OUTER HOUSE, COURT OF SESSION

[2020] CSOH 41

P767/19

OPINION OF LADY WISE

In the Petition of

PERTH AND KINROSS COUNCIL

Petitioner:

for

Judicial Review of a decision by the Scottish Ministers to issue a call-in notice under the schools (Consultation) (Scotland) Act 2010

Against

THE SCOTTISH MINISTERS

Respondent:

Petitioner: Mure QC: Brodies
Respondent: Ross QC; Charteris: Scottish Government Legal Directorate

7 May 2020

Introduction

[1] The petitioner is a local authority which, like all Scottish local authorities, has a duty to organise and provide education in its area and in performing those functions is properly described as an education authority. One of the primary schools within the petitioner's area of responsibility is Abernyte Primary School ("Abernyte"). The school is a rural school, situated within the village of Abernyte, which lies around seven miles west of Dundee. The closest primary school to Abernyte is Inchture Primary School, approximately 3.4 miles

away. On 27 May 2019 the petitioner notified the Scottish Ministers ("the respondents"), of a decision to implement a proposal to close Abernyte. There followed a period during which the respondents received representations, at the end of which they decided to issue a call-in notice in terms of the relevant legislation, the Schools (Consultation) (Scotland) Act 2010, as amended ("the 2010 Act"). The petitioner seeks to challenge and reduce the respondents' call-in notice dated 16 July 2019.

The legislative scheme

[2] The 2010 Act introduced a comprehensive consultation scheme that must be followed where any Scottish education authority is considering closure of a school. In this context the education authority is the local authority or the Council and I will use all three terms interchangeably. There are a number of requirements at each stage – pre-consultation, consultation and post consultation. Section 1 of the legislation has an overview of the key requirements for all school closures. Section 4 requires a local authority to prepare a proposal paper that includes a number of features listed in section 4(1). Importantly for these proceedings, section 4(2A), added by the 2014 Act, now requires that where a proposal paper relates to a closure proposal, " … it must also contain information about the financial implications of the proposal".

[3] Particular provision is made for rural schools, in that authorities such as the petitioner must have "special regard" to rural factors and so the procedures and requirements relating to proposed closure of a rural school such as Abernyte are more stringent. Some of these were introduced by amendments to the legislation by the Children and Young People (Scotland) Act 2014 ("the 2014 Act"). The provisions of the amended

legislation relating to rural schools insofar as material to these proceedings are in the following terms;-

"**11A Presumption against rural school closures**

(1) This section applies in relation to any closure proposal as respects a rural school.

(2) The education authority may not decide to implement the proposal (wholly or partly) unless the authority –

(a) has complied with sections 12, 12A and 13, and

(b) having so complied, is satisfied that such implementation of the proposal is the most appropriate response to the reasons for formulating the proposal identified by the authority under section 12A(2)(a).

12 Factors for rural closure proposals

…

(2) The education authority must have special regard to the factors mentioned in subsection (3).

(3) The factors are –

…

(b) the likely effect on the local community in consequence of the proposal.

(4) For the purpose of subsection(3)(b) … the effect on the community is to be assessed by reference (in particular) to –

(a) the sustainability of the community,

(b) the availability of the school's premises and its other facilities for use by the community.

12A Preliminary requirements in relation to rural school closure

(1) This section applies where an education authority is formulating a closure proposal as respects a rural school

(2) The authority must –

(a) identify its reasons for formulating the proposal,

(b) consider whether there are any reasonable alternatives to the proposal as a response to those reasons.

13 Additional consultation requirements

(1) This section applies to any closure proposal as respects a rural school.

(2) The proposal paper must additionally-

(a) explain the reasons for the proposal

(b) describe what (if any) steps the authority took to address those reasons before formulating the proposal,

(c) if the authority did not take such steps, explain why it did not do so
(d) set out the alternatives to the proposal identified by the authority under section 12A(2)(c),
(e) explain the authority's assessment under section 12A(2)(c),
(f) explain the reasons why the authority considers, in light of that assessment, that implementation of the closure proposal would be the most appropriate response to the reasons for the proposal."

[4] The call-in provisions, which relate to all education authority decisions to implement a school closure proposal, are contained in sections 15 and 17 of the 2010 Act, again as amended by the 2014 Act. These provisions, again insofar as material to the issues for determination in these proceedings are in the following terms ;-

"**15 Call-in of closure proposals**
(1) Subsections (2)-(6) apply where, in relation to any school, an education authority has decided to implement a closure proposal.
(2) The education authority must –
(a) notify the Scottish Ministers of that decision within the period of 6 working days starting with the day on which the decision is made,
(b) along with that notification, give them a copy of –
(i) the proposal paper,
(ii) the consultation report..
…
(3) Before the expiry of 8 weeks starting with the day on which that decision is made, the Scottish Ministers may issue a call-in notice to the education authority.
(4) In considering whether to issue a call-in notice, the Scottish Ministers are to take account of any relevant representations made to them (by any person) within the first 3 weeks of that 8 week period.
…

17 Grounds for call-in etc.
(1) The Scottish Minsters may issue a call-in notice only if subsection (2) applies.
(2) This subsection applies where it appears to the Scottish Ministers that the education authority may have failed –
(a) in a significant regard to comply with the requirements imposed on it by (or under) this Act so far as they are relevant in relation to the closure proposal, or
(b) to take proper account of a material consideration relevant to its decision to implement the proposal.

> (3) The education authority must provide the Scottish Ministers with such information in connection with a closure proposal as they may reasonably require of it for the purposes of their consideration of –
>
> (a) Whether to issue a call-in notice."

[5] Further, sections 17A and 17B now set out the process where a call-in notice is issued by Scottish Ministers. In essence the Ministers must refer the proposal to the Convenor of the Schools Closure Review Panel who must then constitute a panel within a specified time frame to review the proposal. The approach to be taken by the panel is set out in section 17B. In essence the panel must consider whether or not the education authority has failed in either of the ways in which it appeared to Scottish Ministers that it may have, as section 17B mirrors the language of section 17(2). The education authority must provide the panel with such information in connection with the proposal that the panel reasonably requires – section 17B(2). In terms of section 17C, the decisions available to the panel include (a) refusing to consent to the proposal, (b) refusing to consent to the proposal and remitting to the education authority for a fresh decision on implementation, or (c) granting the proposal unconditionally or subject to conditions. There is provision in section 17D for an appeal against the panel's decision, restricted to points of law. Finally, section 19 requires an education authority to have regard to any guidance issued by Scottish Ministers in connection with the Act.

Summary of the factual background

[6] The petitioner in this case began consideration of its school estate strategy in August 2012, the relevant document being produced at No 6/18 of process. Abernyte was identified as a challenge to management of the school estate by November 2016. In a report (No 6/21 of process) to the authority's Lifelong Learning Committee ("the Committee") dated

2 November 2016, the low occupancy of Abernyte was noted and recorded as 8 pupils out of a capacity for the building of 44 pupils. It was proposed that an options appraisal be developed to consider the matter of under occupancy of the school. Detailed work was undertaken to prepare that options appraisal, all as recorded by Sheila Devlin, Executive Director, Education and Children's Services of the petitioner, in her affidavit No 10 of process, at paragraphs 31-44.

[7] An initial Options Appraisal (No 6/5 of process) was submitted to the Lifelong Learning Committee in March 2018 and recommended reviewing the catchment area to determine whether this would increase Abernyte's school roll sufficiently to ensure its future sustainability. Closure was not recommended as a reasonable option pending such a review. A further report (No 6/8 of process) and associated updated Options Appraisal (No 6/9 of process) was then submitted to the Committee in August 2018. That appraisal recorded that the conclusion of the assessment on catchment area was that there would continue to be insufficient pupil numbers to increase the school roll at Abernyte or make it sustainable in future years if the catchment was extended. It recommended that a statutory consultation exercise take place on a proposal to close the school.

[8] The Proposal Paper (No 6/10 of process) in relation to the closure of Abernyte was published on 24 October 2018 and the necessary consultation commenced shortly thereafter. There were both public and staff meetings and representations were received. A report (No 6/11 of process),("the Consultation Report") on the outcome of the consultation was published on 18 April 2019. The appendices to that report include a detailed analysis of the representations made and the petitioner's responses to them. Particular issues had arisen in relation to the reliability of the data used by the council including on pupil projections, whether the option to review the catchment area had been fully assessed and whether the

council had erred in relation to the availability of a playing field in the village. On the last point, the petitioner had erred in recording that the field was owned by a local community interest company when it is privately owned. The council did not regard this as an error related to a material consideration. The petitioner also provided some breakdown of the capital costs that had been estimated would be incurred if Abernyte did not close and was upgraded. The total estimate of such cost was £330,000. In essence the petitioner concluded that it had made no material inaccuracies or omissions in the proposal paper.

[9] On 8 May 2019 the Committee's Executive Director (Sheena Devlin) submitted a report (No 6/12 of process) to the Committee narrating the outcome and findings of the statutory consultation exercise and sought approval to implement the proposal to close the school from 1 July 2020 or as soon as possible thereafter. The Committee granted that approval on 22 May 2019 and the necessary notification of the decision to Scottish Ministers with accompanying documentation was given on 27 May 2019, all in terms of section 15 of the 2010 Act. The respondents then assessed the material. Mr Jerry O'Connell, Team Leader of the School Organisation Team within the Scottish Government's Learning Directorate reviewed the documentation and completed a Proposal Assessment Form (No 7/1 of process) on which he noted issues for consideration arising from the paperwork. A deadline of 11 June 2019 for further representations was fixed. The call-in notice under challenge was then issued on 23 July.

The Call-In Notice

[10] Mr O'Connell issued the call-in notice (No 6/1 of process). It records that 52 representations were received by Scottish Ministers during the relevant period to 11 June

2019. The material parts of the notice identify three areas of concern that led to the conclusion to call-in the proposal and are in the following terms;-

> ***Financial Information***
> "The Scottish Minsters have concerns about Perth and Kinross's assessment of the financial savings that would result from the closure of Abernyte and that these savings have been overstated.
>
> The Scottish Ministers are also concerned about the high refurbishment costs for a school with a "B" condition rating. In the Councils' final report, it provided a detailed breakdown and rationale for the £330,000 costs, however in our view these costs appear to be high for a school with a "B" condition rating and are also stated to be "outwith five years" and therefore should not be included in costs the Council says are required in the next 2-5 years.
>
> **After careful consideration, the Scottish Ministers have concluded that further investigation is merited into the Council's assessment of the future capital costs the Council would incur if Abernyte were to remain open. There may be a failure with reference to section 17(2)(a) of the 2010 Act – that is, that Perth and Kinross Council may have failed *in a significant regard to comply with the requirements imposed on it by (or under) this Act so far as they are relevant in relation to the closure proposal*, in that the financial information the Council provided in terms of section 4(2A) of the 2010 Act appears to have been inaccurate.**
>
> ***Previous actions taken to address falling pupil rolls***
> The Scottish Ministers note that the Council has failed to describe in their report the actions they have taken in the past to address the reasons for closure and the reasons for not taking any steps, or to explain why it did not take any such steps (as required by section 13(2)(b) and (c) of the 2010 Act, respectively). In addition, the Scottish Ministers are concerned by representations they have received which contend that the Council has not taken the appropriate steps to address these issues despite evidence of letters from the local community to the Council about their concerns dating back to 2012. The Council's reports also appears to focus primarily on the pre-consultation activity undertaken by the Council in the run up to formally consulting on closure and do not appear to describe explicitly the previous action the Council had taken, nor why they did not take steps to address the problems identified.
>
> **After careful consideration, The Scottish Ministers have concluded that further investigation is merited into the efforts the Council has made to describe what**

steps it took to address the reasons for closure which is a requirement under section 13(2)(b) of the 2010 Act. There may be a failure with reference to section 17(2)(a) of the 2010 Act- that is, that Perth and Kinross Council failed ***in a significant regard to comply with the requirements imposed on it by (or under) this Act so far as they are relevant in relation to the closure proposal.*** **Given the centrality of the unsustainably low pupil roll to the Council's proposal, such a failure would be considered to be a failure in a significant regard.**

Community Impact

The Scottish Ministers note that the 2010 Act requires that the local authority consider the impact on the community's future sustainability, availability of the school's premises and facilities for use of the community. There appears to have been significant distance between the community and the local authority on the impact Abernyte's closure will have on the community and, in the case of ownership of the playing field, a lack of knowledge on the part of the Council of the local position. This casts significant doubt as to whether the Council has had " special regard" to the likely effects of the proposed closure on the local community, as they are required to under section 12(2) and (3)(b) of the 2010 Act.

The Scottish Ministers consider that the Council appears to have underestimated the level of community use currently and restricted the interpretation of that to non-school related groups. The Council also relies on the use of the local Church as an alternative venue, which based on the information provided by the respondents appears a doubtful alternative.

After careful consideration, the Scottish Ministers have concluded that further investigation is merited into the Council's assessment of the impact of the proposal (if implemented) on the local community. There may be a failure with reference to section 17(2)(a) of the 2010 Act, that is, that Perth and Kinross Council failed ***in a significant regard to comply with the requirements imposed on it by (or under) this Act so far as they are relevant in relation to the closure proposal,*** **in that they may have failed to have special regard to the factors for proposals for rural school closures in terms of section 12(2) and (3) of the 2010 Act. It appears that the potential failure would be a failure in a significant regard as the enhanced protection for rural schools provided for in the 2010 Act requires the Council to have "special regard" to the rural factors.**

The conclusion section of the notice records that the Minsters are calling in the proposal under section 17(2)(a) of the 2010 Act and sets out briefly the procedure that will follow.

The petitioner's argument

[11] In submissions, Mr Mure made the general point that decision making about education rested largely with the relevant local authorities in Scotland. Each local authority runs the schools and handles the budget for their area. The decision making of each local authority is subject to democratic oversight by elected individuals. It was also relevant to these proceedings that 40% of Scottish primary schools are classed as rural schools. Under reference to the documents produced in relation to the factual background, Senior Counsel submitted that the Council had gone to considerable lengths to explore all of the options for Abernyte before concluding that there was no available route for generating sufficient pupil numbers. All statutory duties had been acknowledged and fulfilled. The statutory consultation exercise had then been undertaken in accordance with all necessary requirements, as illustrated in the various papers and reports, Nos 6/8, 6/9, 6/10, 6/11 and 6/12 of process. Sheena Devlin's affidavit set out in considerable detail exactly what steps were taken at each stage. Even before formulating their proposal in October 2018, the Council had spent nearly two years in consultation and discussion with parents and interested parties. Her Majesty's Inspectorate of Education (HMIE) had agreed that the proposal had some potential educational benefits, such benefits being something that the Ministers' own statutory guidance (No 6/2 of process at para 33) say should be at the heart of any proposal to make a significant change to schools.

[12] Under reference to the call-in notice, Mr Mure submitted that it was interesting that the first matter recorded was the number of representations. Further, only two of the large number of relevant documents are referred to in the notice. An initial complaint that there was no affidavit to support the respondents' averment that all documentation provided by

the petitioner was considered had been to some extent superseded by the late lodging of an affidavit by Mr O'Connell but the document apparently prepared by him, (No 7/1 of process) was rather brief. It was noteworthy that the document ended with the words "...pull together list of criticisms" and that the assessment was made on 7 June 2019 only ten days after notification from the petitioner. The decision to call-in was not made until 16 July and so it could not be correct that the respondents had insufficient time to seek input from the council before deciding. It was also odd that Mr O'Connell's affidavit stated (at para 2) that the Options Appraisals (original and updated) were considered, when the original one was not attached as a document, albeit that the report to the Committee was. It could be that he had mistaken No 6/8 of process for an Options Appraisal. There was a concern that the respondents were looking for "criticisms" rather than taking a balanced approach. The context of the petitioner's decision was that it had followed a three year process in fulfilment of statutory obligations. In any event, the respondents' assessment indicated a relatively positive view of the proposal overall and Mr O'Connell's affidavit failed to explain how the respondents moved from that to the call-in decision. All that had changed was the receipt of representations.

[13] Mr Mure spoke first to his general grounds of challenge to the decision issued on 16 July 2019. This concerned fairness of procedure and an alleged lack of adequate reasons. It was acknowledged that the legislation does not oblige Ministers either to share representations received by them with the local authority or to seek further information from that authority before reaching a call-in decision. However it was still open to the court to intervene if not satisfied that the process included the appropriate degree of procedural fairness – *Bank Mellat* v *Her Majesty's Treasury* [2014] 2 AC 700 at 777. In the circumstances of this case, procedural fairness required Ministers to seek further information from the

petitioner, or at least to provide the petitioner with such representations as they had received and considered might give rise to a call-in notice. Those circumstances included the very limited grounds for call-in, the primary role of the petitioner as education authority, the identified educational benefits of the proposal, the available power to seek further information under section 17(3), the reliance on representations received by the respondents and not provided to the petitioner, the 2010 Act's failure to guarantee the petitioner a right to participate in any proceedings before the Panel and the five year prohibition on a further closure proposal under section 2A of the Act, with relative consequences for the petitioner's management of its school estate. In essence the petitioner had been denied an opportunity to address any issues of detail that may have arisen from the representations made to Ministers and there was no indication that the respondents took into account that previous representations had been fully addressed. Any correspondence after the call-in notice could not rectify these inadequacies.

[14] So far as the alleged inadequacy of reasons was concerned, it was not enough to simply use the language of the statute. Reasons had to be clear, adequate and full. In *Comhairle Nan Eilean Siar ("CNES")* v *Scottish Ministers* 2013 SC 548 Lady Smith had clarified that where reasons were given in a call-in notice, those reasons could be examined to see whether they proceeded on a correct or incorrect basis in law. The respondents had omitted to address whether the failure on the part of the local authority they had identified was considered to be of the necessary degree, ie "in a significant regard". The procedural unfairness and reasons arguments in this case were general ones and should be considered in light of the submissions on each of the three discrete grounds of review relative to (i) financial information (ii) previous action to address pupil rolls and (iii) community impact.

[15] The focus of the argument for the petitioner on financial information was the breakdown of the £330,000 figure, provided in Appendix 6 to the Consultation Report, (No 6/11 of process), at p102. The reasons given in the call-in notice under this heading included a reference to the petitioner's possible overstatement of financial savings and a statement that the £330,000 refurbishment costs were "outwith five years" in terms of timescale. Mr Mure submitted that no basis was given in the notice for why Ministers considered the anticipated costs for Abernyte to be "high" when costs for other schools in the local authority area were comparable. Examples were given, including Greenloaning, another "B" category school where up to £320,000 would require to be spent within 5 years, as set out within No 6/7 of process. In any event there was a lack of detail in the notice as to what estimates were said to be high. On the breakdown of the total figure of £330,000, the figure represented a correct addition of the listed elements. The timing and priority of particular works had to be regarded as approximate, as was the notion of "medium term". In context, even if the information was open to criticism, it could not reasonably be said to amount to a "failure in a significant regard" which was the statutory test. In the sheriff court decision in *Highland Council* v *School Closure Review Panel* 2016 SLT (Sh Ct) 207, that expression had been interpreted as meaning " in an important way". In the present case, there was no error in the raw information, let alone a failure in a significant or important way, to comply with the statutory requirements. Had there been thought to be an error of categorisation or arithmetic, the respondents could have resolved it with a simple telephone call to the petitioner.

[16] Further, it was clear from the Consultation Report (No 6/11 at pp15 and 17) that issues with the school building and financial savings were not a material factor in the closure proposal. That was the context in which the financial information, based as it was

on a template developed by COSLA and referred to in the Ministers' own guidance, had been prepared. It was not reasonable or proportionate for the respondents to state that there may have been a failure in a significant regard in relation to the financial information.

[17] On the second discrete challenge, that of the reference in the notice to previous action to address pupil rolls, the notice referred to section 13(2)(b) and (c) of the Act, which imposed additional consultation requirements on relevant steps taken or at least an explanation as to why none were taken. Senior Counsel submitted that the alleged failure was merely one of description. Further, there seemed to be some confusion on the part of the respondents between the Proposal Paper (No 6/10 of process) which contained the formulated closure proposal and the Consultation Report (No 6/11) , prepared after consultation had taken place. As might be expected it was the Proposal Paper that dealt with this matter. It had to be read with the updated Options Appraisal, (No 6/9 of process), which set out in detail the steps that had been taken to address the falling school roll at Abernyte. The earlier Options Appraisal (No 6/5 of process) documented clearly the work that had been carried out by the Council between 2016 and 2018 in this respect. The catchment area had been reviewed as a possible alternative to closure. That was assessed and a conclusion was reached that it was not a reasonable alternative. The process outcome and reasons were also recorded in the later Options Appraisal (No 6/9 of process). In short, the petitioner clearly had taken steps to address the falling school roll before it formulated its closure proposal and had assessed reasonable alternatives. Section 12A(2)(c) of the Act contemplated that there may be no reasonable alternative to closure and section 13 (2)(d) refers to "any" reasonable alternatives identified. In the present case no reasonable alternative to closure was identified.

[18] Further, the fact that people had made representations asserting they have been concerned about the matter since 2012 was of no assistance in judging whether the petitioner had complied with section 13 of the Act and so was not a relevant factor. In any event the petitioner had not seen those representations. Anticipating the respondents' argument that section 13(2)(b) was concerned with what steps had been taken " in the past", as opposed to the period leading up to formulating the proposal, Mr Mure pointed out that the expression " pre-consultation" appears in the respondents own Guidance (No 6/2 of process at paras 22-24). It was evident from paragraph 82 of the Guidance that "the past" was the period prior to formulating the proposal. Standing the wealth of detail set out in the various reports and appendices, it was unreasonable to suggest that the Council may have failed in a significant regard to comply with the requirements of section 13(2)(b). In a report appended to the Consultation Report, Education Scotland had recorded (No 6/11 at p100) that the Council had given "due consideration to any reasonable alternatives". In all the circumstances no reasonable Minister would have concluded that the petitioner might have failed on this aspect of the process.

[19] The final challenge related to that part of the notice dealing with community impact. The primary submission was that this paragraph of the notice conflated two different issues, that of the obligation to have special regard to rural factors in section 12 and the test of failure "in a significant regard" under section 17(2)(a). The notice states in terms that the Ministers consider that **any** failure to have special regard to rural factors **would be** a failure in a significant regard. That was plainly not what the legislation stated and so was an error of law. The term "special regard" was interpreted in *Highland Council School* v *Closure Review Panel* 2016 SLT (Sh Ct) 207 as having its normal meaning, namely a greater or closer consideration than usual. The substantive question was whether the respondents had

pointed to any evidence that the Council failed to have special regard to the likely effect on the local community if the proposal was implemented. In terms of section 12(4), the effect is to be assessed by particular reference to (a) the sustainability of the community and (b) the availability of the school's premises and its other facilities for use by the community.

[20] The Council had set out in detail its assessment of the impact of closure on the local community in the Options Appraisal, the Proposal Paper and the Consultation Report. What seems to have affected the respondents' view on this matter also were the representations which the petitioner had not seen and to which the legislation gave no right to respond. The mere fact of representations being made on community impact did not support the assertions in the notice on this issue. Ministers ought to have considered what the Council had done by way of exploring and assessing the impact on the community rather than focusing on representations made to them. In concentrating on the representations, the notice contained no reference to any of the work undertaken and documented by the council on community impact. This raised again the procedural unfairness of relying on representations to which the Council was not permitted to respond. On the specific issue of the ownership and use of the playing field, Sheena Devlin dealt with this at paragraphs 84- 85 of her affidavit. It was clear that the field was not in the Council's ownership, something acknowledged in the Proposal Paper. Further information could easily have been provided to Ministers had they requested it. In any event, it did not follow automatically that community use of a playing field not owned by the Council would be adversely affected by closure of the school.

[21] The playing field issue was again demonstrative of the unfairness arising from a process in which the Council had spent significant time and resources obtaining information and consulting widely only for Ministers to receive other information at a very late stage

and rely on it without seeking any response from the Council. On the example of whether the church might not be a suitable alternative venue, the Council had addressed this in both the Proposal Paper (at section 10-8-10-13) and the Consultation Report (pages 36-37). Community impact generally was considered at every stage and it could not be said that the rural factor had not been given closer than normal consideration.

[22] Finally, under reference to the decision in *IBA Healthcare Limited* v *OFT and others* [2004] ICR 1364, which Mr Mure anticipated would be relied on by the respondents, it was submitted that where a legislative provision includes a test that a party believes something "may" be the case, such a belief had to be reasonably held and based on the facts before that party. In that case the Court of Appeal had been looking at a particular statute in context and while one couldn't just read across to the statute under discussion here, the similarity was that it concerned a review of a gatekeeping role, as the OFT was the gatekeeper in relation to a reference to the Competition Appeal Tribunal. Mr Mure submitted that the court was entitled to enquire whether the Minsters had adequate material to support the conclusion where the matter was one of factual judgement.

The respondents' submissions

[23] Ms Ross invited dismissal of the petition and presented her submissions in three chapters. First she addressed the chronology and legal framework, including the role of the petitioner and of Ministers. Then she responded to the petitioner's general grounds and then dealt with each of the specific grounds in the decision letter. On the first matter, much of the chronology was agreed, but it was noteworthy that on 8 and 14 August 2019 the School Closures Review Panel ("the panel") had written to the petitioner requesting further information. The statutory framework carries with it an expectation that information will be

sought by the panel, despite the reference in Sheena Devlin's affidavit (at para 88) to there being no "role" for the Council in that process. Prior to the petitioner raising proceedings the panel had intimated the date by which a decision would be made. *Interim* suspension of the panel proceedings was then granted unopposed on 21 August 2019. The importance of the 2010 Act was that it set up a complete scheme for the consultation process that may or may not lead to a school closure. Each body, the education authority, Scottish Ministers and the panel has specified duties and responsibilities within the scheme. Parliament has achieved a careful balance between the primacy of the local authority's educational duties and the need for oversight by Scottish Ministers and separately the panel in appropriate cases. As was recognised in *CNES* v *Scottish Ministers* 2013 SC 548, "… the Ministers' role is one of safeguarder in relation to the core objective of securing genuine consultation". The legislation should not be interpreted in a way that gives the local authority the benefit of the doubt because of its duties as an education authority. The petitioner's approach in this case appeared to be that because of the enormous time and effort undertaken the court should not trespass on its responsibility. That ignored the central feature of the legislative provisions as a check on local authority decision making, primarily in relation to consultation.

[24] The introduction of an independent review body, the panel, by the 2014 Act amendment was significant. It restricts the role of Ministers to the calling-in decision, whereas they had previously also conducted the review that is now exclusively the panel's task. Any consultation must be meaningful in the sense that account has to be taken of what one has been told by the consultee. It is not sufficient for the petitioner to show that it has consulted, rather it must illustrate that it has satisfied all of the requirements of the 2010 Act. Other changes to the 2010 Act by the 2014 Act were also significant, including the

introduction of the statutory presumption against rural school closure in section 11A and the requirement to include information about financial implications of a closure proposal in section 4(2A). On consideration of alternatives in a rural school context, it was important to understand that the requirement for the local authority to identify reasons for a proposal was distinct from consideration of alternatives, as was evident from the list in section 13(a)-(e). The identification of alternatives and the carrying out of a catchment review did not amount to reasons. Finally, the role of the panel is to perform an independent review function within a reasonably short time frame. The maximum period allowed for a decision is sixteen weeks from initial constitution of the panel. But for these proceedings, the panel would have decided this issue by November 2019.

[25] It was noteworthy that there is no suggestion from the petitioner either that the legislation itself is flawed or that the panel has acted improperly. The petitioner's objections on the basis of procedural unfairness and reasons lose force when the reality of the legislative scheme is considered. Information can be sought by the panel and that is what happened. Crucially, the panel is the body that makes the decision on whether there has been a failure of the type described in section 17B and must give reasons for its decision in terms of section 17C(2). It is now clear that Scottish Minsters' decision making is effectively procedural, with the panel making the only substantive decision. The test for Minsters in section 17(2)(a) is watered down not only by the word " may" but also by the word " appears", something not as definite as "believes", which was the statutory wording in the legislation under discussion in the case of *IBA Healthcare Limited* v *OFT and others* [2004] ICR 1364. So far as the affidavit of the petitioner's director Sheena Devlin was concerned, there was no difficulty with the factual account of what took place. The affidavit seems to suggest, however, (at paras 86-87) that because a call-in notice will have an impact on the

plan and will be widely known it somehow shouldn't have been issued. Calling-in is a feature of the statutory scheme and so cannot be regarded as something to be avoided. It creates a necessary hiatus for a limited period to enable proper scrutiny by the independent panel.

[26] The main contention of the petitioner's general unfairness ground seemed to be that the respondents did not seek the petitioner's comment on the representations made. However, the respondents had done exactly what was required by the statute. Section 15(4) obliged them to take representations made within three weeks into account and some 52 representations had been received during that period. Scottish Ministers are not required to take account of the local authority's view on or response to those representations and so no issue can properly be taken with account being taken of such representations in reaching a call-in decision. Against a background of calling-in being a procedural step only, this approach made sense. The duties of the panel and the right of appeal to the sheriff provided an effective procedural guarantee to local authorities. In *Rees* v *Crane* [1994] 2AC 173 Lord Slynn (at p191) listed some of the circumstances in which natural justice does not require that a person be told of the complaints made against him. These include where an investigation is purely preliminary, where there will be a full chance to deal with the complaints later. Although the context of that case was very different, the education authority in this case was very familiar with the statutory scheme and knew that there was a period after notification when representations might be received by Ministers that could lead to call-in. If the petitioner's position is that more information could have been provided, the proper forum for that will be the panel. Any other system would involve delay while the respondents sent representations to the petitioner, allowed them a period to respond and then consider all of that before even taking the procedural decision on calling-

in. It is for the panel not Ministers to reach a concluded view on such matters, not for duplication of work as between Minsters and the panel. There could be no question of Ministers resolving the differences between the representations and the petitioner's paperwork. The documentation lodged at No 7/2 of process illustrated the issues raised with Minsters in the representations made to them. The respondents picked out the main points and noted them as part of the obligation under section 15(4) to take them into account. Many raised mixed questions of fact and opinion. Although there are circumstances in which Ministers can seek further information from the local authority as envisaged in section 17(3), this would normally be impractical because of the strict timescale for Ministers to decide whether to call-in.

[27] Insofar as there was a reasons challenge, senior counsel submitted that, leaving aside the arguments on whether the petitioner could point to any errors in the notice, the respondents couldn't be meaningfully criticised for a lack of reasons. On the face of the notice there are reasons given. On the issue of whether the Ministers had failed to address all of the information provided by the Council, Mr O'Connell's affidavit now narrated the position, but it was pled from the outset in Answer 12 and dealt with in the note of argument. It wouldn't usually be necessary for the respondents to have to confirm the position pled on instructions in a matter of this sort. The affidavit is brief and simply confirms that the respondents' decision maker looked at all of the documents submitted. Those mentioned by name in the call-in notice could not be read as an exhaustive list. It was clear enough from Mr O'Connell's working paper (No 7/1 of process), that the Options Appraisal is the report to Committee.

[28] On the first of the specific discrete grounds of challenge, the financial information, Ms Ross submitted that the respondents had identified, accurately, an issue involving the

inclusion of present and future costs. In the Proposal Paper (No 6/10) at para 4.12, the petitioner recorded that the approximate cost of upgrading the school building was £330,000. The works listed were said to be " ..not required immediately but in the medium term which is 2-5 years". As planned and unplanned maintenance in the three years leading up to the paper had been £14,144 , the respondents had been justified in making a general comment that the £330,000 figure seemed high for a " B" condition school. While it is contended for the petitioner that the closure decision was not on financial grounds, it is not for officials preparing a paper to say what is important. The closure proposal read as a whole included a reference to costs. In the Consultation Report (No 6/11) there is a breakdown (at p 110-111) of the £330,000 figure. After noting that there are no priority 1 items (ie requiring immediate work) the report listed the essential priority 2 work that requires to be done within two years, at a cost of £183,621. Then as priority 3 there was work listed as being required within 3-5 years, at a cost of £51,598. Taken together the cost of works required within 5 years was far less than £ 330,000. While long term work for beyond five years is then listed as priority 4, there appeared to be work that was listed twice, once in priority 3 and again in priority 4 (boiler replacement). These discrepancies between the statement in the Proposal Paper and the breakdown in the Consultation Report amounted to sufficient cause for concern and for the respondents to give pause to the issue of financial information. The petitioner's submission that the addition was accurate (if one included the priority 4 figures) made no difference, the concern remained that the information given to councillors who made the decision was incorrect. Such a failure was enough to call-in the closure proposal on this ground.

[29] On the second challenge to the notice, the paragraph on previous action about falling school rolls, senior counsel submitted that a distinction had to be drawn between the

subparagraphs of section 13(2) that list certain additional matters that require to be addressed in a proposal relating to closure of a rural school. In particular, section 13(2)(b) requires a description of steps taken to address issues that (later) led to a proposal and so relates to a period before the formulation of that proposal and not simply the time leading up to the proposal. In contrast, section 13(2)(d) requires the education authority to set out any alternatives to the identified proposal, something that is applicable only at that later stage. The related requirement in 13(2)(c) to explain why it did not take such steps where that was applicable was also important. The need to look at steps taken in the past is confirmed by the respondents' guidance (No 6/2 of process at para 82) in relation to section 13(2)(b), which records the example of a falling school roll and the need to understand what action, if any, the authority has taken in the past to seek to address that. A review of the catchment area did not satisfy this statutory requirement as it would fall within the subsequent stages listed in section 13(2)(d)-(f). As the falling school roll was the principal reason for the school closure proposal, the apparent failure to comply with section 13(2)(b) and (c) was significant and so the test in section 17(2)(a) was also satisfied in relation to this issue.

[30] On the third and final discrete challenge to the notice, that of community impact, there were two issues. First, the respondents had recorded a "significant distance" between the community and the local authority. This was evident from the significant number of representations the respondents received. Community impact was a strong thread running through those representations (summarised in No 7/2 of process) and so had to be considered. In the Consultation report the petitioner claimed (No 6/10 at p 36) that declaring the school to be surplus to the local authority's requirements would present an opportunity to use the school as part of a community asset transfer. That was at best speculative and

seemed to be challenged in the representations, as did the councils' view on practicability of using the local church as an alternative venue for community events. Secondly, there was the issue of the playing field. It was sufficient for the respondents to identify a lack of knowledge on the part of the local authority during the process as to who owned the field because it fed into the concern about the petitioner's conclusion that the school closure would have little community impact, in contrast with the views expressed in many of the representations. The respondents could only have reached a different conclusion on this by ignoring the large number of representations, make an assumption that the council was correct in its view of community impact and decide not to call-in the proposal. Against that, all that was required to call-in was that it appeared to the respondents that there may have been a failure in a significant regard on this matter, a test that was clearly satisfied.

[31] On the alleged error in the paragraph in the call-in notice on community impact, Ms Ross pointed out that having special regard to the factors listed in section 12 (which include community impact) when considering a rural school closure was a statutory requirement and so that was an accurate statement. Having special regard was not synonymous with a special requirement or of a significant requirement. The "in a significant regard" provision in section 17(2)(a) relates to the potential failure and not to the requirement on rural schools. The sentence alighted upon as an alleged error had to be read in context. It was clear that the view was that a failure to have special regard to community impact would be a failure in a significant regard because the issue of community impact is given importance in the statute. It was going too far to suggest that there had been a fundamental conflation of the two separate concepts. In any event, even if this final comment in the letter could be said to be erroneously drafted, it could not undermine the decision as a whole. It related to one of three separate aspects, any one of which would have

been sufficient to call-in. The overall conclusion is correctly stated and there was no material error in the paragraph on community impact of a type that could vitiate the respondents'' decision. It would be for the panel to decide whether there had been any failure and if so whether the test of "in a significant regard" was met.

Discussion

[32] The petitioner, as education authority for Perth and Kinross has a duty to ensure that adequate and efficient school education is provided by the state throughout the local authority area. Decisions about such provision are, as Lady Smith pointed out in the case of *CNES* v *Scottish Ministers* 2013 SC 548 best taken locally when possible. This case is concerned with the circumstances in which there may be a review of local decision making on school closure where it appears to Scottish Ministers that there may have been a failure in a significant regard to comply with the detailed requirements of the 2010 Act. The principal purpose of the legislation, as narrated in the respondents' guidance (No 6/2 at para 3), is to "provide strong, accountable statutory consultation practices and procedures … consultation processes are expected to be robust, open, transparent and fair, and seen to be so". Since certain amendments to the scheme were made by the 2014 Act, those requirements are more stringent where rural schools are concerned. When the Extra Division decided the *CNES* v *Scottish Minsters* case there was no statutory presumption against rural school closure, something now contained in section 11A of the 2010 Act. The presumption is described in the respondents' guidance (No 6/2 of process, para 4) as a procedural presumption, because it can of course be overcome by meeting the detailed requirements of sections 12 and 13. Additionally, at that time Scottish Ministers took the decisions both on calling in and on the subsequent substantive review of the education

authority's decision. Under the amended Act, the formation of a panel, independent of government, to take the determination on closure where the local authority's decision has been called-in by Ministers, avoids any suggestion of political justification for that substantive decision. So, the initial consultation, proposal making and decision on that proposal is carried out by the local authority, Scottish Ministers then decide whether, on an application of the test in section 17 of the 2010 Act the closure proposal should be called-in and if so the panel alone has the task of deciding whether there have in fact been failures of a type described in the legislation such that the local authority decision must be reviewed. In that tripartite exercise, it is the intermediate stage of deciding whether there is a "case to try" on failure in a significant regard to comply with the statutory requirements that is under scrutiny.

[33] The petitioner makes overarching complaints of procedural unfairness and inadequate reasons that are said to vitiate the decision reached by the respondents. The main thrust of the argument is that, in the circumstances of this case, procedural fairness required Ministers to seek further information of the petitioner or at least ask for comment on such representations as had been received and might give rise to a call-in notice. It is of course always open to the court to intervene if there is a lack of procedural fairness, even in the context of a statutory scheme. However, in *Bank Mellat* v *HM Treasury* [2014] 2 AC 700, an authority prayed in aid on this point by the petitioner, it was also emphasised that before the court would take the unusual step of supplementing procedure laid down in legislation, it would have to be "clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation" – per Lord Sumption at p777,citing Lord Reid in *Wiseman* v *Borneman* [1971] AC 297 at 308. In the legislative scheme under discussion in this case, the Scottish Ministers are conducting

a safeguarding or gatekeeping function. Their decision is not one that disposes of the substantive issue of whether the petitioner's decision on closure of a school was taken in accordance with legislative requirements, but only whether there are grounds for remitting the question of whether there has been a relevant failure to the independent panel. In the context of the 2010 Act and its purpose, it can easily be concluded that the absence of a procedural requirement on the respondents to engage with the local authority before reaching a decision on calling-in is not a barrier to achieving fairness. The local authority will have submitted all the material on which it relied in making the decision on the proposal and the respondents require to consider that against any representations made. Ministers do not require to reconcile the differences between the different positions stated by the council and those making representations because they are not making a determination as between conflicting positions. The exercise in which Scottish Ministers are engaged is in identifying whether there appears to be a basis for stating that the local authority may have failed to comply with the legislative requirements in a significant way. If there is such a basis, it will be for the panel to reconcile conflicts between the different positions and reach a determination. The main consequence for the petitioner of the respondents' decision to call-in is a delay which, but for these proceedings, would have been measured in weeks. In the context of the Ministers' decision being itself a procedural one and a step in the larger process and in the absence of any challenge to the legislative scheme, I do not consider that the absence of further input from the education authority on any of the points raised amounted to procedural unfairness. Once the different roles of the education authority, the Scottish Ministers and the panel are properly understood, it becomes apparent that the call-in stage is one of those situations in which there is clear justification for departure from the usual rule that someone knows of and is given a chance

to respond to complaints against them as it is only a step in a larger process and not the ultimate decision (*Rees* v *Crane, supra*, at p 191 G-H and 192 A-B). I reject the complaints of procedural unfairness made by the petitioner. On the associated reasons challenge, I have narrated the relevant passages of the notice that give reasons. While the quality of the reasoning forms part of the argument in relation to the treatment by the respondents on each of the three discrete grounds and will be examined in that context, it cannot be said that there was any general failure on the part of the respondents to give reasons for their decision.

[34] I turn now to the test that Ministers had to apply in deciding whether there was a basis to call-in the petitioner's decision on the proposed closure of Abernyte. Section 17(2) provides that it must "appear" to the respondents that the petitioner "may" have failed "in a significant regard" to comply with the requirements imposed on it by the Act. In *Office of Fair Trading and others* v *IBA Health Limited* [2004] ICR 1364, Morritt V-C in the Court of Appeal thought it clear that a test including the words "may be the case" excluded the purely fanciful, but that "In between the fanciful and a degree of likelihood less than 50% there is a wide margin in which [the decision maker] is required to exercise its judgment". The test in the 2010 Act represents on any view a low threshold, entirely consistent with the tripartite exercise involved. The local authority has made its decision, subject only to the call-in and review provisions and so scrutiny by the respondents of the material upon which that decision was based is part of the assessment under section 17(2). The other part is to consider any representations made during the period referred to in section 15(4). There can be no objection to the process being one of collating criticisms because if there are no perceived relevant failures on the part of the local authority there can be no calling-in of their decision on the closure proposal. It is necessary that the terms of the call-in notice go

further than a mere reference to section 17(2)(a), it must make clear both that the respondents are satisfied there may be a relevant failure and that any such failure is of the requisite degree of "in a significant regard" - *CNES* v *Scottish Ministers* 2013 SC 548 at para 44. There is no suggestion that the respondents failed to address both issues in this case. The call-in notice identifies three separate matters on which the Minsters consider that there may be a failure to comply with the relevant requirements of the 2010 Act. I turn now to examine each of the challenges to these three separate sections to see whether or not they are illustrative of error in the manner contended by the petitioner. I deal with this on the basis that I have already rejected any suggestion that it was procedurally unfair or contrary to natural justice for the decision to be made without sharing the representations or seeking more information from the local authority.

[35] The petitioner contends that insofar as the notice founds on section 17(2)(a) in respect of financial information it is irrational, disproportionate and unreasonable and that the reasons given are irrational and inadequate. While financial considerations may not have been material factors in the petitioner's closure proposal for Abernyte, the respondents were in my view both entitled and obliged to consider this matter. The requirement for a Proposal Paper to contain information about the financial implications of the proposal is not restricted to rural school closure proposals – section 4(2A) of the 2010 Act. The provision of inaccurate information would certainly suggest that there may be a failure to comply with that requirement. The education authority produces documents on which councillors must be able to rely in reaching a decision on a closure proposal. It seems to be accepted by the petitioner that, reading the Proposal Paper and Consultation Paper on this together, there are inaccuracies, at least to the extent that there was duplication of certain work as between priority 3 and 4 and that some of the work would take place outwith the 2-5 year period

specified for all of the £330,090 cost in the Proposal Paper. The petitioner's reliance on the accuracy of the arithmetic in the Consultation Paper does not resolve the inconsistency. The respondents' tentative view that the petitioner has overstated the savings that would result from the closure of Abernyte is justified by an analysis of the papers, which illustrate that using the petitioner's own figures, the cost of refurbishment over the next five years would be significantly less than £330,090 (by at least £90,000, more if the duplication point is resolved by priority 3 costs being overstated). The general comment that the costs seemed high for a "B" condition school was also criticised by reference to refurbishment costs of other schools, referred to in Sheena Devlin's affidavit at paragraphs 78-80. In the context of a comparison with total spending of £14,144 on the property over the previous three years, however, the comment seems reasonable. That the apparent failure seemed to the respondents to meet the necessary degree of "in a significant regard" is perfectly rational in light of the sums involved in the acknowledged errors.

[36] On the second challenge to the notice in relation to steps taken to address falling school rolls, the petitioner's position is that there is no evident failure and even if there was it would only be a failure in description. It seems to me that the petitioner's submission about this aspect overlooked that section 13 includes statutory requirements that, if there appears to be a failure to comply with them, it raises a relevant concern under section 17(1)(a), albeit that the degree of failure would still require to be addressed. Referring to it as merely an alleged failure of description belies the purpose of that description, which is to allow analysis not just of whether any steps were taken to address the problem of the falling school roll but also to consider any explanation as to why no such steps were taken if that was the case. If the documentation does not state whether steps were taken, the subsequent analysis of looking at an explanation for that cannot take place. I

accept Ms Ross' submission on the distinction between section 13(2)(a)-(c) and (d)-(f) respectively. In the Proposal Paper, the local authority must, after explaining the reasons for the closure proposal, provide retrospective information about what steps it took to address those reasons (here principally falling school roll) " before formulating the proposal", a clear reference to a period prior to even considering that closure might be an option. These additional requirements for rural schools flow naturally from the procedural presumption against rural school closure introduced by section 11A. The starting point for a local authority must be to address a falling school roll in a way that avoids the spectre of closure. Only if the problem can't be addressed, and the local authority can explain why that was, can it properly move to the next stage. Identification of alternatives is not synonymous with addressing a problem and is part of the later stage. Conducting a review of a catchment area is not tantamount to addressing a falling school roll problem; making alterations to a catchment area would be different and could well constitute an attempt to address the issue. The reference to representations in this paragraph links the failure that emerges from the paperwork to the probable importance of that apparent failure. If, as the representations state, the local community had raised concerns from 2012 about this issue and no steps were taken, evidence of that will have to be considered carefully by the panel. In the context of Ministers not being the final arbiters on this or any other issue, all that was required was a tentative view based on the available material. Against that background the respondents were entitled to conclude that there may have been a failure in a significant regard in relation to this matter.

[37] Turning to the last of three specific challenges, that of community impact, the petitioner contends that the respondents again placed too much emphasis on representations received and to which the council had no opportunity to respond. For all

the reasons already given, this was not procedurally unfair in the context of the role of Ministers at the call-in stage. Community impact is one of the factors to which the education authority must have "special regard" when making a closure proposal in relation to a rural school. Axiomatically, a large number of strongly expressed views by members of the community on the perceived impact will be a relevant factor, albeit that at the later stage of a panel determination on whether there has been a failure in a significant regard on this issue, they will require to be more critically assessed. In my view it was sufficient for the respondents at this stage to note the considerable distance between the council and the community residents on this issue, together with identification of two examples that give rise to a concern about statutory compliance before concluding that the modest test in section 17(2)(a) was engaged. The two examples, that of the council's error in relation to ownership of the playing field and the dispute about whether the local church was a suitable alternative venue for larger events, are clearly relevant to the issue of community impact. The ownership position in relation to the playing field stated in the Proposal Paper was not formally retracted in the Consultation Paper (see No 6/11 at para 8.12), although it is there stated that if there was an error it was not a material consideration. But the issue was whether the field was owned by a community group or an individual, something that on the face of it would make a difference to its likely availability to the community. It was perfectly reasonable for the respondents to be concerned about the lack of clarity on this point. The dispute about the extent to which the church would provide an adequate alternative venue for community events was similarly unresolved. Assertions by the local authority in the reports are not a sufficient basis to resolve such issues. They can be resolved by the panel as ultimate decision maker.

[38] However, the petitioner raised an issue of alleged error in law in this last challenge that merits separate consideration. In the conclusion on community impact, the notice states that there may be a failure under reference to the relevant statutory test, that possible failure being to have special regard to the factors for rural school closures. Then it states "It appears that the potential failure would be a failure in a significant regard as the enhanced protections for rural schools … in the 2010 Act requires the Council to have "special regard" to rural factors." Senior Counsel for the petitioner argued eloquently that this was illustrative of an error of law because it conflated the concepts of "special regard" and "significant regard" when the legislation made no such link or created any such inevitability. It is undoubtedly the case that an apparent failure to comply with any of the statutory requirements is just that, it is not a failure to any particular degree. The sentence is oddly expressed and could be interpreted as meaning that the respondents considered that every failure, however small or insignificant, to have special regard for a rural factor would be a failure of the necessary degree to call-in the closure proposal. That would be wrong. Of course as the statute as amended does place particular emphasis on rural schools, by imposing the procedural presumption and associated additional requirements, including those in section 12(2) and (3), it is incumbent on the respondents to consider those with care and to flag up any perceived inadequacies in the council's obligation to have special regard to them. Whether a failure to have special regard to the rural factors is significant would depend on whether the perceived failure is trivial or not. Having considered this particular sentence and the submissions made, I conclude that, while it overstates matters to view the respondents as having confused or combined the two separate notions of "in a significant regard" and "special regard", the sentence is inappropriately and ambiguously expressed. The importance placed on rural factors could lead to a conclusion that unless the perceived

failure is trifling it may be regarded as significant. Much depends on what the apparent failure is. However, the use of the word "would" coupled with the conjunctive "as" appears to indicate it being a necessary conclusion that any failure in this respect is a failure in a significant regard. On balance, therefore, I will treat the last sentence as erroneously expressed. Two relative issues then arise, namely whether the error is material and secondly whether, if it is, it vitiates either the relevant section or even the decision as a whole?

[39] The role of the respondents was to ascertain whether any perceived failure "may" be a failure in a significant regard. The erroneous use of "would" rather than "could" or "may" must lead to a close analysis of the rest of the paragraph and the letter as a whole so that it is understood both in the context of the community impact section and that section in its place and context in the letter. What matters above all is whether the respondents applied the correct test. I conclude that they did. First, the last sentence of the section comes after a correct statement of applicable test in section 17(2)(a), with appropriate reference to the use of the terms " may be a failure" and " in a significant regard". Secondly, there are references earlier in the section that illustrate an understanding that trivial points or gaps in knowledge by the council would not matter (and so not meet the test). For example there is reference to the "significant distance" between the local authority and the community in relation to the community impact issue generally, a reference to the large number of responses on this point and the strength of feeling that the Council had misunderstood the position. Further, the uncertainty about the ownership of the playing field is also said to cast "significant doubt" as to whether the council has complied with the special regard test in section 12(2) and (3)(b) of the Act and for the reasons given the conclusion the council reached regarding the use of the church may also be wrong. Taken together, these examples highlight the issue as an important one because the differences are not merely of detail but suggest that the

Council's approach to this statutory requirement lacked rigour on matters that were of real concern locally. There is sufficient in the narrative of the section prior to the unhappily worded last sentence for me to conclude with some confidence that the respondents did not misunderstand the test and so the error in expression in the final sentence is not a material one.

[40] It follows from the conclusion just given that there is no material error such as to vitiate the section under discussion, far less the decision as a whole. In any event, I would not have regarded the error as fatal to the decision overall. The correct statutory test for call-in is enunciated on page 1 of the notice and at the end of each discrete section. The respondents could call-in the proposal under any of those three separate grounds. Only if all three sections contained material errors or other general grounds for review had been made out, could the whole decision be reduced. For the reasons already given, I have rejected the petitioner's arguments about general procedural unfairness and also in relation to the first two discrete challenges. The last sentence of the community impact section of the notice adds nothing to what has gone before in that section and in context is not a material error.

[42] For completeness I should add a note about Mr O'Connell's affidavit, which was produced by the respondents and lodged, under some protest from the petitioner, after the Scottish Ministers had sight of the petitioner's speaking note. That note criticised the lack of an affidavit supporting the averment (in Answer 12) that the respondents had considered all of the paperwork. No 7/1 of process, which was lodged timeously, comprises Mr O'Connell's assessment of the points arising from that paperwork. It is sufficient to record that I would have been content to deal with the arguments without Mr O'Connell's affidavit and to proceed on the basis of the averment made on instruction, given the nature of proceedings of this type.

Decision

[41] For all of the reasons given, I will sustain the respondents' first plea in law and dismiss the petition, reserving meantime all questions of expenses.