

Neutral Citation No: [2024] NIKB 99	Ref: McA12652
<i>Judgment: approved by the court for handing down (subject to editorial corrections)*</i>	ICOS No: 15/67355(01)
	Delivered: 28/11/2024

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

**KING'S BENCH DIVISION
(JUDICIAL REVIEW)**

**IN THE MATTER OF AN APPLICATION BY MID ULSTER DISTRICT
COUNCIL FOR JUDICIAL REVIEW**

**IN THE MATTER OF A DECISION BY THE DEPARTMENT OF THE
ENVIRONMENT FOR NORTHERN IRELAND**

**Mr Peter Oldham KC with Mr AJS Maxwell (instructed by PA Duffy & Co) for the
Applicant**

**Mr Paul McLaughlin KC with Mr Michael Egan KC (instructed by the Departmental
Solicitor's Office) for the Respondent**

McALINDEN J

[1] In order to facilitate the restructuring of local government which took place in Northern Ireland in the middle of the last decade, the Department of the Environment ("the Department" or "DOE") was allocated just under £50M by the Northern Ireland Executive. Included in this budgetary allocation was the sum of £4M which was earmarked for local authority IT systems convergence. A scheme was devised under which £2M was to be made available for the financial year 2013-2014 and £2M for the financial year 2014-2015 to the newly created local authorities in order to help them meet the costs associated with ensuring that the IT systems previously used by the legacy councils were compatible with each other following the amalgamation of the legacy councils into the larger local authorities. The scheme as devised was not a grant scheme. Instead, the money was to be used to help the new authorities with the cost of any borrowing incurred by the authority for the purpose of funding IT convergence. In essence, to be eligible for a payment under the scheme, the authority had to borrow money for the purpose of funding IT convergence and had to spend the money borrowed in the same financial year. However, the loan period had to be for a minimum period of two years and the scheme would only meet any repayments under the loan agreement which fell due within the same financial year.

[2] The loan could be sourced from the then Department of Finance and Personnel (“DFP”) (NI Consolidated Fund) or from a private, commercial lender. In order to avail of such Departmental support, the local authority had to submit an application to a body set up to facilitate the operation of the scheme known as the Systems Convergence Programme Board (“SCPB”). This body was tasked with examining the application and sending it on to the Department, if the application was in order. Thereafter, the Department was tasked with determining the application by deciding whether to provide funding and, if so, deciding on the amount of funding to be provided. Councils were informed that any applications had to be made before the end of the relevant financial year and that the scheme would remain open up to the end of the relevant financial year unless the £2M allocated for each of the two years was “exhausted.” One of the issues in this case is what is meant by the term “exhausted” in the context of this scheme.

[3] On 21 February 2013, Mr Alex Atwood, the then Minister of the Environment wrote to the Councils informing them of the allocation of £4M to “cover the cost of council borrowing in relation to ICT costs and systems convergence for the next two financial years.” See Trial Bundle 2, pages 29 and 30 (TB2:29-30). To ensure that the programme of amalgamation went smoothly, a Regional Transition Operational Board (“RTOB”) was set up and it included representatives of the various councils. Regular meetings of this Board took place at which all councils had to opportunity to raise issues about the process of amalgamation.

[4] Following one such meeting, Mr Jeff Glass, of the Reform Finance Team in the Local Government Policy Division of the Department wrote to all council chief executives on 7 June 2013 in order to provide a fuller explanation of the operation of the scheme. (TB1, Section C:106-107). In this correspondence it was made clear that end of year flexibility or budget re-profiling was not available, and that cover can be for either interest only or interest and principal. At a meeting of the RTOB on 29 January 2014, which was chaired by Mr Mark H Durkan, then the Environment Minister, it was confirmed by the Minister that the £2M funding for the financial year 2013-2014 “had been returned to DFP as there had been no demand for it from local government.” The Minister went on to state that “there is still £2 million available in the next financial year which can be utilised to service borrowing.” It is important to note that the £2M that had been set aside for ICT costs and convergence in the 2013-2014 financial year was surrendered to DFP well before the end of that financial year and the local authority representatives were aware of this surrender in late January 2014.

[5] On 6 May 2014, following the first meeting of the SCPB, Roger Wilson, the chair of that body, wrote to the councils and informed them that the role of the SCPB was to provide a comment to the Department as to whether the “proposed work aligns with the strategic direction agreed by the sector.” The letter went on to state that “we have been advised by DFP that bids for borrowing over a one year period are unlikely to be approved ...” (TB2:97). On 6 August 2014, Mr Jeff Glass again wrote to all chief executives of the new councils informing them that the Department had prepared new

guidance (LG37/2014) for the new councils in relation to the operation of this scheme. This guidance was promulgated four months into the second year of the scheme. In summary, the guidance stipulated that a business case should relate to the costs associated with the convergence of key systems between councils and should align with the strategic direction set out in the Gartner Report "Delivering the Right ICT Option to Support Local Government Reform." The new councils should in the first instance seek endorsement of the business case from the SCPB prior to forwarding the business case to the Department. A template business case was set out in Appendix A of the guidance.

[6] The introduction to the guidance confirms that £2M had been set aside for ICT systems convergence to service loans in the 2014/2015 financial year. The £2M could be used to repay both principal and interest. The minimum term over which councils could borrow for systems convergence is 24 months. The guidance stipulated that a business case in the form set out in Appendix A signed by the Chief Financial Officer of the new council had to be submitted to the SCPB in the first instance for endorsement. If endorsed by the SCPB the business case will then be forwarded to the DOE for approval. The approval was stated to focus on the issue of whether the business was compliant with the Gartner Report "Delivering the Right ICT Option to Support Local Government Reform." See the detailed flow chart attached to the guidance (Annex C) (TB1, Section B: 6 and 14).

[7] The guidance clearly anticipates that once DOE approval of the business case has been obtained the council should then apply for a loan. The guidance only refers to applying to DFP for a loan, but it is clear that councils were also entitled to approach the private sector for financing. The guidance states at section 2.2.ii that once a loan has been obtained, the council is required to provide the DOE with official confirmation of the amount and a timetabled schedule of repayments. (TB1, Section B:6 and 14).

[8] Section 2.3 of the guidance is of key importance in the context of this case. It states that the councils should note that "applications will be accepted until the funding is exhausted or until the end of the 2014/15 financial year, whichever is sooner." Section 2.4 of the guidance clearly stipulates that in order to qualify for any funding under the scheme the full amount of the loan obtained by the council must be spent in the 2014/15 financial year even though the minimum length of loan repayment is 24 months. Section 3.3 of the guidance also makes it clear that funding under the scheme will only be given for repayments of the loan (principal and/or interest) made on or before 31 March 2015 and any claims (backed up with supporting documentation) must be made by that date. (TB1, Section B:7 and 14).

[9] The detailed flow chart (Annex C) (TB1, Section B:14) clearly set out the order in which each step along the path to obtaining funding is to be taken. The business case should be submitted to the SCPB for agreement. If agreed, it is then submitted to the DOE for a compliance check (Gartner compliant). If deemed compliant, the council should then seek the loan to cover the expenditure set out in the business case.

Once the loan is obtained, the council should inform the DOE of the terms of the loan and the repayment dates. The loan must be for a minimum period of 24 months. The council must then spend the loan on the items set out in the business case before 31 March 2015 and the council must make an application on or before 31 March 2015 for reimbursement of any principal/interest repayments made on or before 31 March 2015.

[10] There were no business cases submitted in the weeks after the promulgation of the guidance and it would seem that in September 2014, the DOE started to focus on ways to obtain permission to divert at least part of the £2M to allow the Department to use it for other purposes, bearing in mind the pressures on departmental budgets.

[11] On 15 September 2014 an internal DOE memo relating to the October 2014 monitoring round written by Ian Maye, an official in the Local Government, Road Safety and Corporate Services Group within the DOE to Mr Anthony Carleton, the Director of Finance and Business in the DOE reveals that the DOE at that time was looking for ways to use at least part of the £2M for purposes other than local authority ICT convergence. Para 9 of the memo states:

“There is a potential bid to the Systems Convergence fund expenditure for TIU Staff costs on the transfer of function work of £400k which is not shown in the return. The cost is included within the salary costs for HROC. A paper is currently being drafted to demonstrate potentially eligible system convergence work for submission to DFP. The draft paper is expected to be finalised by Wednesday.”

This section of the memo appears under the heading “Human Resources & Organisation Change Division” (“HROC”) and the previous paragraph refers to a required reduction in the salary budget of this division of £410k. (TB2:290)

[12] No further documentation which deals directly with the steps taken by the DOE to obtain permission to, in effect, divert £400k of the fund set aside for local authority ICT systems convergence for use by the DOE has been disclosed. However, it would seem that following the October 2014 monitoring round, £400k was diverted from the available fund to meet other financial pressures within the DOE which undoubtedly existed, leaving the sum of £1.6M in the fund potentially available to councils.

[13] As to what actually happened this £400k, there is an e-mail from Mr Anthony Carleton to Mr Ian Maye dated 19 November 2014 in which Mr Carleton states that “DFP have now confirmed the outcome of October Monitoring.” He enclosed printouts detailing the “outcome ... for each Business Area within your Group” (TB2:166). The spreadsheet shows that £400k has been deducted from the £2M which had been set aside for ICT systems convergence. Further, there is an internal e-mail exchange between senior civil servants in the DOE dated 20 November 2014 in

which a query is raised as to where the £400k went and who agreed to it being removed from the ICT budget. The response indicates that the money was used to cover staff costs in the DOE ICT team who were working on the development of the online planning portal when the “October Monitoring returns had come into Core.” (TB2:100).

[14] Going back in time, on 2 October 2014, Mr Roger Wilson the chair of the SCPB wrote to Ms Linda McHugh in the Local Government Reform Division of the DOE following a meeting of the SCPB on 25 September 2014. In this letter, he confirmed what was discussed at the meeting namely that the “Local Government sector is unlikely to be in a position to draw down any significant funding from the £2 million provision made by the NI Executive in the current financial year to service loans. This is largely due to the nature in which the funding has been constructed as well as the timescales over which the funding has to be accessed.” In spite of this Mr Wilson felt able to report that “significant progress” was being made across the new councils “in progressing systems convergence at a cluster level.” (TB1, Section D 1 Part III: 133)

[15] The issues of the nature of the funding and the timescales were raised by the applicant Council in correspondence to the Minister dated 20 October 2014. The correspondence from Councillor Cathal Mallaghan, the Chair of Mid Ulster District Council, stated that:

“the support package for ICT Convergence as presented in Circular LG 37/2014 will not deliver the intended support as only interest on loans will be funded. The practicalities of accessing the funding make it impossible for councils to avail of any significant amount of support from the £2m available.”

Councillor Mallaghan requested that: “the £2m funding available for repayment of council borrowing costs be restructured as a grant to councils in the current year.” He also requested the Minister to “reinstate the £2m earmarked for 2013/14 as grant assistance for ICT convergence.” (TB1, Section B:15-16).

[16] The Minister Mark H Durkan responded to this correspondence some six weeks later on 1 December 2014 in which he confirmed a number of points about the nature of the scheme including that the scheme would cover principal and/or interest repayments and that borrowing could be “through the commercial sector or HM Treasury.” He stated that “the 2013-14 allocation of £2 million was surrendered as local government did not call on the funding.” He reiterated what he had stated in the Assembly in April 2014 namely that DFP had “confirmed that the £2 million for 2014-15 is still available and I encouraged councils to avail of this funding at that time.” The Minister reminded Councillor Mallaghan of the guidance that had issued in August 2014 and the fact that DOE officials had met with members of the SCPB to discuss the scheme at length. He stated that: “the availability of the £2 million provision for borrowing and associated conditions were restated” at that meeting.

“The Chair, Roger Wilson, was made aware that converting the allocation to a capital grant with possible future ring fencing is not an option.” Minister Durkan concluded by stating that he appreciated the councils’ concerns about the matter in the current budgetary climate, but he was unable to offer any flexibility on this issue. (TB1, Section B:17-18).

[17] In the meanwhile, in another internal DOE memo dated 25 November 2014 which was entitled: “January Monitoring Round 2014-15”, Mr Anthony Carleton wrote to Mr Ian Maye formally asking for returns in respect of the January 2015 monitoring round. He was asked to provide details of all reduced requirements for resource expenditure and capital investment at the earliest opportunity. The memo stated that to “ensure all the relevant deadlines are met, including Ministerial clearance, I would ask that your returns are submitted ... no later than close of play on Monday 1 December 2014.” (TB2:172).

[18] Despite the fact that the Minister categorically stated to Councillor Mallaghan that the £2M for 2014-15 was still available in his letter dated 1 December 2014, on 4 December 2014, Mr Anthony Carleton sent a document entitled “2014-15 January Monitoring Proposals” to the Minister for approval. (TB2:180). It is beyond doubt that these proposals were in gestation for some time before 4 December 2014 and it is hard to understand why the thrust of these proposals were not conveyed to Councillor Mallaghan on 1 December 2014 or why a supplementary letter was not sent to Councillor Mallaghan after the proposals were approved by the Minister.

[19] Looking at these proposals, there were a number of recommendations in respect of bids for additional funding and under the heading “Unused Budget” it was asserted that councils have not drawn down any of the remaining £1.6M of ICT System Convergence funding. As a result of this lack of uptake it was recommended that the DOE “retain the potential funding with a view to possibly using this to meet any pressures that could arise as a result of any of our bids not being met.”

[20] This recommendation was followed up by correspondence from the DOE to the Environment Committee of the Northern Ireland Assembly dated 8 December 2014 in which the DOE set out its proposals for the January Monitoring Round. (TB2:186-188). Of importance is the statement in para 2 of the introduction to the effect that the:

“January Monitoring Round is the last opportunity for departments to register budgetary pressures with the DFP, surrender reduced requirements and process technical adjustments in the 2014-15 financial year.”

Para 3 of the introductions states that the DOE has “six resource bids totalling £5.1 million. One proposed re-allocation of £1.6 million to meet a number of bids ...”

[21] Under the heading “ICT System Convergence: servicing costs of borrowing” the following appears at para 6:

“There is currently budget provision in relation to ICT System Convergence funding (£1.6 million) that was made available to assist councils, as part of the overall package of funding from the Executive to support Local Government Reform. This funding was made available to help councils to service borrowing costs of new ICT infrastructure that they may require as they progress Local Government Reform. Councils have not drawn down this funding to service borrowing costs. It is proposed that the department seeks re-allocation to set off some of the budgetary pressures noted above.”

[22] Internal DOE e-mail correspondence dated 9 December 2014 (TB2:190-191) shows that all the relevant senior civil servants in the DOE were informed that in respect of the recommendations dated 4 December 2014, “The Minister has seen and read your submission of 04/12/2014 and he is content to approve the recommendation.” Following this on 11 December 2014, there was a meeting of the Committee for the Environment chaired by the late Ms Anna Lo. Mr Carleton and other senior civil servants attended from the DOE. Ms Lo enquired (TB2:203-204) as to why the money set aside for ICT systems had not been taken up by the councils. Mr Carleton stated that:

“We can only assume that, as the Planning Service, in particular, is to go from the Department, council systems were up to date and did not need any fundamental improvement.”

Mr Kieran McMahon added that: “there have been no requests or drawdowns by individual councils at this stage.” Pausing there, Mr McMahon’s statement was accurate, but the views expressed by Mr Carleton were absolutely without any foundation in fact and it was just an assumption on his part at that time. See para 14 of his affidavit sworn on 2 October 2024. (TB2:119).

[23] Ms Lo pursued the matter further (TB2:204): “They will definitely not use it within the next few months? They will not come and ask for it?” Mr Carleton then replied:

“Not in this particular category, we believe. We are informed by our colleagues on local government side that there are still no requests in and no business cases made. In a lot of cases, we have gone out and put in the infrastructure for the portal, and there has not been any need to improve IT systems.”

[24] Ms Lo was proved correct in raising concerns about the submission of a business case before the end of the financial year because on 29 December 2014, the applicant Council submitted its comprehensive business case to the SCPB using the template in Annex A to the guidance. (TB1, Section B:19-31). The total cost of the project was estimated to be £805,000 of which it was intended to borrow £800,000. The business case concluded with the following statements:

“Borrowing shall be within the Council’s authorised borrowing limit and shall be undertaken having regard to the Council’s statutory obligations.

Council will fund borrowing not funded by Executive funding by means of an appropriate minimum revenue provision charged to its local ratepayers over an appropriate term.”

[25] Following the submission of this business case to the SCPB, the Department, as yet unaware of the bid, submitted its monitoring round proposal to the DFP on 2 January 2015. In this proposal (TB2:216 - 218), the Department sought permission for internal departmental reallocation of £1.6M of ICT systems convergence funding. The proposal at paragraph 8 (TB2:217) stated that:

“Councils have not drawn down this funding to service borrowing costs. The Department has utilised some £400k, for IT staff/contract costs in relation to the ICT development of the planning portal in respect of local Government reform. Therefore, £1.6million of the ICT System Convergence Funding is currently unused and the Department is seeking to retain it to help offset some of the DOE specific operational pressures identified above.”

An internal DOE e-mail sent by Mr Carleton to the Permanent Secretary dated 2 January 2015 explains the rationale behind the request for the retention of the £1.6 million:

“As with the paper issued to the Committee, we have said we are proposing to re-allocate (and NOT to be treated as a “reduced requirement”) the ICT convergence fund suggesting that it is retained to meet DOE Operational bids without getting into the specifics of a de-rating v re-reinstatement of Budget cuts argument.”

[26] At the latest, the DOE became aware of the submission of the applicant Council’s business case to the SCPB on 12 January 2015 when Mr Tohill, the then Chief Executive of the applicant Council, met the Minister. In his first affidavit sworn on 15 July 2015, Mr Tohill recalls that Ms Linda McHugh a senior civil servant in the DOE

was present at the meeting and, upon hearing about the submission of the business case, she expressed the view that the Council's application was too late. According to Mr Tohill, she did not state that the scheme was closed.

[27] It is legitimate at this stage to ask what the DOE did once it was appraised of the Council's application and whether it took any steps to inform the DFP of this development and appraise it of the need to revise its January monitoring round proposal in light of this development. The simple answer is that the Department did nothing. It did not appraise the DFP of this development and it allowed the DFP to make a decision in complete ignorance of this development. This inaction on the part of the DOE is simply inexcusable. It is compounded by the fact that on 13 January 2015 the SCPB wrote to the DOE and formally informed them of the applicant's bid for funding. Roger Wilson stated: "In the absence of any other comments and if the bid is compliant, then I am happy for it to be submitted." (TB2:102). The SCPB then e-mailed the bid to the DOE with a covering e-mail in the following terms:

"Just to confirm that the bid from Mid Ulster has been considered by the members of the SCPB and no issues have been raised. Roger has confirmed that he is happy for this to be submitted. I have confirmed this with Mid Ulster - can you please advise the appropriate contacts in DoE."

[28] Referring back to the flow chart set out in (TB1, Section B:14) it is clear that the Council's business case had cleared the first hurdle in that it had been agreed by the SCPB and had been referred to the DOE in order for it to be examined to ensure compliance with Gartner. One would have thought that the DOE would have immediately informed the DFP of this development with a view to revising its January monitoring round proposal, but this did not occur. Instead, the documentary evidence provided by the DOE indicates that the official who received the bid from SCPB forwarded the bid to Mr Jeff Glass with the following cryptic comment: "Please see Mid-Ulster BC attached!" The exclamation mark is very telling. Mr Glass was the Head of Local Government Finance in the Department at this time, and it is disappointing to discover that no steps were taken to inform the DFP of this bid which had been agreed by the SCPB. It was a serious and well formulated bid which should have been taken seriously with the result that steps should have been taken immediately to ensure that the funds that had been previously allocated for ICT convergence were retained for that purpose until the bid was properly considered by the DOE. Instead of taking such steps, the DOE stayed silent and allowed the DFP to make decisions regarding the reallocation of this funding in ignorance of this bid. This is quite shameful behaviour and can only be explained by the desire of the DOE to have the remaining £1.6M of funding reallocated for use by the Department to meet other financial pressures. In the management of this scheme and in the consideration of this application by the Council, this represents egregious procedural unfairness and wrongdoing.

[29] On 14 January 2015, the Finance Minister presented a draft paper to his Northern Ireland Executive colleagues containing his proposals for the January 2015 monitoring round which he hoped to bring to the Executive meeting on 15 January 2015. (TB2:226). These proposals were made in the absence of any knowledge of the bid for funding by the applicant Council. In these proposals the Finance Minister rejected the DOE's request for retention and reallocation of the £1.6M ICT convergence funding. In other words, that funding would have to be surrendered to DFP. On the same date the Environment Minister wrote to the Finance Minister expressing disappointment with the outcome. (TB2:228-229). This was the opportunity to alert the DFP to the applicant Council's bid and it can only be as the result of a deliberate decision that this opportunity was not taken. This compounds the unfairness of the procedures adopted by the DOE in respect of the applicant's bid.

[30] In the meanwhile, the applicant went about firming up its borrowing arrangements in respect of its ICT upgrade proposals and on 15 January 2015, the Bank of Ireland provided the applicant with a letter of offer for a term loan in the sum of £800k. The applicant Council then adopted the facility letter and associated terms and conditions at its meeting on 22 January 2015. The facility involved the applicant Council drawing down £800k on 19 March 2015 and then making eleven repayments between 31 March 2015 and 20 June 2017. The first repayment and the only one which would come within the terms of the scheme was proposed to be made on 31 March 2015 and it was proposed that this repayment would be in the sum of £520k. It was proposed that £180k would be repaid on 15 April 2015. Thereafter, starting in mid-June 2015 it was proposed to make quarterly repayments of up to the middle of June 2017 of various amounts between £520.25 (final payment) and £12,690.27. (TB1, Section D 1 Part III: 201).

[31] On 22 January 2015, the DOE issued a circular (LG 03/15) to all councils advising them of the surrender of the £1.6M of ICT convergence funding. (TB1, Section B:60). This circular attempted to offer some justification for the actions of the DOE in that it rehearsed the fact that the chair of the SCPB wrote to the Department on 2 October 2014 stating that:

“the Local Government sector is unlikely to be in a position to draw down any significant funding from the £2 million provision made by the NI Executive in the current financial year to service loans.”

The circular went on to state that based:

“on this information and backed up by the fact that the Department had not received and approved any bids for funding by 31 December 2014, the Department was left with no option but to surrender the 2014/2015 allocation of £2 million, as part of the January Monitoring Round ...

As a result the Department is now unable to provide any funding for systems convergence in 2014/15.”

[32] This circular was misleading, and I am forced to conclude deliberately so. Firstly, the DOE did not surrender £2M. It had appropriated £400k of that £2M earlier in the financial year for other purposes. The absence of any reference to this earlier appropriation cannot have been a matter of oversight. The circular specifically refers to correspondence received by the Department from the SCPB in October 2014 but makes no reference to the actions of the Department in seeking permission to appropriate £400k of the £2M which said actions were occurring at or about the same time. Secondly, the reference to the Department having no option but to surrender the 2014/15 allocation is grossly misleading. The unvarnished truth of the matter is that the Department as part of the January Monitoring Round sought to retain the remaining £1.6M for its own purposes. The DFP did not sanction this request and instead required its surrender in ignorance of the bid that by then had been received by the DOE from the applicant with the specific agreement of the SCPB. The DOE made no attempts whatsoever to make the DFP aware of the applicant’s bid at any stage. This circular compounds the procedural unfairness of the Department’s actions.

[33] As to what happened to the £1.6M that was surrendered by the DOE as a result of the January monitoring round, it is interesting to note the contents of a paper prepared by Mr Carleton for the Minister on 30 January 2015. (TB2:230-233). The paper was prepared in order to update the Minister on the management of the 2014-15 in year financial position. In terms of bids for funding, the Minister was informed that: “At the January monitoring round the Department put forwards six resource expenditure bids totalling £5.62 million.” (These bids are set out in TB2:213). Then there is a sentence which is of crucial importance.

“The outcome of the monitoring resulted in the allocation of £1.6 million resource funding to cover the De-rating bid as well as £1.2 million to cover the additional depreciation costs in relation to the Planning Portal and the Goods Vehicle Licensing System used by the Transport Regulation Unit ...”

On the following page (TB2:232) under the heading “Reduced Requirements” the following appears:

“4. The £1.6 million in relation to Local Government ICT Convergence which was not utilised by Councils was taken as a reduced requirement by DFP.”

It would appear therefore that although the DOE was not permitted to retain the £1.6M and use it for other purposes and had to surrender it to DFP, the DFP gave the DOE an additional allocation of £1.6M resource funding in the same January monitoring

round. By this roundabout route, the DOE was able to arrive at its desired destination: the use of the ICT Convergence fund to meet other departmental financial pressures.

[34] During February and March 2015 it would appear there were a number of telephone and e-mail exchanges between the applicant Council and the DOE concerning the Council's bid for funding. It would appear from e-mail correspondence dated 10 February 2015 from the Council to the DOE that the DOE had initially claimed that councils were advised at an RTOB meeting that the ICT convergence scheme would close on 31 December 2014. In the correspondence, the Council challenged this claim, and it is of note that this claim did not translate into an averment in any affidavit served by the DOE in these proceedings. (TB1, Section B:61-62). In e-mail correspondence from the DOE to the Council dated 20 February 2015, the DOE stated that although the funding had been surrendered, it had considered the Council's application: "in case funding should become available within the Department before the end of the financial year. This cannot be guaranteed." This e-mail went on to state that the DOE:

"would be prepared to consider funding against a commercial loan, provided the interest rate is no higher than the consolidated loan fund, which at present is 1.12% for variable loans and 1.42% for fixed rate loans. The loan period must be a minimum of 2 years. As I explained yesterday, if the loan is paid off in less than 2 years, any funding would be clawed back."

[35] This is the first occasion in which the DOE had informed the Council about interest rate conditions which would have to be met before the DOE would consider providing any funding in respect of the repayment of a commercially sourced loan. The flow chart referred to above, seemed to identify Gartner compliance as being the main focus of the DOE's scrutiny of any bid but here we have the first evidence of the DOE focusing its scrutiny on the terms of the commercial loan which the Council was proposing to enter into. (TB1, Section B:62-63).

[36] Following legislative change in 2011 which permitted councils to seek finance from the private sector as well as the government, the DFP issued guidance that was related to government loans to councils, with effect from 1 April 2012. The guidance, which is set out in TB1, Section D 1 Part III: 148 contained the following paragraph:

"The introduction of the new legislation removes the requirement for DoE approval and instead places a duty on each District Council to ascertain the appropriateness of the loan and the purpose for which it is being sought, whilst ensuring that it determines, and remains within, its affordable borrowing limit at all times."

[37] The applicant Council argues that although this guidance specifically refers to government loans to councils, it is clear that following the change in legislation in 2011 the responsibility for such matters as assessing the value for money of loan arrangements entered into by councils fell to councils themselves rather than the DOE and this together with the guidance relating to the index scheme which specifically states that the DOE's scrutiny should concentrate on Gartner compliance (whether the proposed IT investment will actually further the goal of ICT convergence) should cause the court to view with some scepticism the DOE's sudden keen interest in value for money of the Council's loan arrangements.

[38] The applicant Council responded to the DOE's e-mail of 20 February 2015 by e-mail on 23 February 2015 (TB1, Section B:65) informing the DOE that the Council intended to draw down:

"a loan of £805k to fund ICT systems convergence. We expect to incur and vouch for spend of approximately £650k before the end of this financial year. The remaining elements of expenditure will have commenced but will not be completed before 1/4/15. Can you please clarify the amount of funding that may be available to Mid Ulster?"

[39] The DOE replied on 24 February 2015 (TB1, Section B:64-65) stating that such clarification could not be given until full details of the terms of the loan were provided. Such details were to be provided as soon as possible. Again, it was stipulated that the interest rate had to be in line with interest rates then being charged by the Consolidated Loan Fund. Finally, the Council was reminded that the DOE would only be able to provide funding: "if an underspend is identified at a late stage." On 3 March 2015, the Council replied stating that the loan term was for two years with flexible repayment terms built in and that it had: "secured an appropriate interest rate, term and repayment profile which will minimise the cost of its ICT systems convergence." This e-mail also indicated that the Council would be seeking: "reimbursement of our borrowing costs for ICT Systems Convergence in the order of £650k." (TB1, Section B:64).

[40] The DOE responded by e-mail later that morning again indicating that the Department needed to know the interest rate applicable to the loan. The Council was also reminded that if the loan was paid off in less than two years, any payment made by the DOE would be clawed back. "This was a condition set by DFP to ensure that the scheme funded loans and not, in effect, grants." Importantly the DOE e-mail also stated that: "If we can identify an underspend, we would pay 1/24th of the 2 year loan based on this interest rate." (TB1 Section B:64).

[41] The Council replied to this e-mail on 6 March 2015 stating that the interest rate was base plus 1.25% with no fees and that it would be paid off over two years. This e-mail reiterated that the Council was seeking the: "full reimbursement of our borrowing costs of £650k plus interest." The e-mail continued:

“To only receive 1/24th of that amount would not be acceptable to the Council. Given the delays in receiving guidance on this matter and the conflicting advice on the ability of councils to borrow from the commercial sector, surely the absolute minimum that we should be entitled to receive is one quarter of £650k plus the associated interest as this reflects a six month payment as per the guidance. Can you please revisit this and advise asap?” (TB1, Section B:67).

[42] Going back slightly in time, on 4 March 2015, the DOE internal e-mail with the subject line: “LGPD Forecast Outturn Return” made the following statement: “As you will be aware, there are a few cases of ICT funding being considered; these are not reflected in this return.” (TB2:245). This is the first reference to a “few cases” being considered. No details of any other cases have ever been provided by the DOE. In fact, the DOE’s affidavit evidence states that the only application being considered was the applicant’s. (TB2:120–121 at paragraph 20).

[43] On 19 March 2015, the Bank of Ireland sent two further letters of offer to the applicant Council which contained some amendments to the terms of the loan. (TB1, Section D 1 Part III: 134–145). It would appear that on foot of this loan agreement, £800k was drawn down on 19 March 2015 and £520k was repaid on 31 March 2015. (TB1, Section D 1 Part III: 201). On 31 March 2015, the applicant Council submitted a “Reimbursement Claim Form” in the proper format, setting out the itemised spending on ICT convergence that the Council had engaged in up to 31 March 2015. This amounted to £528,717. The applicant Council pay paid back £520k on 31 March 2015 and this was the sum that the applicant Council sought from the DOE under the scheme. (TB1, Section B:68). It is to be noted that in respect of each item of expenditure the form stated under the heading: “Invoice & Supporting Documentation Included ... Available for inspection.”

[44] On 6 April 2015, the Minister for the Environment wrote to the applicant Council rejecting the Council’s application for funding under the scheme, based on the financial assessment of the business case. This letter maintains the misrepresentation that “the Department was left with no option but to surrender the 2014/15 allocation of £2 million, as part of the January Monitoring Round.” The Minister went on to state that the: “key reason for my decision is that there is a major issue regarding value for money.” The Minister indicated that his decision was based on the premise that the rate of interest attached to the loan taken out by the Council was 1.75% (base rate of 0.5% + 1.25%) whereas the government rates were 1.12% (variable loans) and 1.44% (fixed loans). He stated: “Your choice of loan is not for me to determine, but were I to support this, I could be criticised as it does not represent value for money to the public purse.” The Minister also confirmed that there was no underspend declared in the 2014/15 financial year and, therefore, there was no money in any event to cover ICT

claims. This last statement also turned out to misstate the true situation regarding the DOE's finances. (TB1, Section B:69-70).

[45] By letter dated 29 May 2015, the DOE had to advise the Environment Committee of its proposals for the June 2015 monitoring round and that the out-turn for resource expenditure for 2014/15 revealed a £1.03M underspend arising from above forecast revenue from planning applications and the plastic bag levy (TB2:262-263). The actual additional Planning Application income was £1.22M. The actual additional Carrier Bag Levy income which was ringfenced so that it could only be used for environmental projects was £230k. On 2 June 2015, Departmental officials attended a meeting of the Environment Committee and made reference to the underspend, but no reference was made to the ICT scheme and the rejection of the applicant Council's reimbursement application. (TB2:273).

[46] On 17 June 2015, the applicant Council directed a pre action protocol letter to the DOE. The response is dated 7 July 2015. On 15 July 2015 the applicant Council issued these proceedings seeking an order quashing the refusal decision made on 16 April 2015 on the basis that this decision was unlawful. The applicant Council also sought a declaration that it was entitled to the reimbursement sought in this case and it also sought an order of mandamus directing the DOE to allow the applicant Council's application in accordance with the scheme. In the alternative, the applicant Council sought an order of mandamus requiring the DOE to reconsider the applicant Council's application for funding fairly and in accordance with the law. The applicant Council grounded its case in breach of substantive and procedural legitimate expectations, procedural unfairness and adopting a closed mind attitude when considering the application and coming to a decision which was pre-determined in order to serve the DOE's own agenda and interests. A leave hearing took place before O'Hara J on 9 October 2015. In a reserved judgment delivered on 2 December 2019, O'Hara J granted leave stating at paragraph [6]:

"While there is some scope for debate on the arguments advanced on behalf of the Department, I am satisfied to the requisite standard that the Council's case is one in which leave should be granted. I am concerned in particular about whether the Department anticipated not receiving applications in time, surrendered the funding (or most of it) to the Executive and then attempted to create a retrospective justification for having done so which does not withstand scrutiny."

[47] Following the grant of leave, the matter came on for substantive hearing on 28 to 30 May 2024 and was adjourned until 12 November 2024 to enable the parties to file further evidence. In total, the applicant Council filed three affidavits sworn by Mr Tohill, who was Chief Executive of Mid Ulster Council at the relevant time. These affidavits were sworn on 15 July 2015, 1 September 2015 and 2 October 2024. The DOE filed affidavit evidence from Mr Glass, the Head of Local Government Finance in the

Department, dated 28 September 2023 and Mr Carleton who at the relevant time was the Director of Finance and Business Planning in the DOE dated 2 October 2024. I am grateful to counsel for their skeleton arguments and oral submissions from which I derived great assistance.

[48] Having carefully considered all the evidence in this case and having weighed up the competing oral and written submissions of the parties, I am able to determine this application in relatively short order.

[49] I do not consider that the word “exhausted” in the guidance naturally and ordinarily lends itself to being interpreted as including the concept of being surrendered through an in-year monitoring round. Even in the overall context of this scheme, such an interpretation of the word “exhausted” would be far too contrived. The ordinary and natural meaning of the wording of the scheme is that it would remain open until the end of the relevant financial year unless the £2M of funding was used up in making payments under the scheme before the end of that year.

[50] However, that is not the end of the matter. Government departments work in accordance with long-standing and well-established, sound financial principles and it would be entirely wrong for a court to interpret such a scheme so as to remove the possibility of unused ICT convergence funding being surrendered as part of an in-year monitoring round. For a court to act in such a manner would constitute unjustified and unconstitutional judicial over-reach into the normal financial workings of government. Despite the clear and unambiguous wording of the guidance, I accept that it would be permissible for the DOE to surrender unused ICT convergence funding as part of the January monitoring round, if it rationally concluded that there were not going to be any calls on the funding from local authorities. Such a course of action had been taken by the Department in respect of the previous year’s tranche of funding without any challenge being mounted by local government. However, like every other step or action that the Department takes in respect of the operation of such a scheme, if the Department wants to exercise its right to surrender the unused ICT convergence funding as part of an in-year monitoring round, it must do so in a manner which is fair. It must follow a procedure which is fair and having regard to the facts of this case, as outlined above, the Department has failed abysmally to proceed in a fair manner.

[51] As stated earlier in this judgment at para [28], once the Department became aware of the applicant Council’s business case, it should have taken immediate steps to inform the DFP of this bid so that the funding remained available for its originally intended use. The opportunity to do so was there. The Department deliberately failed to take this opportunity. Contrast this with the alacrity with which the Environment Minister wrote to the Finance Minister concerning the Finance Minister’s proposals for the January monitoring round. See parag [29] above. The Environment Minister also failed to raise the issue of the applicant’s business case in his correspondence with the Finance Minister. This compounded the unfairness of the Department’s actions.

[52] The respondent in this case argues that even though the funding was surrendered in the January monitoring round, it still went ahead with an evaluation of the applicant Council's bid just in case there was a surplus at the end of the year which could be used to reimburse the Council for ICT convergence expenditure made in accordance with the provisions of the scheme. Far from remedying the unfairness exposed above, it is clear that this evaluation was in reality a sham.

[53] Despite the fact that the guidance and the attached flowchart strongly suggested that the focus of the DOE's scrutiny of any business case would be "Gartner compliance" ie whether the proposed expenditure did materially advance the goal of local government IT systems convergence and despite the content of the 2011 guidance to councils on borrowing from central government, I am prepared to accept the DOE's argument that the Minister was entitled to look at the issue of value for money both in relation to the expenditure incurred by the local authority and in relation to the loan entered into by the local authority to finance the expenditure.

[54] However, any assessment conducted by the DOE must be fair. It is argued by the applicant Council that the assessment of value for money was superficial. Yes the interest rate agreed with the Bank of Ireland was higher than the central government interest rate but because of the repayment profile agreed between the Council and the bank with the bulk of the loan being paid off in the same calendar month and the remaining principal sum and interest being paid off over the remainder of the two year term, the amount of interest actually paid by the Council was less than what would have been paid if the Council had approached central government for the loan which would have involved regular half yearly repayments of principal and interest. The applicant Council argues that the DOE should have drilled down into the nitty-gritty of this loan and acquainted itself with such detail before making a determination on the issue of value for money.

[55] Against this argument is the fact that the Council was not exactly forthcoming with information about the loan agreed with the Bank of Ireland. This information had to be requested over and over again and even then, the Council was rather shy about revealing the actual repayment arrangements.

[56] Where the Council is on much firmer ground is its argument that the outcome of the DOE's assessment of its business plan was pre-determined. All the evidence in this case points firmly towards a pre-determined outcome and a closed departmental mindset. The internal departmental communications clearly demonstrate that from a very early stage in the 2014-15 financial year, it wanted to get its hands on the £2M of ICT convergence funding in order to meet other departmental financial pressures. It initially took a tranche of £400k and then set about securing the remaining £1.6M and by hook or by crook, it achieved that goal.

[57] As I have found above, once it became aware of the bid, it took no steps to alert the DFP of the bid in order to halt the surrender of the ICT funding in its tracks. Why would it not alert the DFP to this development? The answer in my view is straight

forward. It wanted the ICT convergence funding to meet other departmental funding pressures. It interpreted the contents of Mr Wilson's correspondence in early October 2014 as giving it the green light to pursue that objective. All its actions thereafter were in furtherance of that goal. Without any evidence on which to base such an opinion, Mr Carleton, a senior civil servant in the Department opined before the Environment Committee on 11 December 2014 that the funding probably was not being accessed by local authorities because councils' IT systems were up to date and their systems did not need any fundamental improvement. Not only was this opinion proffered without any evidence to support it, it ran contrary to the explanation provided by Mr Wilson in his correspondence with the DOE in early October 2014 where he stated that the lack of interest:

“is largely due to the nature in which the funding has been constructed as well as the timescales over which the funding has to be accessed.”

[58] When the applicant's application did land in the DOE's in-tray, it used the convenient justification of a superficial assessment of “value for money” to effectively scupper the Council's bid for funding. I, again, stress that the DOE were entitled to look at the issue of value for money but in examining that issue they had to act fairly, with a mind that was not closed to any other outcome other than the desired and pre-determined outcome, and this the Department patently and blatantly failed to do.

[59] The final chapter of this rather sorry saga is the Department's assertions to the Council that there was no end of year surplus whereas it is clear that there was such a surplus and the bulk of that surplus was not ring-fenced. The excuse offered by the Department for this inaccuracy is that the surplus only became evident after the financial year had ended and resulted from a surge in income from the plastic bag levy and planning application fees in March 2015. Be that as it may, the surplus became obvious shortly after the end of the financial year. The refusal letter was dated 16 April 2015. In that refusal decision, there is a positive assertion that there was no surplus in the 2014-15 year. This was inaccurate and this inaccuracy was never corrected in follow up correspondence with the Council. What is utterly inexcusable is that this inaccuracy was not even corrected in the response to the PAP letter dated 7 July 2015. (TB1:91-97). In fact, the misrepresentation was specifically repeated at a time after the DOE had attended the Environment Committee and had declared the surplus. The last substantive paragraph of the PAP response is worth setting out in full:

“Finally, the Council was clearly advised that funding could only be provided in the event that additional monies were available at the end of the financial year. No such monies were available, and no additional monies have been secured for the 2015/16 year. The Department is not therefore in a position to reimburse the Council for this expenditure.”

[60] Rather than brazen it out, the DOE ought to have informed the Council that there was, in fact, a surplus at the end of 2014-15 at the earliest possible opportunity. The approach adopted by the Department in relation to this discreet issue is reflective and illustrative of its approach to every aspect of this sorry affair including the conduct of this judicial review.

[61] In the circumstances, I have no hesitation in quashing the refusal decision of the Department on the basis of egregious procedural unfairness in deliberately failing to take immediate steps to halt the surrender of the ICT convergence funding when it became aware of the applicant's business case and in evaluating the applicant's business case with a mind that was closed to any other outcome other than the desired and pre-determined outcome. The applicant is entitled to a quashing order and a declaration in the appropriate terms.

[62] No mandatory orders will issue in this case. The court cannot take on the role of decision-maker in respect of the applicant's entitlement to reimbursement under this long since defunct scheme. Bearing in mind that these events occurred almost ten years ago, and the scheme is long since closed and indeed the DOE no longer exists with the Department for Infrastructure now in place as the successor department, it is difficult to envisage how a mandatory order requiring the successor department to consider the applicant's business case afresh would work. In the circumstances, the only orders which will issue in this case will be the quashing order, the declaration in the appropriate form and an order that the applicant is entitled to its costs from the respondent. Bearing in mind the behaviour of the Department in this case including its approach to the litigation, the threshold for an award of costs on an indemnity basis is clearly in sight but has not been crossed.