeat" SCC's target duties. The passage in the ***One Search*** judgment above makes it clear just how unusual such circumstances are.

151. The other difficulty with SCC's case on this ground is that the submission that the grant of the order was for an improper purpose by thwarting the on-going review implies that the Commissioner was required to enquire into the motives at Swanmead in applying for academy status. I find no inquiry into an applicant's motives to be incumbent upon the Commissioner. It is correct that, as a proper exercise of her discretion, the Commissioner was obliged at least to consider the effect upon education in the relevant area, as otherwise there would be a failure even to consider the effect upon the Defendant's counterpart duties under the Education Act. This is something which the Defendant accepts had to be considered in terms of consistency with the duties under the Academies Act. However, the earlier grounds comprise the way that the Commissioner failed to consider prejudicial impact upon the ongoing review. The fact that the making of the order had such an effect upon the ongoing review is dealt with in the earlier grounds.

152. I do not consider that SCC succeeds on this as a separate, freestanding ground. If Swanmead made its application to become an academy to outmanoeuvre SCC itself, take itself entirely out of the review and seek to ring-fence itself – and certainly there were a number of stake holders who considered that the school had done precisely that – then that could be said to be improper, if looked at subjectively. However, in the absence of any specific requirement upon the Commissioner to consider Swanmead's motives, I do not consider that this would render the decision unlawful.

Ground 6

153. This is an alleged failure to give adequate reasons. There are two issues under this ground, the first being whether there was a duty to give reasons at all; and if so, whether the reasons in the 19 September 2019 letter were sufficient. The Defendant also relies upon the letter of 6 September 2019 as containing reasons.

154. The Defendant points, quite rightly, to the statutory duty to give reasons should an application be declined. This is expressly stated in section 4(5) of the Academies Act 2010: "If, after an application has been made under section 3, the Secretary of State decides not to make an Academy order in respect of a school, the Secretary of State must inform the following of the decision and the reasons for it…..". The Local Authority, here SCC, is one of those listed, at section 4(5)(b), but there is no express statutory requirement to give reasons if an application is approved.

155. Accordingly, SCC can only succeed on this ground if the common law duty to give reasons is engaged. In ***R (CPRE Kent) v Dover District Council*** [2017] UKSC 79 the Supreme Court stated per Lord Carnwarth JSC the following at [51] in the context of planning decisions:
"[51] Public authorities are under no general common law duty to give reasons for their decisions; but it is well-established that fairness may in some circumstances require it, even in a statutory context in which no express duty is imposed."
This principle was then examined further in the context of planning decisions at [52]:
"[52] Similarly, in the planning context, the Court of Appeal has held that a local planning authority generally is under no common law duty to give reasons for the grant of planning permission (*R v Aylesbury Vale District Council, Ex p Chaplin* [1997] EWCA Civ 2262, (1998) 76 P & CR 207, 211-212 per Pill LJ). Although this general principle was reaffirmed recently in *Oakley v South Cambridgeshire District Council* [2017] 2 P & CR 4, [2017] EWCA Civ 71, the court held that a duty did arise in the particular circumstances of that case: where the development would have a "significant and lasting impact on the local community", and involved a substantial departure from Green Belt and development plan policies, and where the committee had disagreed with its officers' recommendations. Of the last point, Elias LJ (giving the leading judgment, with which Patten LJ agreed) said:

> "The significance of that fact is not simply that it will often leave the reasoning obscure. In addition, the fact that the committee is disagreeing with a careful and clear recommendation from a highly experienced officer on a matter of such potential significance to very many people suggests that some explanation is required … the dictates of good administration and the need for transparency are particularly strong here, and they reinforce the justification for imposing the common law duty." (para 61)

156. SCC, whilst accepting that in this case the Commissioner was not disagreeing with the recommendation of the HTB, relied upon an analogy between the departure from the Green Belt policies in ***Oakley***, and the departure by the Commissioner here from the FFS Report, and the SCC ongoing review. There are similarities, but I do not consider it correct to equate either the FFS Report or the ongoing review with a policy. However, as explained above by Lord Carnwarth, it is the requirement of fairness, based on the particular circumstances of the case, that leads to the common law duty to give reasons. Making the academy order for Swanmead Middle School, the only middle school under the control and direction of SCC, was going to have a significant

and detrimental effect upon the structural re-organisation of schooling in the area as whole. It was made in the middle of the consultation period being performed by SCC as part of the two-phase consultation process that was developed in accordance with the Defendant's own "Consultation Principles Guidance 2018".

157. The Divisional Court in ***R (Birmingham CC) v Birmingham Crown Court*** [2009] EWHC 3329 (Admin) stated (or repeated, based on the cases there identified) per Beatson J (as he then was) at [47] that one of the categories of case in which there is a duty to give reasons is a decision that appears aberrant without reasons. However, the ***Dover*** case does not limit the common law duty to arising only in "aberrant" decisions, and Beatson J uses the term "one of the categories of case". The duty to give reasons does not only arise if a decision appears aberrant without reasons. Even if it does, this decision is extremely difficult to understand without reasons.

158. In the unusual circumstances of this case, I consider that the common law duty to give reasons for the decision is engaged.

159. The Defendant therefore relies upon the letter of 19 September 2019, to which I now turn. Although I have quoted it above at [66], I have already observed that it is relatively short and it is convenient to reproduce it here.
"I understand that some concerns have been raised locally regarding the applications from Swanmead and Maiden Beech, because of the perceived potential implications for the recent review of [the relevant area] school system. I would like to reassure all local stakeholders that, as we have previously discussed, the development of multi-academy trust (MAT) structures should not present an impediment to school organisational planning or change, to the continuation of local partnership working across and between MATs and between academies and local authority maintained schools. It is my expectation that MATs should be working with each other and with the local authority across an area to ensure sufficient good school places and strong outcomes. Structural changes to academies also require both consultation and RSC approval through the Significant Change process. As such I am confident that, if and when there is a shared view that changes are needed to the local school system, the fact that these two schools have joined the Bridgwater College Trust should present no barrier to this.
I read with interest your letter of 13 September regarding next steps following the review and thought it important to clarify my position. We have discussed the local authority's preference for all schools within the local three tier system to be within a single organisational structure. I understand your reasoning and have agreed that should I receive further applications from local schools to join a MAT I will consider such applications in the context of the local authority's preference. However, we have also discussed the fact that individual schools have the freedom to apply to join the MAT of their choice and that my office cannot direct schools on that point unless they are the subject of formal intervention (although it is open to me to decline an application). As such, I would not want to give the impression that, having approved these two schools to join Bridgwater College Trust, a decision has thereby been taken at this time that all schools in the local area will necessarily join that same MAT."

160. Reasons must "be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the principal and controversial issues"; this is a quotation from Lord

Brown in ***South Bucks DC v Porter (No 2)*** [2004] UKHL 33, the passage itself being quoted at [35] of ***CPRE Kent v Dover***. The reasoning must not give rise to substantial doubt that decision-maker erred in law, but such an adverse inference will not readily be drawn by the court. Reasons can be brief and the degree of particularity required depends entirely on the nature of the issues.

161. The Defendant submits that SCC is reading the letter with reasons in a hypercritical and overly legalistic fashion. I accept that approach must not be adopted when considering reasons such as this. The letter must be read in a common sense way and without excessive – or indeed any – legalistic precision or mechanistic analysis of the terminology used in the letter.

162. I do not consider it to be overly legal or hypercritical to consider each paragraph in in turn to decide whether either contains adequate reasons. In my judgment none of the passages in the first paragraph contain any or any adequate reasons for the decision. The first sentence "I understand" repeats some concerns. The second "I would like to reassure" contains assurances. The third "it is my expectation" states that the Commissioner expects MATs and SCC to work together. The fourth is that structural changes to academies are subject to a separate process, which they are, and this is a correct statement. It is not however a reason for the decision. The fifth sentence is that "if and when there is a shared view" that changes are needed, BCT should not present a barrier to this. That is the closest that the passages in the paragraph come to reasoning, but I do not consider it adequate. It ignores the conclusion that had already been reached that the three-tier structure was not viable, and proceeds as though that had not been reached, hence the use of "if and when".

163. I turn then to the second paragraph. That paragraph in my judgment does not contain any reasons for the decision at all. It refers to the future, how future applications will be dealt with, and individual schools' freedom to apply to join the MAT of their choice.

164. Neither of the paragraphs, either read individually or collectively, contain any adequate reasons for the decision. There is no adequate explanation for why the decision was made to make Swanmead an academy, with the consequences which have been identified earlier in this judgment, including the prejudicial impact upon the ongoing review process; nor are there reasons why the representations from the other stakeholders (including but not only SCC) should have been ignored; nor are there reasons for why a decision had to be made actually during the on-going consultation rather than waiting until its conclusion. It seems entirely to ignore the on-going review.

165. The letter, read sensibly as a whole and without being overly critical or legalistic, does not contain adequate reasons, and leads to a conclusion that the decision-maker erred in law, which is a conclusion I have only reached very cautiously.

166. The letter of 6 September 2019 pre-dates the decision by 10 days, but is also relied upon by the Defendant as containing reasons. That letter states:
"Thank you for your letter of 3 September. I can assure you that in reaching a decision at the September HTB [on the applications], I will take account of the recent review and the local authority views that you have shared with me.

I would also, however, like to reassure you that whilst I appreciate it can bring added complexities, the development of [MAT] structures should not present an impediment to school organisational planning or change, or to the continuation of local partnership working across and between MATs and between academies and local authority maintained schools. It is my expectation that MATs should be working with each other and with the local authority across an area, and I would be concerned in any instance that this were not the case."

The expectation by the Commissioner that the parties should work together is not an adequate reason, in my judgment.

167. I find that SCC succeeds on this ground too.

Relief

168. The Defendant mounts a separate defence to the grant of relief, even if SCC succeeds on any of its grounds (which it has). This is that no relief should be granted because the outcome is academic. The Defendant maintains that it is highly likely that the outcome for SCC would not have been substantially different if the conduct complained of had not occurred, and relies upon section 31(2A) of the Senior Courts Act 1981.

169. This is a new statutory test which has modified what used to be called the ***Simplex*** test. It was considered by the Court of Appeal recently in ***R (Plan B) v Secretary of State for Transport*** [2020] EWCA Civ 214 where the following was stated [AB/823]:

> "[272]. The new statutory test modifies the *Simplex* test in three ways. First, the matter is not simply one of discretion, but rather becomes one of duty provided the statutory criteria are satisfied. This is subject to a discretion vested in the court nevertheless to grant a remedy on grounds of "exceptional public interest". Secondly, the outcome does not inevitably have to be the same; it will suffice if it is merely "highly likely". And thirdly, it does not have to be shown that the outcome would have been exactly the same; it will suffice that it is highly likely that the outcome would not have been "substantially different" for the claimant."

170. The Defendant relies upon the failure of SCC to bring judicial review proceedings in respect of Maiden Beech joining BCT, the conversion of which took place on 1 December 2019, as substantiating its submission that the outcome for SCC would not have been substantially different, thus engaging section 31(2A). It is also said that the academy order causes no direct prejudice because it has not changed the age range of Swanmead. It is also said that Maiden Beech "is just as crucial as Swanmead in relation to the future of the schooling structure, as both are the middle school provision in the area". BCT is involved in any event as a result of Maiden Beech moving from being a single academy trust to part of BCT.

171. I do not accept these submissions. They ignore that Swanmead was the only middle school in the area under the direction and control of SCC prior to the making of the academy order. Mr Farrow's evidence makes clear the range of potential options available to SCC in respect of Swanmead, and how these fitted with the options identified in the FFS Report. By making the academy order, the only middle school provision in the area under SCC's direction in this respect moved to becoming an independent school, and changes simply cannot be imposed by SCC. The fact that

Maiden Beech was already an academy and hence independent is rather glossed over by the Defendant when arguing its reliance upon section 31(2A).

172. The Defendant also relies upon the recent age range change at Hinton St. George, to include Year 5 from September 2020 and Years 5 and 6 from September 2021. I do not accept those submissions. Those age range changes, at one school of a far higher number, are not inconsistent with the ongoing review. They do not reinforce the existing three-tier structure. The academy order does.

173. The Defendant submitted that any risks to the structural re-organisation are potential risks. This point was also argued in respect of Grounds 1 to 3. I do not accept that, or that this point could in those circumstances fail to be considered as the Defendant seems to suggest. Weight, rather than whether to consider it at all, is a matter for the decision-maker. However, material considerations must be taken into account.

174. The Defendant also submits that any prejudice to the ongoing review is "entirely hypothetical", and that it is "perfectly possible the views of SCC and BCT will wholly align." There is no evidence to support that submission, but in any case it is insufficient to meet the new statutory test, which requires that it is "highly likely". Possibility is not the same as high likelihood.

175. The Defendant also submitted that there was no real indication of what was going to happen in terms of the outcome of the structural review that was going on, and this submission is reflective of Mr De Rivaz' evidence which seems to approach the matter as though it was wholly unclear. Certainly the failure by SCC to identify what Mr Rivaz describes as SCC's "preferred option" seems to have been weighed heavily in the balance. However, this is to ignore that the consultation process which was essential to arrive at a preferred option was actually underway in August 2019.

176. SCC argues that this defence by the Defendant was deployed at the permission stage, as though that means that the single judge's grant of permission in March 2020 weakens the defence on relief grounds. I do not accept that, and have considered it anew. In any event, there has been change since permission was granted, such as the Hinton St. George age range approval by SCC. However and in any event, I have concluded that this challenge by the Defendant to the grant of relief to SCC is not well made. To be fair to Mr Glenister, although he advanced this separate defence persuasively, it did not attract a significant proportion of oral submission at the hearing.

Conclusion

177. For the reasons identified, the claim by SCC for judicial review succeeds on Ground 1, Ground 2 (which is an alternative ground to Ground 1), Ground 4 and Ground 6. It fails on Grounds 3 and 5. The relief granted is that sought in the Statement of Facts and Grounds, namely a declaration by the court that the decision to approve Swanmead's application to become an academy and join BCT was unlawful (for the reasons given in respect of the grounds upon which SCC has succeeded) and SCC is entitled to an order quashing the decision and the academy order.

178. It should be borne in mind that the facts of this case are highly unusual. Certainly the outcome of this judicial review should not be interpreted as granting carte blanche to

those wishing to challenge the making of academy orders generally, or to contain any finding that there is a general duty to give reasons whenever such an application is approved.

179. Finally, the academic year of 2019/2020 has been substantially affected in any event, across the country, as a result of the Covid-19 crisis. For a great many parents, pupils and staff, however, in one particular area of Somerset, the same academic year will also have been fraught with uncertainty and concern generally. The structure of the education provision in that area was in 2019 subject to an ongoing and wide-ranging review, in the middle of which came the challenged academy order, and these legal proceedings. The Defendant also relied in his submissions upon SCC's failure to challenge the approval by the Commissioner for Maiden Beech to join BCT. At [58] above I have already referred to the pre-action letters exchanged between BCT and SCC concerning Hinton St. George, about a change of age range at that school to include pupils from Years 5 and 6. Year 5 contains children who are 9 to 10 years old; a handful of these would potentially have gone to Maiden Beech, absent the age change. The pre-action letter from BCT threatens yet further judicial review proceedings. Suggestions are also made in the evidence that the Governors of Swanmead sought academy status to outflank the review and consultation process, and to protect or ringfence their own school, to keep it from changes that SCC might wish to make to improve education across the area.

180. These are only observations, but that relations between the parties seem to have deteriorated. This was probably not helped by both the timing and method whereby the Commissioner gave notification that the applications would be considered on 16 September 2019. This decision, in August, did not even reach some of the schools until they saw the item on the agenda for the HTB meeting itself. No satisfactory or comprehensive explanation was given for this. The letters in early September 2019 from the other schools make it clear that they considered this highly unsatisfactory, putting it at its lowest. This was not likely to lead to harmonious relations.

181. Legal proceedings are expensive, and even expedited ones can take a number of months. There is a total of three different sets of judicial review proceedings that have been threatened or initiated concerning schools in this area. The three sets are the proceedings in respect of which this judgment is provided; the proceedings the Defendant states that SCC *ought* to have started (as well as these) concerning Maiden Beech; and now threatened proceedings by BCT relating to Hinton St. George. It is in nobody's interests for time, money and effort to be spent challenging one another in legal proceedings in this way. It is certainly not in the interests of the children being educated in this part of Somerset, nor in the interest of all those involved in that important process, including staff and parents. Consultation, consensus and co-operation are far more likely to result in viable solutions for education in this particular area than continuing conflict and yet more litigation.

[i] The application for academy status describes this as the Bridgwater and Taunton College Trust but Bridgwater College Trust is used on the Judicial Review Claim Form N461