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Neutral Citation Number: [2020] EWHC 2071 (Admin)

Claim No: CO/4062/2019

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

Date of judgment: 30 July 2020

Before :

THE HONOURABLE MR JUSTICE FRASER

- -

Between :

The Queen on the application of
ANNE-MARIE DRIVER

Claimant

- and –

RHONDDA CYNON TAF
COUNTY BOROUGH COUNCIL

Defendant

- and –

COMISIYNYDD Y GYMRAEG
WELSH LANGUAGE COMMISSIONER

Intervener

- -

Judgment

- -

Rhodri Williams QC and Nia Gowman (instructed by Watkins & Gunn) for the Claimant
Julian Milford QC and Katherine Eddy (instructed by Gwasanaethau Cyfreithiol/Legal Services Department of the Defendant) for the Defendant

Owain James (instructed by Capital Law) for the Intervener

Hearing date: 24 June 2020

- -

Mr Justice Fraser:

Introduction

1. In these proceedings, the Claimant seeks judicial review of the decision made by Rhondda Cynon Taf County Borough Council ("the Council") on 18 July 2019 to implement proposals that concern wide-ranging re-organisation of the primary, secondary and sixth form education in the greater Pontypridd area within the Council's boundary. The proposals were published in three Statutory Notices. The implementation of a fourth proposal, contained in a fourth Statutory Notice, was referred by the Council to the Welsh Ministers. The proposals all concern reorganisation of education in the Pontypridd area.

2. The Claim Form was issued on 17 October 2019. Permission to bring judicial review proceedings on three grounds, numbered Grounds 1, 2(d) and 2(f), was granted on paper by Jefford J on 27 February 2020. Permission was refused in respect of other grounds. An application was later made by the Claimant to amend her grounds, by adding a further ground, namely Ground 2(g), which relates to the Welsh language; an application was also made to have the judicial review proceedings heard by a Welsh-speaking judge. On 14 April 2020 Choudhury J allowed the Claimant to add to her grounds by the addition of Ground 2(g), and also granted the Claimant permission to bring judicial review on that ground. He refused the application for the proceedings to be heard by a Welsh-speaking judge. The Claimant therefore advances her claim on four grounds, and the parties retained the original numbering throughout the documentation and submissions. The four grounds are therefore Ground 1, and Grounds 2(d), 2(f) and 2(g). I explain the substance of each of those four grounds below.

3. On 8 June 2020 the Welsh Language Commissioner ("the WLC") made an application to intervene, and to serve evidence and make both written and oral submissions at the hearing. The Claimant supported that application; the Council did not oppose the application to intervene, but opposed the application by the WLC to make submissions. I granted the application by the WLC in advance of the substantive hearing, including granting the WLC permission to make written and oral submissions. In view of the substance of Ground 2(g) (which concerns the impact of the proposals upon education in the Welsh language), and the role of the WLC in the Welsh language, it seemed to be entirely right that the WLC should be permitted to intervene and make submissions too. In light of the opposition by the Council to his involvement, the WLC had voluntarily offered a self-imposed time limit of only 15 minutes for oral submissions on his behalf. In view of the fact that the oral submissions were to be made both in Welsh and English, the court explained that it would not impose this time limit, and counsel for the WLC was not to feel unnecessarily constrained or disadvantaged in this respect. Although colloquially one might refer to "education in Welsh" or "education in the Welsh language", education delivered through the medium of the Welsh language is known more formally as "Welsh medium education".

4. The hearing was conducted remotely using Skype for Business. I am grateful to the parties for their assistance, in particular for bearing the extra burden in terms of

preparation of electronic bundles and associated document management required as a result of this.

5. The Claimant is part of a campaign group called "Our Children First – Ein Plant yn Gyntaf Group" ("the campaign group"). She is also a parent of four children, aged 14, 6, 3 and 2, who are educated at different schools affected by the changes to be imposed by the Council. Her eldest child attends Cardinal Newman Roman Catholic Comprehensive School ("Cardinal Newman School"), which under the proposals is to have its existing 6th form provision closed. That aspect of the re-organisation was the one referred by the Council to the Welsh Ministers.

6. The Statutory Notices including the different proposals were as follows:
1. The alteration of the age range of pupils at Cardinal Newman School, from the ages 11 – 19 years currently educated there, to an age range of 11 – 16 years, resulting in the removal of the sixth form provision by September 2022 ("Proposal 1"). This was referred to the Welsh Ministers by the Council, as it involves the closure of a 6th form.

2. The closure of Pontypridd High School and Cilfynydd Primary School, and the creation of a new school on the site of Pontypridd High. This would educate children from ages 3 – 16, and this type of school with this age range is called an 'all through' school. It is to open on the site of the current Pontypridd High School by September 2022. Pontypridd High School currently educates children aged from 11 – 19. There will therefore be no 6th form provision at this school as a result of this ("Proposal 2"). This means that the existing 6th form at this site would no longer exist. The correct approach to this cessation of 6th form provision is in issue in these proceedings, and the Council maintains this proposal does not involve closure of a 6th form (which is why the Council did not refer that to the Welsh Ministers). The Claimant maintains it should have been referred, as a matter of statutory construction.

3. The closure of Hawthorn High School and Hawthorn Primary School and the creation of a new 3 – 16 'all through' school on the site of the current Hawthorn High and Hawthorn Primary Schools, again by September 2022, The Local Authority designated Alternative Learning Needs (or ALN) specialist class located in Hawthorn High School, as well as the current pupils receiving education through the medium of English at Heol y Celyn Primary School, would transfer to the new school. There will be no 6th form provision at this school after these changes either ("Proposal 3"). Similar issues in terms of referring this to the Welsh Ministers arise in respect of the cessation of the existing 6th form at Hawthorn High, as do in respect of Pontypridd High.

4. The closure of Ysgol Gynradd Gymraeg Pont Sion Norton ("Pont Sion Norton") and Heol y Celyn Primary School and the opening of a new Welsh medium Primary School on the site of the current Heol y Celyn Primary School by September 2022 ("Proposal 4"). Existing pupils at Heol y Celyn who are taught in English (English medium stream pupils) would transfer to the new "all through" 3-16 Hawthorn school. Heol y Celyn is a dual language school. Pont Sion Norton is a Welsh medium school.

5. There was also a fifth consequential proposal involving changes to school catchment areas.

7. The proposals are all interlinked. They involve considerable re-arrangement of the education in the Pontypridd area. The Pontypridd area currently has three schools with 6th forms, namely Cardinal Newman School, Pontypridd High and Hawthorn High. After the changes are implemented, all of these three 6th form provisions will either cease to exist or close.

8. The Claimant served evidence, both in her own witness statement and a sizeable number of other witness statements. These are both from other parents, who explain not only the impact upon their children of the proposed changes, but also from staff too. They explain the impact upon education (including children of the parents) of what is seen as the detrimental effect of these proposals. These include removal of the existing Welsh language provision from the schools in their particular area; the impact upon children with special educational needs ("SEN"); and also the closure of the 6th forms. These witness statements demonstrate strong views, and follow detailed engagement by these deponents both in the consultation process, and also potential alternative proposals to those adopted. The witness statement of Ms Hadley, a community volunteer and trustee of the local community project, exhibits all the relevant documents on behalf of the Claimant and gives a careful account of the sequence of matters that led to the decisions being challenged in these judicial review proceedings.

9. Following the closure of the 6th forms at Cardinal Newman School, Pontypridd High and Hawthorn High, the town of Pontypridd will have no schools with 6th forms. Those pupils who wished to attend a 6th form at a faith school could attend St David's College in Cardiff, some distance away. For the others, alternative post-16 school provision would be available at Bryncelynnog Comprehensive, which is in the next valley, again some distance. Coleg Y Cymoedd is a college that would accommodate students who wished to have a broader curriculum choice of A Level and vocational subjects.

10. Pontypridd is the county town of Rhondda Cynon Taff. It has a population of approximately 40,000 people, and has 22% of pupils in receipt of free school meals, as compared to the average across Wales of 16.5%. I intend no disrespect to the residents of Pontypridd by summarising some of the evidence as contending that it is an area of lower economic advantage. There are witness statements from both existing and former head teachers and heads of 6th form. The former head of 6th form at Hawthorn High School (to be discontinued under Proposal 3) provides evidence why the alternative, English speaking 6th form is simply not viable, being at Bryncelynnog, some distance from Pontypridd and stating that this, to quote the witness statement itself, "is terrible". The difficulties of attending after school clubs and activities are explained, particularly in an area of lower economic advantage where families can only rely on public transport, as well as the lack of provision identified by the Council for free transport for pupils who may wish to stay at school beyond the end of the timetabled lessons. There is very great concern that losing all three of the existing 6th forms in Pontypridd will lead to many pupils, who would otherwise stay at school past the age of 16, simply deciding to leave education. Mr Imperato, the Claimant's solicitor, also served two witness statements, dealing with the need for some further short statements to cover the additional ground concerned with the Welsh language,

Ground 2(g), the delay argument advanced by the Council and also his dealings with Mr Nicholls, the Council's solicitor.

11. There is widespread concern amongst the campaign group, of whom the Claimant is one, that the re-organisation will remove the availability of education in the Welsh language entirely from the North Pontypridd area. As one of the statements puts it "there is a large swathe of villages north of Pontypridd that will be deprived of access to Welsh medium education as a result of these proposals". Some of the parents are Welsh speakers, others are not, but they have chosen Welsh education provision for their children. As a result of the reorganisation, some of the existing pupils at different schools will have to move to schools in other areas, some will leave Welsh education altogether, and others will no longer be able to participate in their existing after-school activities for logistical reasons. Most, if not all, will have to travel much further to go to school. Some have additional support for their particular needs, some have special educational needs, and there are a variety of real issues identified in the evidence. The real concerns expressed about the likelihood of many 16 year olds choosing to leave education entirely, because of the loss of the 6th forms involved in the reorganisation, also raise the issue of the consequential impact upon those young people's futures.

12. The Council relies on detailed and extensive evidence from Ms Howell, the Business and School Organisation Manager, and Mr Nicholls, its solicitor and Service Director. That latter evidence related predominantly to what is said to have been delay by the Claimant in commencing the claim, together with when the Claimant was notified of the difficulties said to be caused by delaying the reorganisation generally, and also the Council's decision not to take "any irreversible steps" pending resolution of these proceedings. Ms Howell in her statements summarises the advantages of the reorganisation, explains the investment involved in the proposals (£37.4 million in new and improved facilities) and also how the consultation process was performed. The focus of the proposals is said to be to raise educational standards at all key stages and "ensuring that limited financial resources were targeted at improving the learning environment for the pupils".

13. The WLC, the Intervener, served evidence in his own witness statement. The WLC is Mr Aled Roberts. The purpose both of his application to intervene, and his statement, was to provide the court with further information about the events leading up to the preparation of his final investigation report into the way that the Council had approached the proposals, and consideration of the impact of the proposals on the Welsh language. I deal with this in further detail when I consider Ground 2(g) below, which I term the Welsh Language Ground. The WLC had arrived at a proposed determination that the Council was in breach in certain respects of the requirements of standards 91 to 93 of the Welsh Language Standards (No.1) Regulations 2015. The position is however more complicated than that, and the Welsh Language Ground is explained further at [101] to [125] below.

14. In 2009 the Welsh Government announced a programme called the 21st Century Schools and Education Programme. The name of this was then changed in 2019 to the 21st Century Schools and Colleges Programme. The programme is a collaboration between the Welsh Government and local authorities, who are responsible for education in their areas. Investment is available on a "match funded" basis with

approximately 65% coming from the Welsh Government and 35% from local authorities and others. Estyn is the independent education and training inspectorate for Wales (its English equivalent is called Ofsted). In 2012 Estyn carried out a formal inspection of the Council's Education Service and made a recommendation to reduce surplus school places that it had identified.

15. A report was published by an educationalist in 2014 called "Successful Futures". This was adopted by the Welsh Government as policy. One of its elements was continuous schooling as what was called "a coherent and progressive whole", to use the description in Ms Howell's witness statement. The Council undertook a review of education provision in its area, and in 2017 the proposals at the heart of these proceedings emerged. These proposals, which are identified in paragraph 28 of Ms Howell's first witness statement, are as set out at [6](1) to (4) above. The Council then commenced the consultation process. This commenced on 15 October 2018, and was conducted under the School Organisation Code 2013 ("the 2013 Code") which was then in force, as the new School Organisation Code only came into force from 1 November 2018. The 2013 Code was made under sections 38 and 39 of the School Standards and Organisation (Wales) Act 2013 ("the 2013 Act").

16. The consultation started with the publication of the Consultation Document which was sent to a large number of the schools' governing bodies, parents, carers and staff. This included a questionnaire to be completed, and was followed by a series of consultation meetings, open evenings and exhibitions. This led to a Consultation Report being prepared by the Council, that report recommending that the proposals be maintained with the exception of one proposed change to the catchment area of Bryncelynnog Comprehensive School, concerning Gwauncelyn Primary School.

17. Estyn had responded to the proposals and this response was one of a number of appendices to the Consultation Report. Estyn had certain criticisms of the proposals which are dealt with in greater detail under Ground 2(d), although it concluded that education under the proposals would be no less effective than it was currently. One appendix to the Consultation Report was the Welsh Language Impact Assessment performed by the Council. That is dealt with in greater detail under the Welsh Language Ground. The Council's Cabinet met on 21 March 2019 and agreed to progress the proposals. That decision was considered by the Council's Overview and Scrutiny Committee on 3 April 2019 who had "called-in" the decision. The Council thereafter published Statutory Notices in respect of each of the proposals on 30 April 2019. This triggers a statutory period of 28 days for any person to object in writing.

18. The Claimant objected, as did a large number of deponents who have provided evidence supporting the Claimant in these proceedings. Ms Howell explains that a total of 435 objections were received. A large number were from those campaigning against the proposals, a point which Ms Howell makes in the following passage of her witness statement:
"348 of these objections were generated via a website created by "Our Children First – Ein Plant Cyntaf". The website included a prewritten objection template and visitors to the website simply had to enter their name, email address and click submit to register an objection".

19. I have already explained that the Claimant is part of a campaign group. Mr Imperato gave evidence about the concerned local parents and campaigners involved. Objections from a well organised group would, one hopes, be considered in the same way as less well organised objections. They should not be given lesser weight because they originate in an organised manner such as the one identified by Ms Howell, and I assume they were given equal weight by the Council with other objections. The use of electronic means promotes efficiency in any event. This is not, in any event, directly relevant to any of the specific grounds. It may be a tangential explanation to the background to the judicial review proceedings, or it may simply be unfortunate wording of her evidence on behalf of the Council. I have had no regard to the number of objections, whether this is a large or small number, and whether they were electronically submitted or not.

20. Following the objections, the Council's case is that they were considered, and an Objection Report prepared which summarised them. Objections were also received from the governing bodies of Hawthorn High and Pontypridd High School. The impact assessments were also updated, which included an update of the Equality Impact Assessment and Welsh Language Impact Assessment. Estyn's response was not a statutory objection, and Ms Howell explains that the response from Estyn was not therefore treated as an objection for the purposes of the Objection Report. This statement overlooks that many of the objectors expressly adopted Estyn's concerns about the proposals as part of their individual grounds of objection. This point is addressed further in respect of the Estyn Ground, where I identify Estyn's concerns about the proposals, including but not limited to the failure to make adequate provision for pupils with special educational needs.

21. The Cabinet met on 18 July 2019 to consider the Proposals that were made and the objections that had been received. Proposal 1, relating to the closure of the 6th form provision at Cardinal Newman School, was referred to the Welsh Ministers. The other proposals the subject of these proceedings, namely Proposals 2 to 4, were approved. The Welsh Ministers have not yet made a decision on the proposal to close the 6th form at Cardinal Newman School. One of the detailed grounds, Ground 1, relates to an alleged failure by the Council to refer to the Welsh Ministers the decisions which will lead to the cessation of 6th form provision at both Pontypridd High School and Hawthorn High School, which it is said by the Claimant also have to be referred to the Welsh Ministers. Whether there is any link between the outcome of these proceedings, 6th form provision generally in the Pontypridd area and any delay in the outstanding decision awaited by the Council from the Welsh Ministers is not known.

22. I will not set out in this judgment all of the evidence lodged on behalf of both the Claimant and the Council, but have of course considered all of it. The proposals have obviously generated a great amount of strong feelings, and I do not doubt that those feelings are sincerely held. I should record, however, that the function of judicial review proceedings is not to substitute the view of the court for the substantive decisions that are being challenged. This is not a consideration of the merits of the organisation of education in the area. Nor are these proceedings an appeal (in some way) from the decisions made by the Council. The issue in judicial review is to consider the lawfulness of the decision, or decisions, which are reviewed by the court.

23. The WLC lodged evidence and I deal with this under the Welsh Language Ground, the ground to which it specifically relates. That ground concerns the way in which the impact upon Welsh medium education of the proposals was considered and/or dealt with by the Council.

24. There are, as might be expected, pros and cons argued on the underlying merits of all of the grounds, particularly in the detailed evidence. The Council's wish to remove surplus school places is one of the reasons for the re-organisation, and is a justifiable one; its intentions in terms of the overall re-organisation are carefully explained. The witness evidence served on behalf of the Claimant make perfectly valid points in favour of retaining school 6th form provision in Pontypridd, a sizeable area that currently has three schools offering 6th form provision, but which the Claimant considers will end up with none. The impact on a community of lower economic advantage, traveling issues, and Welsh medium education consequences as a result of the closure of Pont Sion Norton are all identified. Some of the arguments on each side have become extremely polarised. For example, the Council points to what it says is the lack of viability of 6th form education in Pontypridd, currently spread across three different 6th forms. To meet that argument, the Claimant points to the Council's own projected numbers for the total at each of those three schools, which are as follows. For each of the years 2019, 2020, 2021, 2022 and 2023 they are 274, 289, 285, 283 and 303 respectively, all in excess of the number of 250 said by the Council required to render a 6th form viable. Another example is travel distance and time. The Claimant's evidence carefully explains the disadvantages of 6th formers having to travel either to Cardiff or to Bryncelynnog. The Council seeks to meet that by explaining free school transport will be provided. The counter-response to that is that travel time affects wellbeing, increases pollution, and in any event such transport will not be available for anyone taking part in after-school activities.

25. However, these competing merits arguments about organisation of education in the Pontypridd area are not relevant to judicial review, and they are not considered in this judgment. This judgment should not be read as containing a resolution of the competing underlying merits. Organisation of education is a matter for the local authority, together with the Welsh Ministers, in so far as the statute requires that for 6th form provision (the subject of Ground 1). I do not wish this to be misconstrued as the court minimising the very real human consequences of the reorganisation that are carefully explained in all the evidence; or the particular impact on some pupils, some vulnerable, and some with special educational needs. It is simply to repeat that it is the lawfulness of the Council's decisions that is the issue in judicial review.

The Grounds

26. These are as follows:

1. The decision to re-organise sixth form education, as part of Proposals 2 and 3, was taken in breach of section 50 of the School Standards and Organisation (Wales) Act 2013 ("the 2013 Act");

2. The decision in relation to all four proposals was taken in breach of the Welsh Government's School Organisation Code 2013 ("the 2013 Code") in that the Council:

(i) Failed to take into consideration the response of Estyn to the consultation process (Ground 2(d)). I shall refer to this as the Estyn Ground.

(ii) Failed to consider suitable alternative proposals which were put forward as part of the consultation process (Ground 2(f)). I shall refer to this as the Alternative Proposals Ground;

(iii) Failed to take into account a specific factor for proposals to reorganise secondary schools or remove sixth forms, namely how the proposals might affect the sustainability or enhancement of Welsh medium provision in the regional 14 – 19 network and wider area and promote access to availability of Welsh medium courses in post 16 education (Ground 2(g)). I shall refer to this as the Welsh Language Ground.

27. The failure of the Claimant to obtain permission to bring judicial review on some of her grounds explains why the lettering of the sub-grounds of Ground 2 omits 2(a), (b), (c) and (e). As can be seen, Ground 1 concerns the 2013 Act. Each of the three grounds advanced under Ground 2 concern the 2013 Code.

28. The Council's case in summary is that the decisions were lawful. As a point of statutory construction, it is said that closing an entire school with a 6th form, and opening a new school on the same site with an age range that ends at 16, is not closing a 6th form, it is closing the whole school. As such, the Council does not have to refer the 6th form issue (whether closure or cessation) to the Welsh Ministers. The Council maintains that it was not obliged to treat the Estyn reports as objections, and that it did consider alternative proposals. It maintains that a joint 6th form could not be opened at Cardinal Newman School as that is a faith school. It also maintains that the fact that it did a Welsh Language Assessment means that the Welsh Language Ground is not made out either.

29. The Council further challenges the grant of relief in any event under any of the three limbs of Ground 2. It is said by the Council that the grant of relief to the Claimant will cause significant hardship and prejudice, and be detrimental to good administration. The Council argues that the challenge is out of time, and should have been brought well within the 3 month period for issuing judicial review proceedings, rather than just within that 3 month period. Further, the Council submits that even if there have been failures to follow the Code (each of the latter three limbs of Ground Two) the outcome would not have been substantially different. The Council invokes section 31(2A) of the Senior Courts Act 1981 to justify the refusal of relief. I shall consider this after deciding whether or not the Claimant succeeds on any of her grounds for judicial review, before considering relief. For obvious reasons it only arises if any of the grounds for judicial review are made out in the Claimant's favour.

The Statutory Framework

30. The School Standards and Organisation (Wales) Act 2013 ("the 2013 Act") is the statute that governs responsibility for education in Wales. As part of the context within which the 2013 Act sits, it should be noted that the funding for 6th form education in Wales comes directly from the Welsh Government. This is considered in more detail under Ground 1 below, but helps explain why some matters connected with the provision of 6th form education require referral to the Welsh Ministers.

31. Section 38(1) of the 2013 Act requires the Welsh Ministers to issue a School Organisation Code. Section 38(3) states that the Code "may impose requirements, and may include guidelines setting out aims, objectives and other matters". It is under

this provision that the Welsh Government's School Organisation Code 2013 ("the 2013 Code") was issued.

32. Section 40 of the 2013 Act states the following:
"(1) A new community school, voluntary school or community special school may be established in Wales only in accordance with this Part.
(2) No new foundation school or foundation special school may be established in Wales.
(3) A maintained school may be discontinued only in accordance with this Part.
(4) An alteration which is a regulated alteration in relation to the type of school in question may be made to a maintained school only in accordance with this Part.
(5) No alteration may be made to a maintained school that changes the religious character of the school or causes a school to acquire or lose a religious character.
(6) Subsection (3) has effect subject to section 16(5) (power of Welsh Ministers to direct closure of school).
(7) Schedule 2 (which describes regulated alterations) has effect."
(emphasis added)

33. Pursuant to s. 38(2) of the 2013 Act, local authorities (amongst others) must, when exercising functions under Part 3 of the 2013 Act, act in accordance with any relevant requirements contained in the Code, and have regard to any relevant guidelines contained in it. The Code expressly states:
"Where guidance is given by the Code, it is stated that relevant bodies **should** follow this guidance unless they can demonstrate that they are justified in not doing so".

34. Provision is made for proposals to establish mainstream schools under section 41 of the 2013 Act; to alter mainstream schools under section 42 of the 2013 Act; and to discontinue mainstream schools under section 43 of the 2013 Act.

35. Section 48 imposes a duty upon those who publish school organisation proposals, to consult in the following terms:
"(1) A proposer must publish proposals made under this Chapter in accordance with the Code.
(2) Before publishing proposals made under this Chapter, a proposer must consult on its proposals in accordance with the Code.
(3) The requirement to consult does not apply to proposals to discontinue a school which is a small school (see section 56).
(4) Before the end of 7 days beginning with the day on which they were published, the proposer must send copies of the published proposals to—
(a)the Welsh Ministers, and
(b)the local authority (if it is not the proposer) that maintains, or that it is proposed will maintain, the school to which the proposals relate.
(5) The proposer must publish a report on the consultation it has carried out in accordance with the Code."

36. Section 49 is concerned with objections once those proposals are published. It provides that:
"(1) Any person may object to proposals published under section 48.

(2) Objections must be sent in writing to the proposer before the end of 28 days beginning with the day on which the proposals were published ("the objection period").
(3) The proposer must publish a summary of all objections made in accordance with subsection (2) (and not withdrawn) and its response to those objections—

(a)in the case of a local authority that is required to determine its own proposals under section 53, before the end of 7 days beginning with the day of its determination under section 53(1), and

(b)in all other cases, before the end of 28 days beginning with the end of the objection period."

37. Section 50 sets out which kinds of proposals require the approval of the Welsh Ministers. Interpretation of this section lies at the heart of Ground 1. The section states as follows:

"(1) Proposals published under section 48 require approval under this section if—

(a) the proposals affect sixth form education, or

(b) the proposals have been made by a proposer other than the relevant local authority and an objection has been made by that authority in accordance with section 49(2) and has not been withdrawn in writing before the end of 28 days beginning with the end of the objection period.

(2) Proposals affect sixth form education if—

(a) they are proposals to establish or discontinue a school providing education suitable only to the requirements of persons above compulsory school age, or

(b) they are proposals to make a regulated alteration to a school, the effect of which would be that provision of education suitable to the requirements of persons above compulsory school age at the school increases or decreases."

38. Schedule 2 to the 2013 Act describes what constitute "regulated alterations" for the purposes of section 50(2)(b). As far as material, Schedule 2 provides as follows at paragraphs 5 and 6 (with paragraph 6 setting out the two "regulated alterations" applying to 6th form provision):

"**Age range**

5(1) The alteration by a year or more of the lowest age of pupils for whom education is normally provided at the school.

(2) The alteration by a year or more of the highest age of pupils for whom education is normally provided at a school where the school, both before and after the alteration, provides education suitable to the requirements of pupils of compulsory school age and does not provide full time education suitable to the requirements of pupils over compulsory school age.

Sixth form provision

6(1) The introduction of the provision of full-time education suitable to the requirements of pupils over compulsory school age at a school which provides full time education suitable to the requirements of pupils of compulsory school age.

(2) The ending of the provision of full time education suitable to the requirements of pupils over compulsory school age at a school which is to continue to provide full time education suitable to the requirements of pupils of compulsory school age."

39. Chapter 5 of the 2013 Act concerns proposals for restructuring sixth form education and, specifically, confers on the Welsh Ministers the power to make their own

proposals to restructure 6th form education. Section 71 of the 2013 Act defines those powers in the following terms:

"(1) The Welsh Ministers may make proposals under this section for—

(a) the establishment by a local authority of one or more new community or community special schools to provide secondary education suitable to the requirements of sixth formers (and no other secondary education);

(b) an alteration described in paragraph 6 of Schedule 2 to one or more maintained schools;

(c) the discontinuance of one or more maintained schools which provide secondary education suitable to the requirements of sixth formers (and no other secondary education).

(2) A "sixth former" is a person who is above compulsory school age but below the age of 19."

40. A further feature of the statutory landscape is as follows. This is that Welsh legislation and these proceedings concern re-organisation of education in part of Wales (and hence being heard by the Administrative Court in Wales). Under section 1(a) of the Welsh Language (Wales) Measure 2011, the Welsh language has official status in Wales. The official status of the Welsh language is given legal effect under section 1(2) by enactments about certain specific matters, which are dealt with in greater detail under the Welsh Language Ground. Section 1(3) states the following:

"(3) Those enactments include (but are not limited to) the enactments which –

(a) require the Welsh and English languages to be treated on the basis of equality in the conduct of the proceedings of the National Assembly for Wales;

(b) confer a right to speak the Welsh language in legal proceedings in Wales;

(c) give equal standing to the Welsh and English texts of –

(i) Measures and Acts of the National Assembly for Wales, and

(ii) subordinate legislation".

41. Therefore, because the 2013 Act is an Act of the National Assembly for Wales, the Welsh text of the 2013 Act has to be given equal standing to the English text. The passages at [34] to [39] above are taken from the English text. There are differences in construction between the parties regarding section 50 of the 2013 Act. One of the arguments advanced on behalf of the Claimant is that the meaning of the English text of section 50 of the 2013 Act is more clearly demonstrated by looking at the Welsh text. Given the Welsh text has equal standing with the English text, the Claimant submits that the English text cannot be construed in the way contended for by the Council if the Welsh text has a different meaning. For its part, the Council argues that because the English text should be construed in a particular way, the Welsh text does not need to be considered, and is of no assistance (or should be construed in exactly the same way, which may be a different way of saying the same thing). Either way, it is necessary in this judgment to consider and take into account the Welsh text of the Act. Counsel for the Council is an English speaker and does not speak Welsh. Counsel for both the Claimant and the WLC each speak Welsh (and as I have already explained, both evidence by, and submissions for, the latter were given in both Welsh and English).

42. The title of the Act in the Welsh language is Deddf Safonau a Threfniadaeth Ysgolion (Cymru) 2013. The Welsh text of the pertinent parts of the statute states as follows,

with the literal translation into English following afterwards. These literal translations were agreed by the parties:

(1) Section 50(2) of the 2013 Act provides in Welsh:
"[Mae cynigion yn effeithio] [ar addysg chweched dosbarth]—
(a) [os ydynt yn gynigion][i sefydlu neu derfynu ysgol][sy'n darparu addysg][sy'n addas at anghenion personau sydd dros oedran ysgol gorfodol yn unig], [neu]
(b) [os ydynt yn gynigion][i wneud newid rheoleiddiedig i ysgol],[y byddai ei effaith yn golygu][bod darparu addysg][sy'n addas i anghenion personau sydd dros oedran ysgol gorfodol yn yr ysgol][yn cynyddu neu'n lleihau]."

(2) Literally this may be translated as:
"[Proposals affect] [sixth form education]—
(a) [if they are proposals][to establish or discontinue a school][which provides education][which is suitable to the needs of persons who are above compulsory school age only], [or]
(b) [if they are proposals][to make a regulated alteration to a school], [the effect of which would mean][that the provision of education][which is suitable to the needs of persons who are above compulsory school age at the school][increases or decreases]."
(The underlined words "yn yr ysgol" or "at the school" were added at the suggestion of the WLC, and agreed by the other parties. They do not affect the meaning of the provision for the purposes of these proceedings.)

(3) Section 71(1) of the 2013 Act in Welsh provides:
"[Caiff Gweinidogion Cymru] [wneud cynigion o dan yr adran hon]—
(a) [i un neu fwy] [o ysgolion cymunedol neu arbennig cymunedol newydd] [gael eu sefydlu] [gan awdurdod lleol] [i ddarparu addysg uwchradd] [sy'n addas at anghenion disgyblion chweched dosbarth] [(ac nid unrhyw addysg uwchradd arall)];
(b) [ar gyfer newid a ddisgrifir ym mharagraff 6 o Atodlen 2] [i un neu fwy o ysgolion a gynhelir];
(c) [i derfynu un neu fwy o ysgolion a gynhelir] [sy'n darparu addysg uwchradd] [sy'n addas at anghenion disgyblion chweched dosbarth] [(ac nid unrhyw addysg uwchradd arall)]".

(4) Literally this may be translated as:
"[Welsh Ministers may][make proposals under this section]—
(a) [for one or more][new community or community special schools][to be established][by a local authority][to provide secondary education][which is suitable to the needs of sixth form pupils][(and not any other secondary education)];
(b) [for an alteration which is described in paragraph 6 of Schedule 2][to one or more schools which are maintained];
(c) [to discontinue one or more schools which are maintained][which provide secondary education][which is suitable to the needs of sixth form pupils][(and not any other secondary education)]".

(5) Part 2 paragraph 5(2) of Schedule 2 of the 2013 Act in Welsh provides:
"[Newid oedran uchaf y disgyblion][y darperir addysg iddynt yn arferol yn yr ysgol] [gan flwyddyn neu fwy][os yw'r ysgol], [cyn ac ar ôl y newid], [yn darparu addysg]

[sy'n addas i ofynion disgyblion mewn oedran ysgol gorfodol] [ond heb fod yn darparu addysg][sy'n addas i ofynion disgyblion dros oedran ysgol gorfodol]."

(6) Literally this may be translated as:
"[An alteration in the highest age of pupils][to whom education is normally provided in school][by a year or more][if the school], [before and after the alteration], [provides education][which is suitable to the requirements of pupils of compulsory school age][but without providing education][which is suitable to the requirements of pupils over compulsory school age]."

(7) Finally, Part 2 paragraph 6(2) of Schedule 2 of the 2013 Act in Welsh provides:
[Terfynu'r ddarpariaeth o addysg lawnamser][sy'n addas i ofynion disgyblion dros oedran ysgol gorfodol][mewn ysgol sydd i barhau i ddarparu addysg lawnamser] [sy'n addas i ofynion disgyblion mewn oedran ysgol gorfodol].

(8) Literally this may be translated as:
[Discontinuing the provision of full time education][which is suitable to the requirements of pupils over compulsory school age][in a school which is to continue to provide full time education][which is suitable to the requirements of pupils of compulsory school age.]

43. It can be seen from the Welsh text of section 50(2) that the words "yn unig" appear in a different place in the sentence in the Welsh text, than they do in the English. "Yn unig" is said to be the Welsh translation of "only". The different position of this term in the sentence, is expressly relied upon by the Claimant as justifying its case on construction of this section of the Act. I address this further under Ground 1. I was assisted by having three counsel before me who speak Welsh (leading and junior counsel for the Claimant, and counsel for the WLC). One of the Welsh-speaking counsel (namely Mr James, who was acting for the WLC) made his submissions also in Welsh. I asked counsel for all the parties to seek to agree the literal translation of the words, grouped in clauses, of the Welsh text of the section, which they did, and it is this that appears at [42] above. That literal translation does not necessarily enable the text to be accurately translated whilst respecting the syntax of the language in question, a point made by the WLC. However, given the Claimant's reliance upon the Welsh text, this seemed to me to be necessary, in order that those submissions can be considered in context. I also consider that it is consistent with the purpose of the legislation to which I have referred to reproduce the Welsh text of the statute in this judgment. If the Welsh language and English language versions of the legislation have equal effect, it seems somewhat one-sided only to reproduce the English text.

44. At the time the 2013 Act was passed, section 156 of the Government of Wales Act 2006 provided that the English and Welsh texts of any Assembly Measure or Act of the Assembly, which was both in English and Welsh when it was enacted, are to be treated for all purposes as being of equal standing. (For completeness, this provision has since been replaced by section 5 of the Legislation (Wales) Act 2019 which applies to enactments made after 1st January 2020.)

45. I consider that in order to give proper effect to the primary legislation as well as section 1(3)(c)(i) of the Welsh Language (Wales) Measure 2011, I have to consider the meaning of the Welsh language text of the 2013 Act as well as the English text,

insofar as I am able to do so. I have been assisted by the agreed translation of the actual words in the Welsh text submitted by the parties following the hearing before me at my request. Prior to that being done, the only submissions on literal translation that were before the court were those of the Claimant.

The Grounds individually

Ground 1

46. The Council accepts that the closure of the 6th form at Cardinal Newman School is a regulated alteration under paragraph 6(2) of Schedule 2 to the 2013 Act, and as such had to be referred to the Welsh Ministers. That paragraph of the Schedule defines a "regulated alteration" as including "the ending of the provision of full time education suitable to the requirements of pupils over compulsory school age at a school which is to continue to provide full time education suitable to the requirements of pupils of compulsory school age."

47. Both Pontypridd High and Hawthorn High currently have 6th forms, and therefore "full time education suitable to the requirements of pupils over compulsory school age" which is currently provided there would, on the face of it, fall to be dealt with in the same way, namely by referring the closures to the Welsh Ministers for their approval as well. In the letter of claim sent by the Claimant to the Council, the point was made that both these proposals should also have been referred to the Welsh Ministers for their approval.

48. The Claimant's letter of claim was dated 10 September 2019 and sent under the judicial review pre-action protocol. It contended that Proposals 2 and 3 (explained at [6] above) should have been referred to the Welsh Ministers for approval. However, the Council's position, as it was explained in its response of 30 September 2019 to that claim letter, was that the proposals did not fall to be referred to the Welsh Ministers. This is because the school which will "provide full time education suitable to the requirements of pupils of compulsory school age" at each of those sites, after the proposals have been introduced, was said to be (in each case) a wholly different or new school.

49. The Council argues that a "regulated alteration" for the purposes of Schedule 2 to the 2013 Act did not include the discontinuation of a maintained school if that school had a 6th form. It maintained that the proposals involved the closure of the entirety of the schools (Pontypridd High and Hawthorn High), with the creation of new 3 – 16 schools on their sites, rather than merely the closure of their sixth forms. Although this would mean that a school on that site with a 6th form would be replaced by a school on that site without a 6th form, this could not be categorised as closing a 6th form. It was therefore said by the Council that this did not fall within section 50 of the 2013 Act, and therefore did not have to be referred to the Welsh Ministers.

50. The Council argued that closure did not fall within section 50(2)(a) of the 2013 Act, as this applied only to 6th form colleges; and that the school closure was not a "regulated alteration" under Schedule 2 so as to fall within section 50(2)(b); nor was the establishment of a new school. The result of this was that these proposals were not deemed to be proposals which "affect sixth form education" for the purposes of section 50(1) of the 2013 Act. In other words, because the entire school was being closed, with a new school, educating children in the age range 3 to 16, to commence

thereafter in its stead (albeit on the same site), this change in education of 6th form pupils at that site did not "affect sixth form education" and therefore requirement for a referral to the Welsh Ministers under section 50 was not engaged.

51. The Council also relied upon an expression of views given by the Welsh Government in this respect in a letter dated 14 August 2015, which concerned entirely different proposals submitted by the Council to the Welsh Ministers in July 2015 to reorganise school provision in the Rhondda Valley and Tonyrefail.

52. I shall deal firstly with the reliance by the Council on the views of the Welsh Government as contained in the letter of 14 August 2015. Firstly, the meaning as a matter of construction of section 50 of the 2013 Act is a matter of law. The subjective understanding of the author of the letter of 14 August 2015 is not relevant. In any event, those views were in the context of entirely different proposals, and it can be seen from the conclusion of that letter that the meaning of section 50 of the Act was not the main point under consideration in any event. The main point under consideration was whether proposals made to close a 6th form at Ferndale Comprehensive School were interlinked to other proposals affecting other schools. It would be quite wrong, in my judgment, for the Council to pray the contents of this letter in aid on Ground 1 in these proceedings in any event, even if the views therein on the construction of section 50 of the 2013 Act were admissible (which they are not).

53. To be fair to Mr Milford QC for the Council, he advanced this argument with an understandable degree of hesitancy, and as tentative support at best. He entirely accepted that the views in the letter of 14 August 2015, which do not relate to the proposals under consideration in any event, were not of direct relevance to the issues of construction of section 50 of the 2013 Act.

54. The Claimant submits that the proposals in relation to Pontypridd High and Hawthorn High "affect sixth form education" for the purposes of section 50 of the 2013 Act. To meet the arguments of the Council in relation to the meaning of section 50(2), the Claimant relied upon the word "only" as being referable to, or part of, the phrase "education suitable…..to the requirements of persons above compulsory school age", in other words identifying and qualifying education. The Claimant submitted that to read the section in the way contended for by the Council would require the word "only" as applying to the school, rather than to the education it provided. The Claimant submitted that the Council was seeking to read the section as though it referred to "a school *only* providing education suitable to [6th formers]". The Claimant relied upon the position of "only" in the section, immediately following "education suitable", as justifying its interpretation, rather than the position the Claimant stated "only" ought to occupy for the Council's interpretation to be correct.

55. The Claimant also relied upon the Welsh text as support for this construction. The Welsh text reads as follows:

> "(2) Mae cynigion yn effeithio ar addysg chweched dosbarth –
> Os ydynt yn gynigion i sefydlu neu derfynu ysgol sy'n darparu addysg sy'n addas at anghenion personau sydd dros oedran ysgol gorfodol yn unig…"

56. The Welsh word for "only" is "yn unig", and this appears in the Welsh text at the very end of the section, as can be seen above, rather than earlier in the section (as it does in the English text). The following is submitted in the Claimant's skeleton argument:
"In the Welsh text, the corresponding adverb "*yn unig*" qualifies, and can only qualify, the clause "*addysg sy'n addas at anghenion personau sydd dros oedran ysgol gorfodol*" that is "education which is [only] suitable to the needs of persons who are over compulsory school age" (i.e. sixth form education). The Welsh language version does not read "*sy'n darparu yn unig addysg sy'n addas at anghenion personau sydd dros oedran ysgol gorfodol*". Thus, as a matter of simple interpretation of the wording of the statute, if the proposal is to discontinue sixth form education at a school, regardless of whether the proposal has any effect on any other compulsory education at the school, it will fall squarely within section 50(2)(a) and therefore section 50(1)(a) of the 2013 Act".

57. The Claimant also sought to rely upon the wording used in Part 3 of the Act itself, where in paragraph 5(2) of Schedule 2 a regulated alteration included "the alteration by a year or more of the highest age of pupils for whom education is normally provided at a school, where the school, both before and after the alteration, provides education suitable to the requirements of pupils of compulsory school age and does not provide full time education suitable to the requirements of pupils over compulsory school age." (emphasis added). The Claimant argued that because there was no such converse corollary exclusion in section 50(2)(a) of the 2013 Act, this supported the Claimant's construction argument that "only" did not refer or qualify "school", it referred to "education provided". It was also argued that this protection would be rendered ineffective if the Council's arguments on construction were accepted, because all any Council would need to do, in any situation where it sought to close a 6th form (without wishing to refer this to the Welsh Ministers), would be to "close" the whole school, and immediately reopen a new one on the same site, just with a different age range that did not include 16 to 19 year olds.

58. The Claimant argued that the construction contended for by the Council would mean that section 50(2)(a) would effectively apply only to 6th form colleges, in other words schools that only provided 6th form education, and no other form of education. Mr Williams QC for the Claimant also submitted that the Claimant's construction was consistent with the way that education in Wales is organised. It is common ground that the funding of 6th form education is direct from the Welsh Government on a financial year basis, whereas funding for those before 16 (compulsory school age) is paid through the Settlement Revenue Support Grant.

59. The Claimant sought, if it were necessary due to any ambiguity, to invoke the well known principles in ***Pepper v Hart***, by demonstrating that the material available that led to the passing of the Act supported this construction of the statute. The Schools Standard and Organisation (Wales) Bill White Paper published in October 2011 contained under the heading "What specific changes are we proposing?" the following entry:
"We intend that the Welsh Ministers will determine all proposals concerning the removal of 6th forms, or the addition of 6th forms, including the closure of sixth form only schools.
Explanation: The Welsh Ministers have statutory responsibilities in relation to post-16 education and the provision of sufficient places and are directly responsible for

funding post 16 education provision. In the light of these responsibilities, we consider it appropriate that the Welsh Ministers exercise a strong element of control over post-16 proposals."
(emphasis added)
This would suggest that 6th form only schools were a smaller part of the "removal of 6th forms", which required referral to the Welsh Ministers of "all proposals".

60. Answers given by Ministers in the Welsh Assembly Plenary Session on 24 April 2012, the Minister in question at the time being Leighton Andrews AM, the Minister for Education and Skills, included the following:
1. In answering a question from Angela Burns AM:
"On school organisation, I am delighted that she shares my view that one objector should not be able to trigger a reference to Welsh Ministers. As she will understand, we are trying to take Welsh Ministers out of the picture in respect of the bulk of school organisation proposals. There will now be local determination of those proposals. However, for post-16 education, because there are issues regarding the relationship between sixth forms and other forms of post-16 education, it is important and right that Welsh Ministers retain the right to intervene. By providing statutory guidance on this in the way that we are proposing, it will be clearer that proposers have to go through, as she says, a proper process of making an assessment of school closure proposals."
(emphasis added)
2. In answering a question from Simon Thomas AM seeking confirmation of his powers: "In respect of school organisation, he asked a specific question in relation to sixth forms. Indeed, I will retain responsibility for determining proposals to remove or add sixth forms, so there is no specific change in that regard."
(emphasis added)
3. In answering a question from Suzy Davies AM:
"There is a difference with post 16 education: it is centrally funded; it is not funded through the revenue support grant. It is funded on a different basis: we make specific allocations. We have a national funding and planning system in place, until I suspended it, which was designed to ensure more equity between sixth form provision and further education provision, and has served us well for several years, but was still leading to probably unnecessary duplication of provision in some parts of Wales."

61. The Council submitted that under section 50(2) of the 2013 Act proposals "affect sixth form education" if (and only if) they are either "proposals to establish or discontinue a school providing education suitable only to the requirements of persons above compulsory school age" (section 50(2)(a)) or "proposals to make a regulated alteration to a school, the effect of which would be that provision of education suitable to the requirements of persons above compulsory school age at the school increases or decreases" (section 50(2)(b)). The Council pointed out that the construction contended for by the Claimant would mean "that section 50(2)(a) of the 2013 Act is intended to encompass the closure of any school whose educational provision includes educational provision for persons above compulsory school age (i.e. the closure of any school with a sixth form). This is not what section 50(2)(a) of the 2013 Act says: it applies, in terms, only to "proposals to establish or discontinue a school providing education suitable **only** to the requirements of persons above compulsory school age". That must mean proposals to establish or discontinue a school that provides education suitable only to the requirements of persons above

compulsory school age, and not education suitable to the requirements of other persons."

62. The Council maintains that the Claimant's interpretation "does not make sense on the plain language of the words used. If section 50(2)(a) of the 2013 Act were intended to encompass the closure of any school which provided education suitable for those above compulsory school age, then the word "*only"* would be redundant as an entirely unnecessary qualification".

63. It is said by the Council that the word "only" must have a purpose and that the construction contended for by the Claimant robs it of any purpose, thus offending against the statutory presumption that every word in an enactment is to be given meaning, and Parliament does nothing in vain; *Bennion on Statutory Interpretation,* 7th ed, section 21.2.

64. The Council also submitted that the position of the word "only" in the English text does not matter. Wherever "only" is placed in the sentence, it must be intended to qualify the act of providing the education concerned, rather than the kind of education provided. The Claimant explained this in the following way. "This is because there is, under the 2013 Act, no category of education "suitable to the requirements of persons above compulsory school age" that is also education suitable for other age groups. Within the maintained school context, the curriculum is organised according to school years. There is no such thing as a curriculum that is equally suitable for 15 year olds and 17 year olds."

65. The Council also submitted that because the position of the word "only" does not matter in the English text, then the position of the words "yn unig" in the Welsh text does not matter either. This is a bold submission to make; in my judgment it is misplaced where the Welsh text has equal standing with the English text; and I consider it to be wrong. The meaning of the Welsh text is not derived by construing the meaning of the English text, and then applying that meaning across to the Welsh text, which is what this submission seeks to do. That is not considering the two language texts as having equal effect.

66. The Council submitted that the purported "contrast" set up by the Claimant with the language used in paragraph 5(2) of Schedule 2 to the 2013 Act does not support the Claimant's contended for construction. It is said that the Claimant has overlooked the words "full time" in the paragraph, and this approach does not assist the Claimant at all. Paragraph 5(2) of Schedule 2 is concerned with alterations to the age range of a school which "provides education suitable to the requirements of pupils of compulsory school age, and does not provide full time education suitable to the requirements of pupils over compulsory school age. The second of the two clauses (i.e. "and does not provide" etc) could not be replaced by the word "only", without changing its meaning. That is because the clause specifically applies to schools which do not provide full time sixth form education (but which may, for example, provide part-time sixth form education).

67. The Council submitted that its case was strongly supported by section 71(1) of the 2013 Act. This is because that section confers the power on the Welsh Ministers to make proposals for restructuring sixth form education, by either establishing or

discontinuing schools suitable to the requirements of sixth formers only, or by introducing or ending sixth form provision in a secondary school. It was said that there was therefore "an exact match" between the type of proposals made by a local authority which must be referred to the Welsh Ministers for approval, and the type of proposals that Welsh Ministers could make themselves. It was said that if the Claimant were right, a local authority would be obliged to refer one type of proposal to the Welsh Ministers (i.e. a proposal to close a school including a sixth form), although the Welsh Ministers would have no power to make such a proposal themselves. This was said to be an anomaly. However, given the central funding of 6th form provision in Wales, I do not consider it to be an anomaly. If, say, an area had but one school with a 6th form and a Council wished to close the whole school, leaving the entire area with no 6th form, I do not consider it to be an anomaly that the Welsh Ministers would wish to be involved in that. As the entity responsible for funding 6th form provision, it would seem entirely consistent. This submission also rather overlooks what in fact is occurring in these two proposals, namely the immediate reopening of what is said to be a new school but on the same site.

68. The Council relied upon the Explanatory Memorandum to the Bill that became the 2013 Act. This passage, which I have already quoted above, was as follows:
"Instead of a situation where all proposals which receive objections are referred to the Welsh Ministers, only those proposals which receive an objection from a local authority (or in the case of a school with a religious character, the relevant religious body) or which are connected solely with the removal or establishment of sixth form provision (in the light of the Welsh Ministers' statutory responsibilities in relation to post-16 educational provision and funding) will be referred to the Welsh Ministers."
(Emphasis added by the Council)

69. The Council argued that its interpretation was supported by the Welsh Government's White Paper on the Bill, and also relied upon the same passage which I have quoted above, namely:
"e. We intend that the Welsh Ministers will determine all proposals concerning the removal of 6th forms, or the addition of 6th forms, including the closure of sixth form only schools."
(emphasis added by the Council).

70. So far as the passages in the debate in the Welsh Assembly are concerned, the Council accepted that the conditions for recourse to such material apply to legislation of the devolved administrations, per Lord Hope at [29] of ***Gow v Grant*** [2013] UKSC 1. This made clear that the approach in ***Pepper v Hart*** [1993] AC 593 per Lord Browne-Wilkinson at 640 is the correct one to adopt in this case, even though this is devolved legislation. That passage, in which Lord Browne-Wilkinson referred to the relaxation of the exclusionary rule, is a classic statement of the limited ways in which such material can be considered. However, the Council did not accept that these conditions were met. The provision was said to be neither ambiguous, nor obscure; nor lead to any absurdity. Even if it were admissible, the Council submitted that it supported the construction advanced by the Council, and not that advanced by the Claimant.

71. Mr Milford met the Claimant's argument that I have summarised at [60] above, namely that if the Council were right, all that a local authority would need to do to avoid the legislation is to close an entire school (including its 6th form) and then re-

open a new school on the same site (but without a 6th form), by submitting this would be susceptible to a judicial review on what are called ***Padfield*** grounds. This means that the statutory powers of a local authority must be used to promote the objects and policy of the statute.

72. The main thrust of the oral submissions for both parties at the hearing focused on the construction and meaning of section 50(2)(a) of the 2013 Act. All of the different arguments that I have attempted to summarise at [47] to [71] were painstakingly argued. However, the correct place to start in terms of construing this sub-section of the Act is to consider the actual words themselves, but remembering to read sub-section 50(1) of the 2013 Act, together with sub-section 50(2). The latter cannot be read in isolation from the former sub-section. That is a very basic starting position for construing what the section means. The provision must be construed as a whole.

73. The two sub-sections together state the following:

> "(1) Proposals published under section 48 require approval under this section if—
>
> (a) the proposals affect sixth form education, or
>
> (b) the proposals have been made by a proposer other than the relevant local authority and an objection has been made by that authority in accordance with section 49(2) and has not been withdrawn in writing before the end of 28 days beginning with the end of the objection period.
>
> (2) Proposals affect sixth form education if—
>
> (a) they are proposals to establish or discontinue a school providing education suitable only to the requirements of persons above compulsory school age, or
>
> (b) they are proposals to make a regulated alteration to a school, the effect of which would be that provision of education suitable to the requirements of persons above compulsory school age at the school increases or decreases."
>
> (emphasis added)

74. The Council recognised that in order to succeed, section 50(2) must be considered as being an exhaustive list of ways in which proposals could be categorised as affecting 6th form education. In other words, section 50(2)(a) and (b) must contain the *only* ways in which proposals could affect sixth form education. This is made clear from paragraph 23(2) of the Council's skeleton argument, where it states that proposals affect 6th form education "if (and only if)" the proposals fall into either section 50(2)(a) or section 50(2)(b).

75. When these two sub-sections are read together, it can be concluded that for the Claimant to succeed on this ground, it has to be shown that the proposals "affect sixth form education". For the Council to succeed in its defence to this ground, two separate matters have to be resolved in its favour. Firstly, that section 50(2) lists the *only* ways that proposals can "affect sixth form education"; it must be construed as containing an exhaustive list. Secondly, that closing a school that currently educates pupils between 11 and 19 years old (which undoubtedly includes 6th form pupils, as these are defined in section 71(2) of the Act itself) and then opening one on the same site to educate age ranges 3 to 16, is not included in one of the specific instances identified in section 50(2) at all.

76. In my judgment, the proposals in respect of Pontypridd High and Hawthorn High affect sixth form education within the section, and thereby have to be referred to the

Welsh Ministers for approval under section 50 of the 2013 Act. This is for the following reasons.

77. There is nothing to suggest that section 50(2) specifies the *only* ways in which proposals could "affect sixth form education". To read it in that way would require one to read the introductory words within section 50(2) as though they stated "Proposals affect sixth form education [only] if —", followed by the two different ways in which that could be satisfied under (a) and (b). This would require one to read into the statute a word that is simply not there. There is nothing in the wording of either section 50(1) or section 50(2) that justifies such a construction in my judgment. Section 50(2) clearly identifies matters that do "affect sixth form education" but there is no reason to conclude that (a) and (b) are the *only* ways in which this can be done.

78. Even if I am wrong about that, and section 50(2) does contain the only two ways in which proposals could be said to "affect sixth form education", then in my judgment the word "only" in section 50(2)(a) qualifies "education" as contended for by the Claimant, and not "school". I do not accept the argument advanced by the Council that the meaning of the sentence in section 50(2)(a) is the same, regardless of where the word "only" appears within it. This is not correct even in terms of the English text. Nor can it be used to explain why the different position of the word in the Welsh text does not matter, either.

79. Given the Welsh text of the Act has equal status with the English, the texts of both have to be construed. The meaning must be consistent across the texts in both languages. I take account of the literal translation provided by counsel for all parties (following the oral explanation by Mr Williams QC, leading counsel for the claimant, of the English equivalent of the different groups of Welsh words). In my judgment, the position of the words "yn unig" near the end of the section, together with the words that precede it, is more consistent with the Claimant's construction than it is with that contended for by the Council. The Council's submissions wholly ignore the Welsh text, then conclude (after construing the English text) that the Welsh text must have the same meaning, or does not matter. I do not consider that to be the correct approach to legislation passed in Wales, both in Welsh and in English, the text of each language having an equal status to the other.

80. The Council's contended for meaning requires one to read "only" into the introductory words of section 50(2), where it does not appear at all; and also requires one to read "only" within section 50(2)(a) as not being referable to "education" at all, but applying only to "school". I consider that to be a constrained and artificial reading of section 50(2)(a). The Council's contended for meaning also requires one to ignore the Welsh text. The Claimant's contended for meaning is consistent both in the Welsh language and English language versions, and does not require one to read additional or further words into the introductory passage of section 50(2) that are not there. It is by far the preferable construction.

81. In my judgment, there is no ambiguity and therefore there is no need to resort to the relaxation of the exclusionary rule expounded by Lord Browne-Wilkinson.

82. The construction that I have identified is also consistent with section 71(1)(c) of the 2013 Act, which concerns discontinuance. Because the Welsh Ministers fund 6th form

education, it is wholly understandable that they can make their own proposals to discontinue that at any particular school, but *only* if that school only educates 6th form pupils and no others (in other words, is what is usually called a 6th form college). There is no good reason why the Welsh Ministers should have the power to make proposals to discontinue if the 6th form is part of a wider school. However, that is a narrower power than that provided to the Welsh Ministers under section 50 of the 2013 Act. The rationale for the power of the Welsh Ministers to approve proposals that affect 6th form education coming from a local authority under section 50 is no less compelling where, as here, the cessation of that education is said to be closure of an entire existing school (with a 6th form) with immediate re-opening of a new school on the same site (without a 6th form). The net effect of this in terms of impact upon 6th form education would be the same as, for example, in the Cardinal Newman case, namely a school in operation on the same site after the changes, but without a 6th form.

83. Returning to ambiguity, in case I am wrong about that, and recourse can and should be had to such material, then this is consistent with the construction contended for by the Claimant. The text in the Welsh Government's White Paper on the Bill states the following, with an earlier passage emphasised than that relied upon by the Council and quoted above:
"e. We intend that the Welsh Ministers will determine all proposals concerning the removal of 6th forms, or the addition of 6th forms, including the closure of sixth form only schools."
(emphasis added)
"All proposals concerning the removal of 6th forms" means what it says – all proposals.

84. This makes it clear that the closure of 6th form only schools (what the parties in this case called 6th form colleges) are a sub-set of the proposals intended to be determined by the Welsh Ministers. This is because the intention was that the Welsh Ministers would "determine all proposals concerning the removal of 6th forms". The term "all proposals" is precisely that, an encompassing one for all proposals. The Council maintains that this passage is consistent with its contended for construction. I do not accept that it is. I consider it is consistent with the construction contended for by the Claimant.

85. The Explanatory Memorandum to the Bill states that proposals "which are connected solely with the removal or establishment of sixth form provision (in the light of the Welsh Ministers' statutory responsibilities in relation to post-16 educational provision and funding) will be referred to the Welsh Ministers". The first part of that sentence is just a different way of saying which "affect sixth form provision", the term used in the section itself. Further, the part in parentheses that refers to funding is either neutral, or equally consistent with the construction contended for by the Claimant. The Welsh Ministers fund both 6th form colleges and also 6th form provision within schools that educates pupils who are of compulsory school age (ie 16 years old or younger). It is clear to me that the intention of section 50 of the Act was that the removal of existing provision for 6th form education, and establishment of new 6th form education – both of which concern the direct funding providing for 6th form education by the Welsh Government – should be subject to the approval of the Welsh Ministers.

86. The answers given in the debate in the Welsh Assembly which I have identified at [60] above are in general terms, and simply address the logic of the Welsh Ministers being interested and involved in the removal and addition of 6th form education. They explain the rationale behind section 50 as a whole.

87. The argument between the parties summarised at [57] and [71] is essentially a circular one. I do not find it assists either party.

88. Given the construction that I find is the correct one, it therefore follows that the Claimant succeeds on Ground 1. Proposals 2 and 3 in respect of Pontypridd High and Hawthorn High affect sixth form education and therefore require the approval of the Welsh Ministers pursuant to section 50 of the 2013 Act. The Council did not have such approval, have not referred those proposals to the Welsh Ministers in order to obtain it, and are therefore in breach of that statutory requirement.

89. The parties each explained, although in different terms to one another, that the proposals were all interlinked. Notwithstanding that, and my decision on Ground 1, I shall address each of the three limbs of Ground 2 in any event. Each of these involve alleged breaches of the Welsh Government's School Organisation Code 2013 ("the 2013 Code"). I have explained that I will refer to these as the Estyn Ground, the Alternative Proposals Ground, and the Welsh Language Ground. Due to the involvement of the Intervener, I shall deal with the Welsh Language Ground first in this judgment for convenience.

The Welsh Government's School Organisation Code 2013

90. Section 38(1)(2) of the 2013 Act provides that the Welsh Ministers must issue a code on school organisation and that the Code is to contain provision about the exercise of the functions of, amongst others, local authorities. The relevant version of the Code which applies to the matters under consideration in these proceedings is the Welsh Government's School Organisation Code (No. 006/2013), which was issued in July 2013, which I term the 2013 Code. Section 38(4) of the 2013 Act provides that the persons referred to within section 38(2) must, when exercising functions under Part 3 of the Act, both (a) act in accordance with any relevant requirements contained in the Code, and (b) have regard to any relevant guidelines contained in it.

91. There is therefore a distinction between "requirements" and "guidelines". This distinction is clear from the fact that the relevant body, here the Council, must "act" in accordance with requirements, and "have regard" to relevant requirements. It is also reflected in the use of "must" or "must not" in the language of some of the provisions. Such provisions are mandatory and are requirements. In other provisions, the word used is "should". This is, as the Council put it in argument, directory guidance which means that it should be followed, but may be departed from where a relevant body has good reason for doing so. This approach by the Code mirrors public law principles generally. Guidance is precisely that, guidance; it can be departed from, if there is a good reason for doing so.

92. I accept the legal framework explained by Mr Milford QC within which each of the elements of Ground 2 fall to be considered. As I have explained already, the court is not concerned with the underlying merits of the proposals or the merits of the

Council's decisions. The only issue before the court is whether those decisions were taken in accordance with the law; in other words, were the decisions lawful?

93. Chapter 3 of the 2013 Code is concerned with consultation and is intended to reflect public law principles that, absent the Code, would be identified in accordance with the authorities, such as ***R v Brent London Borough Council ex parte Gunning*** (1985) 84 LGR 168. These are to the effect that consultation should:
    (a) Be undertaken when proposals are still at a formative stage;
    (b) Include sufficient reasons and information for particular proposals to enable intelligent consideration and response;
    (c) Provide adequate time for consideration and response; and
    (d) Ensure that the product of consultation is conscientiously taken into account when the ultimate decision is taken.

94. It is for the Claimant to satisfy the court that a decision-maker has failed to give genuine and conscientious consideration to consultation responses, it is not for the Council to show that it has; ***R (Liverpool City Council) v Secretary of State for Health*** [2003] EWHC 1975 (Admin) at [56] per Stanley Burnton J. The burden is on the Claimant in this respect.

95. Where a statutory code is detailed, complex and expressly prescribes the processes, procedures and evidence to be followed and taken into account when decisions are made, the court will be cautious before adding a further procedural burden which the democratically elected body decided not to impose. This can be seen from [89] and [98](6)-(7) of ***R (on the application of Plantagenet Alliance Ltd) v Secretary of State for Justice*** [2014] EWHC 1662 (QB), [2015] 3 All ER 261. That case is a decision of the Divisional Court concerned an exhumation licence and all of the associated legal issues that arose upon the discovery of 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.

96. This makes it clear that in modern times, with more detailed and complex provisions, there is less scope (and less need) for the court to become involved, compared to (say) Victorian statutes that were far less detailed. The general principles of the duty to consult are set out at [98], and the Council draws attention particularly to (6) and (7) of the list, the whole of which is as follows:
    "[98] The following general principles can be derived from the authorities:
    (1) There is no general duty to consult at Common Law. The government of the country would grind to a halt if every decision-maker were required in every case to consult everyone who might be affected by his decision. *Harrow Community Support Limited) v. The Secretary of State for Defence* [2012] EWHC 1921 (Admin) at paragraph [29], *per* Haddon-Cave J).
    (2) There are four main circumstances where a duty to consult may arise. First, where there is a statutory duty to consult. Second, where there has been a promise to consult. Third, where there has been an established practice of consultation. Fourth, where, in exceptional cases, a failure to consult would lead to conspicuous unfairness. Absent these factors, there will be no obligation on a public body to consult (*R (Cheshire East Borough Council) v. Secretary of State for Environment, Food and Rural Affairs* [2011] EWHC 1975 (Admin) at paragraphs [68-82], especially at [72]).

(3) The Common Law will be slow to require a public body to engage in consultation where there has been no assurance, either of consultation (procedural expectation), or as to the continuance of a policy to consult (substantive expectation) (*(R Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755 at paragraphs [41] and [48], *per* Laws LJ).
(4) A duty to consult, *i.e.* in relation to measures which may adversely affect an identified interest group or sector of society, is not open-ended. The duty must have defined limits which hold good for all such measures (*R (BAPIO Ltd) v Secretary of State for the Home Department* [2007] EWCA Civ 1139 at paragraphs [43]-[44], *per* Sedley LJ).
(5) The Common Law will not require consultation as a condition of the exercise of a statutory function where a duty to consult would require a specificity which the courts cannot furnish without assuming the role of a legislator (*R (BAPIO Ltd) (supra)* at paragraph [47], *per* Sedley LJ)
(6) The courts should not add a burden of consultation which the democratically elected body decided not to impose (*R (London Borough of Hillingdon) v. The Lord Chancellor* [2008] EWHC 2683 (Admin).
(7) The Common Law will, however, supply the omissions of the legislature by importing Common Law principles of fairness, good faith and consultation where it is necessary to do, *e.g.* in sparse Victoria statutes (*Board of Education v Rice* [1911] AC 179, at page 182, *per* Lord Loreburn LC) (see further above).
(8) Where a public authority charged with a duty of making a decision promises to follow a certain procedure before reaching that decision, good administration requires that it should be bound by its undertaking as to procedure provided that this does not conflict with the authority's statutory duty (*Attorney-General for Hong Kong v Ng Yuen Shiu* [1983] AC 629, especially at page 638 G).
(9) The doctrine of legitimate expectation does not embrace expectations arising (merely) from the scale or context of particular decisions, since otherwise the duty of consultation would be entirely open-ended and no public authority could tell with any confidence in which circumstances a duty of consultation was be cast upon them (*In Re Westminster City Council* [1986] AC 668, HL, at 692, *per* Lord Bridge).
(10) A legitimate expectation may be created by an express representation that there will be consultation (*R (Nadarajah) v Secretary of State for the Home Department* [2003] EWCA 1768 Civ), or a practice of the requisite clarity, unequivocality and unconditionality (*R (Davies) v HMRC* [2011] 1 WLR 2625 at paragraphs [49] and [58], *per* Lord Wilson).
(11) Even where a requisite legitimate expectation is created, it must further be shown that there would be unfairness amounting to an abuse of power for the public authority not to be held to its promise (*R(Coughlan) v. North and East Devon Health Authority* [2001] 1 QB 213 at paragraph [89] *per* Lord Woolf MR)".

97. Here, the court is not concerned with a sparse Victorian statute, so although the Council draws my specific attention to [98](7), the immediately preceding [98](6) is also relevant. At [37]-[39] of the case mentioned in that sub-paragraph, ***R (Hillingdon LBC) v The Lord Chancellor*** [2008] EWHC 2683 (QB), Dyson LJ (as he then was) explained the relevance and importance of the scope of consultation required where there were specific statutory consultees, in the context of increases in court fees for certain types of public law child cases. He stated at [39]:
"The courts should not add a burden of consultation which the democratically elected body, decided not to impose. Thus, even if it is right to regard the raising of the fees in public law family cases as depriving local authorities of a benefit, that is not a

sufficient reason for requiring consultation which Parliament did not see fit to require."

98. Here, although the Council draws my attention to these legal principles, this is to set in context the legal framework within which the court will consider the Claimant's challenges in respect of the Code. The Council's duty to consult is set out in the Code. Certainly the challenge in respect of the Welsh Language Ground is clearly identified and it is not a question of the Claimant asking the court to impose an additional burden upon the Council.

99. The Code imposes requirements in accordance with which relevant bodies must act. If the word "must" is used, this is a mandatory requirement which is imposed upon the Council by the Code. If a practice is prohibited, it is stated that the relevant bodies must not use this practice. The provision in Paragraph 1.9 of the 2013 Code uses "should", and is therefore directory guidance.

100. Each of the Welsh Language Ground, the Estyn Ground and the Alternative Proposals Ground rely on different passages of the 2013 Code. I shall identify those passages where I deal with each of those different grounds.

The Welsh Language Ground - Ground 2(g)

101. I shall deal with the Welsh Language Ground first. This is that the Council failed to take into account a specific factor for proposals to reorganise secondary schools or remove sixth forms, namely how those proposals might affect the sustainability or enhancement of Welsh medium provision in the regional 14 – 19 network and wider area, and promote access to availability of Welsh medium courses in post-16 education.

102. It was in relation to the Welsh Language Ground that the WLC sought to intervene, served evidence and had submissions made on his behalf. The evidence and the submissions were made in both Welsh and English. The formal position of the WLC in these judicial review proceedings is one of neutrality. The role of WLC was created by the Welsh Language (Wales) Measure 2011 ("the Measure"), and Mr Aled Roberts was appointed WLC on 1 April 2019, the date he took over the role from the previous incumbent. The principal role of the WLC is to promote and facilitate the use of the Welsh language which includes, but is not limited to, working towards increasing the use of the Welsh language in the provisions of services, and other opportunities for persons to use the Welsh language. There are two main principles which underpin the work of the WLC. One is that the Welsh language should be treated no less favourably than the English language in Wales. The other is that people should be able to live their lives in Wales through the medium of Welsh if they choose.

103. Implicit within that second main principle, although Mr James, counsel for the WLC, did not express it in quite these words, is that both children (and the parents of children) in Wales should be able to be educated through the medium of Welsh if they choose. Welsh medium education is to be distinguished from the study of Welsh as an academic subject. It refers to the education at a particular school being entirely carried out through the medium of Welsh; the whole of the activities at such a school are in Welsh. I shall now set out the requirements upon the Council, and the different contentions of the parties.

104. Paragraph 1.4 of the Code states the following.

> "In all cases, existing pupils at a school where provision is being reduced or removed **must** be able to continue receiving an education that provides at least equivalent standards and opportunities for progression in their current language medium. Specific transition arrangements may be necessary in order to achieve this.
>
> Where proposals affect schools where Welsh is a medium of instruction (for subjects other than Welsh) for some or all of the time, local authorities **should** carry out a Welsh Language Impact Assessment."
>
> (emphasis added)

105. As has been noted above, "should" in the second paragraph means that this is directory guidance only, which may be departed from where a relevant body has a proper basis for doing so. However, the first paragraph uses "must", which is mandatory. The beginning of that paragraph also uses the phrase "in all cases". This applies where "provision is being reduced or removed". In my judgment this is a strictly worded mandatory requirement.

106. Paragraph 1.9 of the Code states the following should be taken into account:

> "How proposals might affect the sustainability or enhancement of Welsh medium provision in the local 14 – 19 network and wider area and promote access to availability of Welsh medium courses in post-16 education…"

107. Therefore in all cases pupils must be able to continue receiving education with at least equivalent standards and opportunities in their chosen language. This is mandatory. Further, if proposals affect schools which are Welsh medium schools, the directory guidance is that a Welsh Language Assessment should be carried out. This is directory, which means it should be done unless there is good reason for it not to be done.

108. Section 26 of the Measure enables the Welsh Ministers to specify standards of behaviour in relation to the Welsh language that relate to public service provision within or outside Wales. The standards are set out within regulations, and the Council (as a county borough council) is subject to the Welsh Language Standards (No.1) Regulations 2015 ("the 2015 Standards"). Under Regulation 3 of the 2015 Standards, the Welsh Ministers have authorised the WLC to give compliance notices to local authorities, such as the Defendant Council in this case, that require it to comply with one or more standards that are specifically applicable to it. The WLC issued such a compliance notice to the Council on 30 September 2015. The date for complying with the policy making standards was 30 March 2016. These standards therefore applied to the Council.

109. Under section 29(6) of the Measure, a policy decision is any decision made by an organisation about the exercise of its functions or about the conduct of it business or other undertaking. The policy making standards provide requirements for considering and adapting the impact of policy decisions on the Welsh language. As the WLC put it in his evidence, "the requirements are not confined to simply identifying and

mitigating risks of discrimination against Welsh speakers. The standards have been designed to ensure that the decisions made by an organisation contribute to the strategic aims of increasing the use of Welsh and treating Welsh no less favourably than English".

110. In 2019 the then-WLC (Mr Roberts' predecessor) published a report called "A Measure of Success: The Welsh Language Commissioner's assurance report 2017-2018". This stated that there was very little information provided by organisations demonstrating how they gathered opinion in relation to the impact decisions may have on the Welsh language when conducting consultations. This statement has been borne out, as Mr Roberts explained, in a number of previous investigations that the office of WLC has carried out relating to consultations undertaken by local authorities concerning school re-organisation proposals. In a number of investigations, findings have been made that a local authority has failed to consider the impact of the new policy that is being consulted upon on opportunities to use the Welsh language. Local authorities have failed to seek views on the impact of the decision upon the Welsh language, and they have failed to consider whether Welsh was being treated less favourably than English. On occasion, they have failed to ask consultees how they could make the decision so that it had a more positive, or less adverse, effect upon opportunities for people to use Welsh. This has resulted in enforcement action being taken by the office of the WLC.

111. In this case, the WLC decided to open an investigation on 25 July 2019 in order to determine whether the Council had, in respect of the proposal to close Pont Sion Norton and open a new Welsh medium school at Ysgol Heol y Celyn, complied with standards 91, 92 and 93 of the 2015 Standards. The decision by the WLC to open this investigation was instigated by a complaint, under which the WLC has a duty to consider this specific point. Those standards are as follows:

1. Standard 91: "When you publish a consultation document which relates to a policy decision, the decision must consider, and seek views on, the effects (whether positive or adverse) that the policy decision under consideration would have on –
(a) opportunities for persons to use the Welsh language, and
(b) treating the Welsh language no less favourably than the English language."

2. Standard 92: "When you publish a consultation document which relates to a policy decision, the decision must consider, and seek views on, how the policy under consideration could be formulated or revised so that it would have positive effects, or increased positive effects, on –
(a) opportunities for persons to use the Welsh language, and
(b) treating the Welsh language no less favourably than the English language."

3. Standard 93: "When you publish a consultation document which relates to a policy decision, the document must consider, and seek views on, how the policy under consideration could be formulated or revised so that it would not have adverse effects, or so that it would have decreased adverse effects, on –
(a) opportunities for persons to use the Welsh language, and
(b) treating the Welsh language no less favourably than the English language."

112. This investigation by the WLC is *not* the same as investigating the validity of the policy decision. This is made clear both by the terms of reference of the investigation,

and also by his evidence in these proceedings. Having conducted that investigation and considered all the relevant matters including the position of the Council, the WLC concluded in his proposed determination that there had been breaches of standards 91 to 93 by the Council. This proposed determination has been made on a provisional basis, as having notified the Council of that, both the Council and the complainant are entitled to make submissions to the WLC.

113. The Council does not, either in its representations to the WLC nor in these judicial review proceedings, accept that it had failed to comply with the 2015 Standards, or with paragraph 1.4 of the Code. The WLC explained that he disagreed with this view; that he had determined that there had been a failure by the Council to comply with standards 91, 92 and 93; and that so far as he was concerned the 2015 Standards and the 2013 Code were different statutory regimes. On that latter point, he is undoubtedly correct, as the 2013 Code and the 2015 Standards are indeed different regimes. The WLC has also formally paused his investigations generally due to Covid-19 and the national lockdown. Therefore, he is of the view "that the current status of my investigation is that a determination of failure to comply with the three relevant standards has been made" against the Council but "the statutory requirement to give a decision notice to the [Council]…..has not been completed as my investigation has been paused". His proposed determination also included proposed enforcement action. It should be noted therefore that there is no final determination of these breaches by the Council at this stage, and in any event the Council would have a right of appeal to the Welsh Language Tribunal. Even if there were a final determination of breaches of the 2015 Standards on the part of the Council, these are judicial review proceedings and such Welsh language breaches would not, of themselves, be determinative or of primary relevance to the claims before me.

114. The Claimant's position is that changes to Welsh medium primary education, found in Proposal 4, inevitably have an impact upon the take-up of Welsh medium secondary education. This is because, perhaps inevitably, any children who leave Welsh medium primary education will not be very likely to take up Welsh medium secondary education. Although this point is not formally conceded, the evidence of Ms Howell in her second witness statement explains that "the Council of course recognises that changes to Welsh medium primary education can have an impact on the take-up of Welsh medium secondary education." This is a sensible position for the Council to adopt. In so far as it may be necessary to confirm it in this judgment, it is plain and obvious that changes to Welsh medium primary education must inevitably have an impact upon Welsh medium secondary education. The fewer pupils who enjoy a Welsh medium primary education, the fewer are likely to attend Welsh medium secondary education. As Mr Williams for the Claimant put it, such pupils are "lost for ever", which in terms of their living their lives in Wales through the use of Welsh, is probably correct; although it may be an emotive way of putting it. Certainly in terms of their being educated through the medium of Welsh, it will be correct. Children who leave Welsh medium primary education will be lost to Welsh medium secondary education.

115. The Claimant makes the consequential point that any proposals to change Welsh medium primary education should therefore consider how this might affect the sustainability or enhancement of Welsh medium secondary provision in the 14 – 19 network, and access to post-16 Welsh medium courses. I accept that submission. The

submission by the Claimant is that the decisions in respect of the proposals were made without taking account of the impact of Proposal 4 upon Welsh medium secondary education.

116. The Council relies upon the fact that it decided not to reorganise Welsh medium secondary education, having considered a number of ways this could potentially be done. There are two difficulties with this line of defence by the Council. Firstly, it wholly ignores that there is an obvious link (and one which is essentially accepted in Ms Howell's evidence) between Proposal 4, and the impact that will have upon Welsh medium secondary education. Secondly, it demonstrates that whatever Ms Howell states in her evidence *now* about the acceptance of the link between Welsh medium primary education and Welsh medium secondary education, it was not something that the Council realised, or acted in accordance with, at the time. The Council decided that there was to be no reorganisation of Welsh medium secondary education, and so that was the end of any consideration about impact of *any* of the proposals upon Welsh medium secondary education. Those involved failed to address how their reorganisation of Welsh medium primary education would impact upon Welsh medium secondary education. They failed, in my judgment, to consider how the decisions that they were making either contributed to the strategic aims of increasing the use of Welsh, and/or whether they were treating Welsh no less favourably than English. I would go further and say that the Council failed entirely to consider how the reorganisation would impact upon Welsh medium secondary education.

117. This finding is borne out by the entries in the consultation document itself, which sets out only very cursorily the advantages and disadvantages of the alternative options. Nowhere in those advantages and disadvantages is the impact upon Welsh medium secondary education of the potential changes to Welsh medium primary education specifically identified or even addressed. The Claimant criticises this as "a balance sheet of advantages versus disadvantages" which is "exceptionally limited in detail and lacks any form of analysis or reasoned rationale for decision making". I accept the Claimant's criticisms of it being "exceptionally limited". I also accept that it does not include any analysis or reasoned rationale. It will be remembered that paragraph 1.9 of the Code states that the following should be taken into account: "How proposals might affect the sustainability or enhancement of Welsh medium provision in the local 14 – 19 network and wider area and promote access to availability of Welsh medium courses in post-16 education."

118. This means that this can be departed from, if there is good reason. Such an explanation would have to be provided; but in any event, it is difficult to see why the Council would decide that there was a good reason for failing to consider the impact on Welsh medium secondary education, particularly given it is the policy of the Welsh Government to strive for 1 million Welsh speakers by 2050. There is no adequate explanation for any departure by the Council, even if there were a conscious departure. But rather than make a conscious departure from the Code, with a reason for that, the Council has in my judgment simply failed to take the requirement under paragraph 1.9 into account. The point simply seems not to have been addressed.

119. The Council also relies upon the Welsh Language Impact Assessment, as well as the Community Impact Assessment and Equality Impact Assessments that were done, in support of its assertion that it considered how its proposals might affect Welsh medium education. The Welsh Language Impact Assessment document, however,

even though it was updated, has extraordinarily limited content in terms of impact upon the Welsh language of the proposal. It refers to consultation responses that suggest a demand for pupil places specifically for a new Welsh medium school in Glyncoch and a demand to maintain the existing Welsh medium provision at Pont Sion Norton (which was to be closed under Proposal 4) but asserts that current demand projections "suggest that this is not justified within these communities" (emphasis added). The parameters used to decide that the demand to maintain the existing Welsh medium provision at Pont Sion Norton was "not justified" are not explained. Nor does the Welsh Language Impact Assessment strike one as considering "the sustainability or enhancement of Welsh medium provision" as stated in Paragraph 1.9 of the Code. The Impact Assessment contains a large amount of bald assertion, and a large amount of it concentrates on transport issues. I would estimate that in approximate terms, only about 10% (at the most) of this document even considers impact on the use of the Welsh language at all, let alone how the proposals would affect the sustainability or enhancement of Welsh medium education. The document recites a commitment to the Welsh Government Cymraeg 2050 target, but more is required under Paragraph 1.9 of the 2013 Code than a simple recitation of this. I also accept the Claimant's criticisms that the Impact Assessment fails to assess the impact of closing Pont Sion Norton on the Cilfynydd, Glyncoch, Coed y Cwm or Ynysybwl communities moving forward. It also fails to consider the point I have already mentioned, namely how the changes to Welsh medium primary education would or may affect Welsh medium secondary education. In my judgment, the inadequate content of the Welsh Language Impact Assessment demonstrates that the Council failed in its duties in this respect. There is nothing either in the Equality Impact Assessment, or Community Impact Assessments, that makes good this deficiency.

120. The Claimant has advanced evidence from a number of people who state that their language preference for the education of their children will, as a result of these proposals, have to change, and they will no longer be able to receive education in Welsh. This type of evidence is of limited assistance in a challenge such as this, which is to the lawfulness of the decision made by the Council. That is not to minimise the effect that would be experienced by specific individuals when a reorganisation such as this takes place. However, it is the overall impact of the proposal upon education through the medium of Welsh that is important, and whether that was lawfully addressed by the Council, not the impact upon specific individuals. I have not taken this type of evidence by the Claimant into account in deciding whether there were breaches of the 2013 Code by the Council. Having said that, the evidence is illustrative of the type of adverse impact that can be caused to individuals when, as here, the impact of the proposals upon Welsh medium secondary education was not addressed by the Council at all.

121. Counsel for the WLC made the specific point that, as an example, site selection can have an impact on Welsh medium primary education and that this is the sort of matter which needs considering from an early stage. I accept that submission by counsel for the WLC. This answers one of the points raised by the Council in defence of this ground, which was to rely upon an increase in available school places at the proposed new Welsh medium primary school to demonstrate a positive impact on Welsh medium education. A simple increase in school places does not meet the point. If – and this is a purely hypothetical example – 50 children were to be lost to Welsh

medium primary education due to a closure in a specific area, then the fact that more places might become available elsewhere (which may not even be utilised) does not demonstrate that the impact of the lost 50 has been considered, let alone that impact assessed. The WLC also pointed out that by virtue of the timing built into the WLC investigation and report procedures, including the right of appeal to the Welsh Language Tribunal, a final decision by the WLC is in most circumstances not likely to be available before any judicial review proceedings are heard by a judge of the Administrative Court. That is simply a different way of stating that it is the court that has to decide whether any judicial review challenge based on Welsh language grounds should succeed. The court cannot slavishly follow the conclusion by the WLC on breaches of the standards, although breaches (or prima facie breaches, as no final determination has been made in the instant case) are not irrelevant. Judicial review proceedings will consider the 2013 Code, not the 2015 Standards. The fact that, in the current view of the WLC as expressed in his evidence before me, the Council also breached the 2015 Standards, does however help in this way. Had the Council wholly complied with its duties in all respects under the 2015 Standards, it would make it harder for the Claimant to make good an alleged breach of the Code.

122. In addition to the matters I have identified, the Council submitted (in response to the example adopted by the WLC, explained at [121] above) that site selection is not identified as a consideration in the 2013 Code at all. The Council accepts that it was not therefore considered, but maintains that it did not have to be. I consider that to be both an overly simplistic, and incorrect, way of approaching the subject matter of Paragraph 1.9 of the 2013 Code. There is unlikely to be an entirely uniform distribution of Welsh speakers across all communities and geographical parts of Wales. The WLC himself considers site selection to be obviously likely to have an impact on such matters, and he is likely to be correct. Simply to state, as the Council did before me, that site selection is not specifically identified in the 2013 Code and did not therefore need to be considered, means that the impact of site selection upon Welsh medium education was not considered either. It is not directing the Council on how to consider impact on the Welsh language to observe that relevant matters have to be taken into account. If the WLC considers that site selection (as an example given by his counsel) ought to be taken into account, then that might be thought to help identify this as a relevant factor. This has the happy coincidence that it is common sense too.

123. The Council is in breach of paragraph 1.9 of the Code because it failed to consider how the closure of Ysgol Gynradd Gymraeg Pont Sion Norton and Heol y Celyn, and the establishment of a new Welsh medium primary school on the Heol y Celyn site would impact upon Welsh medium provision generally, and how the impact upon Welsh medium primary education would also impact upon Welsh medium secondary education for those in the local 14 – 19 network. The Council failed to assess the impact of the proposals on the Welsh language in any meaningful way.

124. Nor do I consider that this failure can, or should, be overlooked, or categorised (as the Council seemed to be contending for at one stage) as a mere technicality. The principles identified at [102] above make it clear how important the Welsh language is to life in Wales. If the Welsh language is to be treated no less favourably than the English language in Wales, and if people should be able to live their lives in Wales

through the medium of Welsh if they choose, then this failure by the Council is an important one.

125. Accordingly, I find that the Council is in breach of its duties under the 2013 Code in this respect as alleged by the Claimant, and the Claimant succeeds in her challenge on the Welsh Language Ground. I will deal with the consequences of this in the section headed "Relief" at [150] below.

The Estyn Ground - Ground 2(d)

126. This is that the decision in relation to all four proposals was taken in breach of the 2013 Code, in that the Council failed to take into consideration the response of Estyn to the consultation process.

127. The Claimant alleges breaches of Paragraph 1.3 and 5.1 of the 2013 Code. The Council alleges that this Ground is based on a misunderstanding of the requirements of the Code, and also a misunderstanding of the stages of the decision-making process to which the provisions of the Code relied upon relate.

128. Paragraph 1.3 is contained in Chapter 1 of the Code which deals with "Development and consideration of proposals." Paragraph 1.3 of the Code provides as follows:
"In assessing the impact of proposals on quality and standards in education and how effectively the curriculum is being delivered, relevant bodies **should** consider any relevant advice from Estyn, refer to the most recent Estyn reports or other evidence derived from performance monitoring, and take into consideration any other generally available information available on a school's effectiveness."

129. The Statement of Facts and Grounds states that despite being raised as part of the consultation and objection process, "the comments on the proposal made by Estyn were not referred to at any time during the cabinet meeting where the proposal was ultimately voted on". In fact, the Estyn responses to the proposals (there was a separate one to each of the four proposals) were appended in full (at Appendix 5) to the Consultation Report that was prepared. The responses were also highlighted in each of the four statutory notices. There is nothing therefore to this part of the Claimant's challenge in this respect.

130. A breach of Paragraph 5.1 of the Code is also alleged. This states that:
"Under section 49 of the 2013 Act must publish a summary of the statutory objections and the proposer's response to those objections ("the Objection Report")".

131. Paragraph 5.1 of the Code and section 49 of the 2013 Act therefore required the Council to publish a summary of statutory objections and the response to those objections. The Council argues that because Estyn's response was not a statutory objection, this does not apply. This overlooks that Estyn's report(s) were adopted as formal objections by several objectors. Accordingly, the Claimant argues that the observations in the Estyn reports, which were adopted by the objectors, acquired the status of objections (by being incorporated by the individual objectors) and should have had responses published to them in the Objection Report. These concerns by Estyn were as follows (taken from the Estyn reports themselves but summarised):

(1) insufficient detail regarding the impact of the proposals on pupils with special educational needs;
(2) insufficient detail regarding how the needs of pupils with additional learning needs or ALN will be met;
(3) insufficient detail regarding the impact of the proposals on travel time and the wellbeing of pupils; and
(4) a lack of clarity regarding the rationale for locating the sixth form in Bryncelynnog as opposed to Cardinal Newman.

132. The Council maintains that this challenge fails on the facts, because the matters were responded to. The substance of the complaints, it is said by the Council, is more properly seen as directed to the quality or content of the responses, not that there were no responses to these points at all. Although the duty to publish an Objection Report carries with it a duty to respond to objections, as made clear in section 49(3) of the 2013 Act, it does not carry with it a duty to respond to the objections in any particular form, or with any particular degree of detail. Nor can such a duty be implied as a matter of common law, as proper consultation at common law does not require publication of objections at all. This is made clear in ***R(Beale) v Camden LBC*** [2004] EWHC 6 (Admin) at [19] per Munby J. In that case he stated that:
"Proper consultation requires sufficient reasons to be given *for* the particular *proposals* to enable those consulted to give intelligent consideration and an intelligent response to the *proposals*. But it is not said that consultation requires sufficient information to be given about any objections to the proposals to enable those consulted to give intelligent consideration and an intelligent response to the *objections*."

133. There is some force in the categorisation by the Council of the true essence of the Claimant's complaints, namely that they should be properly seen as directed to the quality or content of the responses, not that there were no responses to these points at all. The impact of the proposals on pupils with special educational needs was responded to in the Objection Report in a number of places, and also touched on in the Equality Impact Assessment. I can well understand the position of the Claimant, which is effectively that this was insufficient and/or cursory, but responses (such as they are) were included. Similarly, the impact of the separate consultation in relation to the closure of the foundation phase ALN class at Heol y Celyn Primary School was also addressed in the Objection Report. I accept the criticisms made by the Claimant that a statement by the Council that it intended to consult in the future on establishing Welsh medium Foundation Phase and Key Stage 2 ALN provision (in the new Welsh medium primary school on the Heol y Celyn site) does not fully address the impact on existing ALN pupils. It plainly does not. Indeed, the situation of existing ALN pupils could, potentially, be described as being addressed in only cursory terms by the Council. However, the court must be cautious not to be drawn into consideration of the merits of the proposals.

134. The impact of the proposals on transport and travel were dealt with, and the actual objection made by Our Children First was responded to within the Objection Report itself. Specific concerns about the effect on school attendance of children from the Rhydyfelin area who might have to walk further to school, and the issue of travel to Heol y Celyn Primary School from Ynysybwl and Cilfynydd, were also touched upon.

135. I turn therefore to the final item identified by Estyn, namely lack of clarity of the rationale for locating the sixth form centre in Bryncelynnog. The centres for education for those above the age of 16 are to be Bryncelynnog Comprehensive School, and Coleg y Cymoedd (which also offers vocational courses). The Claimant's position on this is that a joint 6th form could be established within Pontypridd by using the Cardinal Newman school, which had an existing 6th form. As an example of the degree of attention given by the Council to this, in the Consultation Report an answer is provided to this specific question at pages 9 and 10, that being part of Appendix A to the Report to Members. The question posed was "Why wasn't Cardinal Newman considered an appropriate site for the sixth form centre?" and the answer given is simply "As previously stated, the decision to progress any such scheme would have to be made by the Diocese". I do not consider that to be much of an answer to that question, but that conclusion does not mean that the Claimant succeeds on this ground. At the hearing before me, Mr Milford explained that this was not an option because Cardinal Newman is a faith school, and section 40(5) of the 2013 Act meant that the Council could not therefore do so. This explanation was provided in respect of the next ground, but it is a consideration here as well. He also argued that there were different reasons against retaining 6th forms at each school, that these were considered, and that the decision was "multi-faceted", which I take to mean had various pros and cons, and interlinking factors in respect of each.

136. Section 40(5) of the 2013 Act states that "no alteration may be made to a maintained school that changes the religious character of the school or causes a school to acquire or lose a religious character". This is not the absolute prohibition on a joint 6th form for which Mr Milford contended, although consideration would have to be given to whether such a proposal would change the religious character of the school (hence engaging the section), and there is no doubt the Diocese would have to be involved in any such proposal. However, the Council's explanation of the different reasons in respect of each different school – the second point at [135] above - does make clear the degree to which the Claimant, on this limb, is impermissibly seeking to have the court descend into the minutiae of the merits of the decision itself.

137. As the various answers in the Objection Report made clear, the Council did consider this and explained – albeit in summary form – that this was not considered sustainable by the Council. Mr Williams for the Claimant took me to the 6th form pupil numbers for each of the years going forwards at all three schools to demonstrate their viability. He said that when these were compared with what Ms Howell said in her witness statement, that the total numbers were insufficient for a joint 6th form to be viable, could not be right. As an arithmetic point, he was right in that the total was higher than the number said by her to be required. However, there was more to the weighing up of the proposals than considering numbers, even though that might be thought to justify a different approach. The Code does not govern the subjective quality of the responses. I accept the submission made by the Council that the matters relied upon by the Claimant on this limb fail on the facts.

138. It therefore follows that the challenges by the Claimant on this limb of Ground 2 are not made out, and accordingly this ground of challenge fails. I should record that Estyn's view, on the final point at [131], may, or may not, be something that is taken into account by the Welsh Ministers. My finding on Ground 1 means that the

proposals affecting all three 6th forms (Pontypridd High, Hawthorn High and Cardinal Newman School) will be referred to the Welsh Ministers in any event.

The Alternative Proposals Ground -- Ground 2(f)

139. This is that the Council failed to consider suitable alternative proposals which were put forward as part of the consultation process. I shall refer to this as the Alternative Proposals Ground. These alternative proposals are those put forward by the Claimant and the campaign group. The Claimant alleges breaches of Paragraph 1.7 and 3.5 of the Code.

140. Paragraph 1.7 of the Code states the following:
"When considering whether a closure is appropriate, special attention should be given to the following:
• whether the establishment of multi-site schools might be considered as a means of retaining buildings, or the reasons for not pursuing this option;
• whether alternatives to closure, such as clustering, collaboration or federation with other schools, might be considered (taking account of the scope for use of ICT links between school sites) or the reasons for not pursuing these as an alternative…"

141. This is directory guidance, due to the word "should" following "special attention". The Consultation Document listed a number of alternatives, under the heading "*What alternative options have been considered".* These listed the advantages and disadvantages of seven alternative options, including the two options for change preferred and advanced by the Council. Those other options included federation of groups of schools; maintaining the school buildings with fewer headteachers and governing bodies; schools providing multi-site education; and increased collaboration between schools offering post 16 education, which was a wholly separate option.

142. Paragraph 3.5 of the Code states:

*"*Within 13 weeks of the end of the period allowed for responses (and in any event prior to publication of the proposals), the proposer **must** publish a consultation report:
• summarising each of the issues raised by consultees;
• responding to these by means of clarification, amendment to the proposal or rejection of the concerns, with supporting reasons; and
• setting out Estyn's view (as provided in its consultation response) of the overall merits of the proposal.
The consultation report might also make recommendations – for example, to the local authority's executive or the governing body – about how to proceed i.e. to publish the proposals as consulted on with any appropriate modifications, to abandon the proposals and retain the status quo or to significantly recast the proposals and re-consult."

143. I accept the argument of the Council that paragraph 3.5 of the Code is concerned with the contents of the Consultation Report, which is published before the period for statutory objections arises. The two proposals which the Claimant maintains were not considered were both alternative proposals put forward by the campaign group. They are the joint 6th form at Cardinal Newman; and use of a different site at Glyncoch site for a new Welsh Medium primary school. Those proposals were put forward by means of a submission made by the campaign group after the publication of the Consultation Report. Given Paragraph 3.5 of the Code identifies the requirement of

the Consultation Report, there cannot have been a breach of this part of the Code in the respect alleged.

144. I have already dealt at [135] to [137] above with some of the arguments raised in respect of the joint 6th form at Cardinal Newman School. It is unnecessary to repeat them. Both these two alternative proposals were included in the campaign group's objection, which was appended in full to the Objection Report so that the Cabinet could consider them when the decision was made. The Council argues before me that "there were not only good but overwhelming reasons for not proceeding with either" but that is not the test to be applied on this ground of these judicial review proceedings, even if it were made out. I have already identified that Paragraph 3.5 of the Code does not assist the Claimant on this limb of the ground. Nor does Paragraph 1.7 of the Code, which is directory in any event.

145. I will however briefly address the second aspect of this challenge, namely that related to the site at Glyncoch. The Claimant and others did research and suggested that a site at Glyncoch be used. This information was obtained as a result of a number of Freedom of Information requests. The Consultation Report included a question "why not use the site in Glyncoch?" and the answer was in relevant part "all of the proposals included in the consultation are inter-dependent".

146. An air of suspicion appears to have lingered over this, and an alleged lack of transparency on the part of the Council, in terms of its future plans for that site. This is to be retained for a catchment area review. The Claimant drew attention to what were said to be different answers given about the likely future use of the alternative site. There were other competing points argued before me, including one by the Council that the size of the site was simply not sufficient, what site size was required by Building Bulletin 99 ("BB99"), whether the Welsh Government Circular No. 021/2011, "Measuring the Capacity of Schools in Wales" is "comparable" to BB99. and different approaches both to measurement and definitions. However, the more attention that was devoted in submission to these competing merits arguments, the more the court had to remind itself of the function of judicial review proceedings. Use of this alternative site was considered by the Council. The Claimant is dissatisfied with the outcome of that consideration. However, that is different to whether the matter was considered or not, and whether any particular paragraph of the Code has been breached, by the Council. In my judgment, the fact that the Claimant is unhappy with the outcome of the consideration given does not constitute a breach of the Code. In my judgment there are no breaches of code in respect of this limb.

147. Accordingly, the challenge brought by the Claimant on this limb, the Alternative Proposals Ground, fails.

148. The Claimant therefore succeeds on Ground One, and limb 2(g) of Ground Two, the Welsh Language Ground. She fails on the other two limbs of Ground Two, the Estyn Ground and the Alternative Proposals Ground.

149. It is necessary therefore to turn to consider relief.

Relief

150. The first point to make is that the evidence clearly identifies that all the proposals are completely interlinked. The finding on Ground One means that this part of the overall

re-organisation, Proposals 2 and 3, namely the 6th form closures at Pontypridd High and Hawthorn High, has to be referred to the Welsh Ministers. However, the Council resists the grant of any relief should the Claimant succeed on any of the limbs of Ground Two, which she has done. Mr Milford accepted that this would not arise in terms of success on Ground One, because that was a matter of statutory interpretation. If the Claimant succeeded on Ground One, then the matter of the cessation of sixth form education at Pontypridd High and Hawthorn would have to be referred to the Welsh Ministers, as has the closure of the 6th form at Cardinal Newman School. Success on Ground One would not entitle the Claimant to have the decisions on all of the proposals quashed.

151. The arguments advanced by the Council on relief are, firstly, that there has been delay by the Claimant, and secondly, materiality. Dealing with delay first, under CPR Part 54.5(1)(a) and (b) a claimant is required to bring any challenge promptly, and in any event within three months after the grounds to make the claim first arose. The claim form in this case was issued within, but just before the end of, that three month period.

152. It is well established that applications in case of school closures need to be made promptly for obvious and common-sense reasons to avoid administrative problems on the part of school authorities. This is clear from cases such as [26] of ***R (on the application of Louden) v Bury School Organisation Committee*** [2002] EWHC 2749 (Admin) and also ***R (Nash) v Barnet LBC*** [2013] PTSR 1457.

153. The Council argues that waiting until 17 October 2019 to issue proceedings concerning a decision made on 18 July 2019 is too long to bring a challenge to such a large-scale reorganisation, particularly in circumstances where much of the challenge related to a consultation exercise that ended earlier than that. The Council argues that in this case there is what amounted to an obvious failure to act promptly.

154. This delay was caused by a number of factors. It is difficult to square the Council's arguments on this point now, complaining of delay by the Claimant in issuing proceedings, with its own request, actually during this period in September, for longer than the period offered by the Claimant's solicitors to reply to the pre-action protocol letter written on the Claimant's behalf in early September. The Claimant's solicitors granted that extra time, yet the Claimant now faces a submission that she did not act promptly in issuing proceedings. That is an unmeritorious and illogical position for the Council to adopt. Further, it cannot be ignored that the Claimant is in receipt of legal aid, and it takes some time for such matters to be organised, and approval to be given, before proceedings can be issued. Another point in her favour is that the pre-action protocol process is a constructive one, and helps in many cases to define and refine the issues to be advanced in judicial review proceedings. I do not consider that this outweighs the need to issue proceedings promptly, but what is prompt must depend upon all the circumstances. However, complying with that protocol does take time. Mr Imperato's 2nd witness statement explains what was being done in that period of time, and in my judgment taking into account all the relevant circumstances, the claim was issued promptly.

155. The Council argues that the delay has caused material hardship or prejudice and/or amounts to a detriment to good administration. The bulk of any delay has followed

the issue of the claim form, not preceded it. I consider it would be wrong to hold this to the detriment of the Claimant. For reasons of transparency, I will outline that delay. The decision on the papers in respect of permission was made on 27 February 2020. That is longer than ideal following the issue of the claim form in the Administrative Court in Wales, but that is not the fault of the Claimant. The Claimant did not receive permission to advance all her grounds. Worldwide events then rather overtook the arrangements for the substantive hearing, in particular the national lockdown and the Covid-19 crisis. The justice system nationally continued to function, but secondary legislation was necessary in order to enable remote hearings to take place at all. The substantive hearing before me did take place remotely on 24 June 2020, a date that had to be moved from earlier that month due to administrative reasons connected with holding remote hearings. Again, this cannot fairly be laid at the door of the Claimant.

156. A further factor is that, due to the interlinking of the proposals, any delay in the Claimant issuing proceedings has caused no effective delay to implementation of the proposals in any event. Until the Welsh Ministers approve the closure of the 6th form at Cardinal Newman School, the whole reorganisation is effectively pending. That approval, or otherwise, has not yet been provided by the Welsh Ministers. It is unclear to what extent it may have been delayed by the Covid-19 crisis; common sense would suggest that factor cannot have been entirely absent. Regardless of the reasons for any delay by the Welsh Ministers, no such approval has yet been given by the Welsh Ministers and I do not consider it to be correct to second-guess what the Welsh Ministers would do, or to assume that their approval would be automatic. Without approval for the closure of Cardinal Newman 6th form, the Council could not implement these interlinked proposals in any event.

157. I therefore decline to refuse relief as a matter of discretion under section 31(6) of the Senior Courts Act 1981. I do not consider that the delay, such as could properly be laid at the door of the Claimant, could properly justify doing so. The Welsh Ministers have not yet ruled on the matter which was referred to them, namely the closure of the 6th form at Cardinal Newman School. Until that has been approved, it cannot be assumed that all of these proposals (which are said to be wholly interlinked, one with another) will proceed. In February 2020 the Council decided that it should await the outcome of these judicial review proceedings before proceeding any further with the procurement necessary to carry the matter forwards. That was a sensible decision, but by then a period of almost five months had elapsed since the issue of proceedings, and none of that five months' delay can be laid at the door of the Claimant as I have explained. I do not consider that there is any delay which could fairly be laid at the door of the Claimant which could properly be said to have caused significant hardship, prejudice and/or be detrimental to good administration.

158. I turn therefore to materiality. The submission is made by the Council that even if the Claimant succeeded on any limb of Ground Two, no relief should be granted because the outcome is academic. The Council submits that it is highly likely that the outcome for the Claimant 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. This was considered and dismissed by the single judge when she granted permission to bring judicial review, but I consider it here in any event.

159. Section 31 of the 1981 Act further provides as follows:

"(2A)The High Court—

(a)must refuse to grant relief on an application for judicial review, and
(b) may not make an award under subsection (4) on such an application,
if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.

(2B)The court may disregard the requirements in subsection (2A)(a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest.

(2C)If the court grants relief or makes an award in reliance on subsection (2B), the court must certify that the condition in subsection (2B) is satisfied."

160. The Council submits that the test under ss 31(2A) is satisfied in its favour in this case, and relief should be refused. It is submitted that it is highly likely that if the conduct complained of by the Claimant had not occurred the outcome of the Consultation would not have been different.

161. This statutory test 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."

162. This is the correct approach to apply. The Claimant relied upon other first instance authorities, such as the statement in ***R(Logan) v Havering LBC*** [2015] EWHC 3193 at [55], to the effect that s.31(2A) was only intended to apply to "somewhat trivial procedural failings that could be said to be incapable of making a material difference to the decision made". The ***Plan B*** case makes it clear that it need only be "highly likely" (not inevitable) that the outcome would be "substantially the same" (not materially identical). There is no suggestion that s.31(2A) is intended to be limited to "somewhat trivial procedural failings".

163. The Council relies upon the nature of the failures complained of, describing these as "the trivial nature of many of the alleged procedural deficiencies". However, it is not necessary for these to be trivial for the Council to be able to rely upon the statute, as I have explained.

164. Regardless of what the position might have been had the Claimant succeeded on either the Estyn Ground and/or the Alternative Proposals Ground, these submissions by the Council have to be addressed in the context of the ground upon which the Claimant has succeeded, namely the Welsh Language Ground. I would not describe this as being trivial, even if that were the test, and I doubt many people in Wales

would either. To be fair to Mr Milford, he probably had in mind the details of the challenges under the other two limbs of Ground Two (which have failed), rather than the Welsh Language Ground, when he included this in the Council's skeleton argument. I regard the Welsh language requirements in the Code as being of considerable importance.

165. Given the Claimant has succeeded on the Welsh Language Ground, it is simply not possible to state that it would have been highly likely that the outcome would have been the same had the Council complied with its duties in this respect. Due to the interlinking of the four proposals, which the contemporaneous documents make clear are linked together, this success on the Welsh Language Ground affects all of the proposals.

166. It is not "highly likely that the outcome for the [Claimant] would not have been substantially different if the conduct complained of had not occurred". The section is not therefore engaged. Given this conclusion, it is unnecessary to consider certification under section 31(2B) and (2C); however, the importance of the Welsh language to education in Wales (and life in Wales generally) is precisely the sort of matter which, in my judgment, would qualify as being of exceptional public interest under section 31(2B) if that point were to arise. It is not necessary to determine that point however, given my conclusion at [165] above.

167. There is no valid or justifiable reason, in my judgment, to deny the Claimant the appropriate relief on Ground One, referring the matters concerning the 6th forms at Pontypridd High and Hawthorn High to the Welsh Ministers, nor on the Welsh Language Ground. The breaches by the Council on each of those two grounds entitle the Claimant to relief. The extent to which the success of the Claimant on the Welsh Language Ground affects the proposed 6th form closures is not a matter argued before me, nor do I consider that it is a matter for the court in any event.

Conclusion

168. The Claimant seeks the quashing of the decision made on 18 July 2019. This is the relief to which the Claimant is entitled, and the court accordingly will quash that decision.