IN THE UPPER TRIBUNAL **Appeal No. HS/531/2020(V)**
(ADMINISTRATIVE APPEALS CHAMBER)

ON APPEAL FROM THE FIRST TIER TRIBUNAL (HESC)
(SPECIAL EDUCATIONAL NEEDS & DISABILITY)
Tribunal Ref EH885/19/00048

BEFORE JUDGE WEST

ORDER

Pursuant to rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, it is prohibited for any person to disclose or publish any matter likely to lead members of the public to identify the child in these proceedings. This order does not apply to (a) the child's parents (b) any person to whom the child's parents, in due exercise of their parental responsibility, disclose such a matter or who learns of it through publication by either parent, where such publication is a due exercise of parental responsibility (c) any person exercising statutory (including judicial) functions in relation to the child where knowledge of the matter is reasonably necessary for the proper exercise of the functions.

DECISION ON THE APPLICATION FOR PERMISSION TO APPEAL AND THE APPEAL

The application for permission to appeal against the decision of the First-tier Tribunal (HESC) (Special Educational Needs & Disability) (which sat on 7 January 2020) dated 23 January 2020 under file reference EH885/19/00048 on grounds one, two and five is granted, but refused on the other grounds. The appeal on grounds one, two and five is nevertheless dismissed. The decision does not involve a material error on a point of law.

This determination is made under section 11 of the Tribunals, Courts and Enforcement Act 2007.

PRELIMINARY MATTERS

This decision follows a remote hearing which has been consented to by the parties. As required, I record that:

(a) the form of remote hearing was V (video by Skype). A face to face hearing was not held because it was not practicable in the light of Government guidance on urgent matters of public health and the case was suitable for remote hearing, involving an application for permission to appeal (and, as was agreed at the hearing, an appeal to follow if permission were granted) on pure matters of law. Further delay would be inexpedient as this is an application for permission to appeal (and, as was agreed at the hearing, an appeal to follow if permission were granted) in a special educational needs and disabilities case involving a child

(b) the documents to which I was referred were contained in (i) a First-tier Tribunal paper bundle of 515 pages and 8 unnumbered pages, (ii) an unnumbered and unpaginated supplementary paper bundle of approximately 100 pages, (iii) a Framework for Action document consisting of 3 pages and a Dyslexia Assessment from the Learning Support Team consisting of 6 pages (both dated 5 December 2019) and (iv) an Upper Tribunal paper bundle of 46 pages

(c) the order and decision made are as set out above.

REASONS

Introduction

1. An appeal to the Upper Tribunal lies only on "any point of law arising from a decision" (section 11(1) of the Tribunals, Courts and Enforcement Act 2007), not on the facts of the case. The Upper Tribunal has a discretion to give permission to appeal if there is a realistic prospect that the First-tier Tribunal's decision was erroneous in law or if there is some other good reason to do so (Lord Woolf MR in ***Smith v. Cosworth Casting Processes Ltd*** [1997] 1 WLR 1538). In the exercise of its discretion the Upper Tribunal may take into account whether any arguable error of law was material to the First-tier Tribunal's decision

2. The parties to the appeal are the Appellant, which is the Worcestershire County Council ("the Council"), and the Respondent, who is the child's mother. In order to preserve her anonymity, and meaning no disrespect to her, I shall refer to the Respondent's daughter only as "C". The appeal was originally against the terms of Section I of C's Education, Health and Care Plan ("EHCP") dated 6 August 2019 (pages 81 to 93),[1] although with agreement it was expanded at the original hearing to take in the terms of Sections B and F as well. The Council's proposal was that C attend Westacre Middle School ("Westacre"), a mainstream middle school, for her secondary education, whilst her mother's position was that she should attend Bredon School ("Bredon"), an independent (non-s.41 approved) dyslexia-specialist school.

3. In summary, the Tribunal made certain amendments to Sections B and F and named Bredon in Section I in place of Westacre.

4. The Council sought permission to appeal to the Upper Tribunal from the decision of the First-tier Tribunal which it made after a hearing on 7 January 2020. The Tribunal produced its written decision on 23 January 2020 (UT pages 24 to 40). Permission to appeal was initially refused by Tribunal Judge McCarthy on 16 March 2020 (UT pages 41 to 44). The Council applied to the Upper Tribunal for permission to appeal on 25 March 2020 (UT pages 3 to 10). Upper Tribunal Judge Ward directed an oral hearing of the application for permission to appeal and made case management directions on 27 April 2020 (UT pages 45 to 46). I heard the application for permission to appeal by video (by Skype) on the morning of 28 May 2020. The hearing was attended over the videolink by Ms Laura Thompson of EMW Law for the Council and by the child's mother as Respondent and I am grateful to both of them for their assistance and their submissions. The Respondent put in some additional written submissions after the hearing, to which I refer below.

5. The application for permission to appeal was against the decision of the First-tier Tribunal concerning C's EHCP and placement. The Tribunal had allowed the

[1] Page references are to the main First-tier Tribunal bundle unless otherwise stated. References to pages in the Upper Tribunal bundle are designated by the prefix "UT".

Respondent's appeal against the original terms of the EHCP and it was ordered that Council should amend the EHCP as follows:

(1) in Section B, below the sub-heading "communication and interaction" should be added the following sentence: "[C] has a developmental language delay and dyslexia"

(2) in Section F

(i) below the sub-heading "communication and interaction" at the first bullet point starting "[C] needs an individualised programme", the last sentence should be struck through and replaced with the following sentence: "[C] shall be taught and supported by staff with qualifications and relevant experience in supporting children with learning difficulties, specifically dyslexia as well as associated sensory, behavioural, developmental and communication and interaction difficulties"

(ii) a new bullet point should be inserted immediately below that paragraph which reads: "[C] shall have 1 x 1 hr 1:1 support each week to facilitate and support work recommended by Speech and Language therapy on an individual basis and within the wider learning environment. This shall be subject to termly review"

(iii) a new final bullet point should be inserted under the sub-heading "communication and interaction" which reads: "A word processor shall be available to [C] for her use in preparing written work".

(3) in Section I, by naming Bredon as the school.

The Grounds of Appeal

6. The Council's grounds of appeal to the Upper Tribunal are contained in a separate attachment to the completed form UT4 (UT pages 11 to 21). In essence, the Council's submission was that the Tribunal erred in using its own expertise to determine issues within the appeal without explaining why it departed from the evidence before it or giving the parties an opportunity to consider or comment on its thinking. It further erred in its failure to understand properly – or attempt to understand – the evidence before it; where it required more information it did not act inquisitorially and its

determination of the appeal without that evidence amounted to an error of law. The Council submitted that the Tribunal's failure in respect thereof led it erroneously to determine that C had not made progress and that she required provision which was not required. It found Westacre to be unsuitable based on an inaccurate and incomplete understanding of the facts and its decision that Bredon was suitable was also made without the necessary evidence. For those reasons the Council sought permission to appeal and an order that the Tribunal's decision should be set aside and remitted to a fresh panel for reconsideration.

7. There were 6 substantive grounds of appeal:

(i) the provision ordered by the Tribunal in relation to speech and language therapy was unlawful in that it was not properly specified and it left room for doubt as to what was required

(ii) the Tribunal's findings in relation to speech and language therapy provision were not based on evidence and the Tribunal provided no explanation for departing from the evidence that was before it

(iii) the Tribunal misinterpreted Dr Tesoi's report and its findings in relation to the qualifications and experience of staff that C should be "taught and supported by" were not based on evidence. The Tribunal provided no explanation for departing from the evidence

(iv) the Tribunal placed undue weight on the report of Dr Tesoi and it provided no reasonable explanation for rejecting the more recent professional evidence before it

(v) the Tribunal misunderstood the evidence relating to C's progress; it erred in its finding that she had not made progress at Westacre and that the school could not meet her needs

(vi) the Tribunal erred in finding Bredon suitable as it did not have the necessary evidence before it to make such a finding.

8. As is customary, I am not treating the present application as a review of Judge McCarthy's determination refusing permission to appeal. Although I have read his

decision by way of background to the chronology of the case, I have in effect put his ruling on one side and considered the matter entirely afresh, with the benefit of having heard from Ms Thompson on behalf of the Council and her explanation of the proposed grounds of its application for permission to appeal. Some of the Council's submissions were directed to Judge McCarthy's reasons for refusing permission to appeal; I have not excised them from my description of the grounds of appeal, but as I made clear at the outset of the hearing the application for permission to appeal was against the decision of the Tribunal dated 23 January 2020, not the decision of Judge McCarthy in refusing permission to appeal on 16 March 2020.

Rolled Up Application & Appeal

9. At the beginning of the oral hearing of the permission application, I raised with the parties the possibility of dealing with the application as a rolled-up hearing, with the substantive appeal being decided at the same time as the determination of the application for permission to appeal, so as to dispense with the need for a second hearing in the event that permission to appeal were to be granted. The parties very sensibly agreed to that course of action, so as to dispense with the need for a second oral hearing in the future. I shall therefore deal with the application for permission to appeal and the substantive appeal together in this decision.

The First Ground of Appeal

10. The Tribunal decision stated (paragraph 68):

> "In our experience as a specialist tribunal and considering both the lack of specialist language provision to date and the importance of a joint understanding of [C]'s language and literacy difficulties, we also consider that she requires 1hr of 1:1 SALT each week, subject to termly review."

11. In conjunction with its decision the Tribunal ordered the following wording to be inserted into C's EHCP (paragraph 69):

> "[C] shall have 1 x 1hr 1:1 support each week to facilitate and support work recommended by Speech and Language therapy on an individual basis and within the wider learning environment. This shall be subject to termly review".

12. Ms Thompson submitted that that wording was unlawful for the following reasons:

(a) it did not make clear who would be delivering the support or what their experience or qualifications should be. In his refusal of permission Judge McCarthy suggested that the Council had not considered this in the context of the Tribunal's order that "[C] shall be taught and supported by staff with qualifications and relevant experience in supporting children with learning difficulties, specifically dyslexia as well as associated sensory, behavioural, developmental and communication and interaction difficulties". However, that still did not explain who should deliver the support envisaged in relation to speech and language therapy. That did not comply with the legal requirement to "leave no room for doubt as to what is needed" (see ***L v Clarke and Somerset County Council*** [1998] ELR 129).

(b) the Tribunal's wording appeared to stem from the educational psychology report of Dr Alexandra Tesoi (pages 142 to 154, particularly page 151). However, Dr Tesoi was not a speech and language therapist. The Tribunal had two speech and language therapy reports before it (pages 135 to 141 and 365 to 370), but it did not appear to have considered that advice. Whilst the local authority accepted that the Tribunal was entitled to depart from advice, no explanation was given for it departing from the speech and language therapy advice which would undoubtedly be most relevant. It seems to me that that point is in reality part and parcel of grounds three and four and I shall deal with it under those grounds.

(c) the reference to 'speech and language therapy' was vague; it was not clear whether the ordered provision needed to be made by a speech and language therapist, whether it was able to come from a specific speech and language therapy programme devised externally, or whether some other member of staff from the speech and language therapy service was able to recommend the necessary work. In his refusal of permission, Judge McCarthy stated that "this is a matter for the therapists and is not something the panel could or should have specified", but that did not acknowledge the Council's submission (see (b) above) that the Tribunal was not following the advice of a speech and language therapist. No speech and language therapist had suggested

the level of provision ultimately decided by the Tribunal and thus it was prudent for the Tribunal to specify properly what it meant. In any event, the reference to "speech and language therapy" remained contrary to the principles of specificity set out in case law (see ***L v Clarke and Somerset***, ***S v SENDIST*** [2007] EWHC 1139 and ***B-M and B-M v Oxfordshire County Council (SEN)*** [2018] UKUT 35 (AAC)).

(d) the reference to a "termly review" was unlawful and it failed to clarify who should be reviewing the work each term (see ***E v Rotherham Metropolitan Borough Council*** [2001] EWHC Admin 432 where a review every 6 months was found to be unlawful). In his refusal Judge McCarthy again stated that this was "taken out of context" as, in the Tribunal's view, that related to "the content of the speech and language therapy provision and not to the amount to be delivered or by whom". Ms Thompson submitted that the local authority simply could not understand how the reference to "termly review" could be construed to relate to the content and, even if it did, the provision still failed to make clear who would be reviewing that content.

13. Crucially, she submitted that the fact that the Council (and presumably anyone reading the EHCP) was able to raise these questions made it clear that the proposed provision was not "so specific and clear as to leave no room for doubt as to what has been decided and what is needed in the individual case" ***(L v Clarke and Somerset)***. The provision ordered by the Tribunal was therefore unlawful.

The Second Ground of Appeal

14. The Tribunal's decision that C required "1:1 SaLT" (paragraph 68) was unlawful as it was not based on any evidence. Further, it had ignored relevant evidence or otherwise failed to explain why it did not consider it relevant.

15. At paragraph 52 the Tribunal stated "We accept the unchallenged evidence of Ms Jordan, SaLT at Westacre School that C has a "developmental language delay" …". However, the Tribunal then seemingly decided to use its own expertise to determine the level of speech and language provision which C required, rather than including the recommendations of Ms Jordan (included at page 369).

16. In ***L v Waltham Forest London Borough Council and Another*** [2004] ELR 161 Beatson J stated the following (the bold text was Ms Thompson's emphasis):

> "14. Reasons must, first, deal with the substantial points that have been raised so that the parties can understand why a decision has been reached. This is seen from *S v SENT* and the *Lucie M* case. In *H v Kent*, Grigson J stated that what was necessary was that the aggrieved party should be able to identify the basis of the decision. Secondly, **a specialist Tribunal, such as the Special Educational Needs and Disability Tribunal, can use its expertise in deciding issues, but if it rejects expert evidence before it, it should state so specifically**. In certain circumstances it may be required to say why it rejects it: see *H v Kent*, per Grigson J at paragraph 50. Thirdly, mere recitation of evidence is no substitute for giving reasons: see *J v Devon County Council*, per Gibbs J at paragraph 50. Fourthly, and linked to the second point, **where the specialist Tribunal uses its expertise to decide an issue, it should give the parties an opportunity to comment on its thinking and to challenge it**. That is established in the Mental Health Review Tribunal context by the *Clatworthy* case, and in the context of this Tribunal in *Lucie M v Worcestershire County Council*."

17. In its decision the Tribunal appeared to try to rationalise its proposal by referring to the Learning Support Team assessment undertaken in June 2019 and Wychbold First School's application for an EHC needs assessment; it stated (paragraph 60):

> *"*out of 16 areas of 11 assessment, [C] scored 'below average' or 'well below average' in 11 areas. This was at a time, where according to the documentation (p.132-133) [C] was receiving full time 1:1 TA support including for 5hrs per week in both literacy and numeracy and 4hrs pw of individual SALT."

18. However, the Tribunal erred in its understanding of the documentation. The documentation referred to (pages 132 to 133) was Wychbold First School's application for an EHC needs assessment, prepared in January 2018. It set out what Wychbold First School considered C *could* receive if she had an EHCP. It was not based on any speech and language therapy (or other) evidence (in fact the speech and language therapy report of Mandy Martin, dated 20 February 2018 (pages 135 to 141) made no such recommendation, nor did it say that that was what she was receiving at

that time). The Tribunal's misunderstanding of the evidence represented an error of law. The refusal of permission to appeal ignored that issue entirely.

19. The refusal of permission did suggest that the Tribunal's acceptance of Ms Jordan's evidence did not mean that it accepted all of her evidence and that it "was considered in the round with all the evidence". Whilst the local authority accepted that the Tribunal could use its expertise in deciding between competing expert views, there simply were no competing experts in this appeal and the Tribunal provided no explanation for rejecting Ms Jordan's recommendations.

20. In addition to all of the above, the Tribunal gave no indication during (or prior to) the hearing that it considered that any alternative provision might be necessary; therefore, neither party was given an opportunity to comment on the Tribunal's thinking or to challenge it. In his refusal of permission, Judge McCarthy stated that "the author of the ground is unaware that the panel must stand in the shoes of the LA when making its decision and has the same powers". The Council acknowledged that that had long been a function of the Tribunal (***Bromley London Borough Council v SENT*** [1999] ELR 260); however, that did not detract from what was said in ***L v Waltham Forest*** and the requirement for the Tribunal to give the parties an opportunity to comment on its thinking. That had not been addressed by Judge McCarthy in his refusal of permission.

The Third Ground of Appeal

21. In its decision the Tribunal determined that "[C] shall be taught and supported by staff with qualifications and relevant experience in supporting children with learning difficulties, specifically dyslexia as well as associated sensory, behavioural, developmental and communication and interaction difficulties" (paragraph 69). That determination was also not based on evidence.

22. The Tribunal placed considerable weight on the Educational Psychology report of Dr Alexandra Tesoi, but it misinterpreted that advice or otherwise amended it without providing reasons for departing from Dr Tesoi's recommendation.

23. Dr Tesoi's report stated: "Staff Qualifications and experience: knowledge and experience in supporting children with learning difficulties as well as associated sensory, behavioural, developmental and communication and interaction difficulties" (page 151).

24. The amendments made by the Tribunal were significant and altered the meaning of Dr Tesoi's advice. Dr Tesoi did not state that specific qualifications were necessary; she plainly considered whether specific 'qualifications' were necessary, but determined that only sufficient 'knowledge and experience' was required. The Tribunal had provided no explanation for its decision to alter the wording proposed by Dr Tesoi. It did not put its proposal to the parties during or prior to the hearing; thus neither the local authority nor C's mother was given an opportunity to comment upon or challenge it. That was contrary to the principle set out in ***L v Waltham Forest*** and represented an error of law.

25. The Tribunal further misinterpreted Dr Tesoi's advice at paragraph 67. It stated that "Contrary to Dr. Tesoi's advice, [C] has not received teaching by specialist trained educators with experience in dyslexia and associated learning profiles". However, Dr Tesoi's report did not say that that was what C required.

26. In the refusal of permission, Judge McCarthy stated that that ground fell away "for the reasons … set out in relation to the first and second grounds" and because "it was for the panel to decide what weight to give the evidence". However, that failed to address the fact that Tribunal misinterpreted the evidence, effectively rewrote the evidence and/or otherwise failed to provide reasons for departing from what it actually said.

The Fourth Ground of Appeal

27. Even if the Tribunal did properly interpret Dr Tesoi's evidence (and the local authority maintained the submission that it did not), Ms Thompson submitted that the Tribunal had placed undue weight on her report.

28. The Tribunal stated that Dr Tesoi's report (which was over two years old by the date of the hearing) was "the only comprehensive Educational Psychology report within the papers" (paragraph 58). It criticised Dr Beck, who also provided a

comprehensive and more recent report, for adopting Dr Tesoi's assessments, rather than repeating them. It did not, however, acknowledge that professional guidance on repeating tests meant that Dr Beck would have been unable to repeat the same assessments within a certain period of time.

29. The Council did not suggest that Dr Tesoi's report should have been ignored; however, the Tribunal failed to explain why it gave greater weight to Dr Tesoi's report when Dr Beck's advice was the most up-to-date advice and was based, in part, on Dr Tesoi's. The Tribunal also had two reports from Ms Smith of the Learning Support Team (12 June 2019 – pages 166 to 174 - and 5 December 2019, produced separately and unpaginated) which considered C's needs and the provision required. The Tribunal ignored all of that advice without a reasonable explanation.

30. The latter of Ms Smith's reports (which diagnosed C with dyslexia) was also considered in conjunction with Rachel Ashmore, Educational Psychologist. However, Ms Smith (the author of the dyslexia diagnosis report) made no recommendation for C to be taught by staff with specialist dyslexia qualifications. If that provision was necessary, the Council submitted that that would have been recommended by Ms Smith (and Dr Ashmore), but it was not.

31. The local authority acknowledged that the Tribunal had (rightly) considered provision for C's dyslexia and the inclusion of that need within Section B of the EHCP. However, the Tribunal had failed to acknowledge the advice of the professional who diagnosed her dyslexia.

32. The refusal of permission argued that this ground simply disputed the weight given to Dr Tesoi's report. The Council agreed; however, the refusal still failed to address why the Tribunal did not err in failing to give reasons for preferring Dr Tesoi's evidence over that of the most recent advice.

The Fifth Ground of Appeal

33. The Tribunal determined that C had not made sufficient progress. On that basis it identified that C required additional provision and found that Westacre was unsuitable.

34. As part of its finding that Westacre was unsuitable, the Tribunal recorded that "The evidence from Westacre is that they have done all that they reasonably can (which we accept)" (paragraph 89). However, that conclusion contradicted the evidence before the Tribunal and that identified within its own decision:

(a) the witness statement of Laura Brighton at Westacre stated that "We are aware that [C] has previously had involvement from the Learning Support Team, speech and language therapy, paediatrics and educational psychology. The school could seek further involvement from these services if necessary" (page 349)

(b) the Tribunal decision recorded that: "Ms. Evans added, "there is more we could do, the more reports we get the more we think of - the dyslexia report has triggered more thoughts for us …"" (paragraph 45).

35. The Tribunal's suggestion that C had not made sufficient progress failed to acknowledge the fact that she had attended the school for less than a term. It also provided no explanation for rejecting the evidence before it which showed that she had made progress. At the point of Laura Brighton preparing her witness statement, C had attended the school for around half a term, yet she was making progress. Ms Brighton stated "As shown on her timetable, she accesses a lot of SEN and pastoral interventions which she enjoys and has begun to make progress in" (page 349).

36. In determining the progress made by C, the Tribunal placed a great reliance on progress made at her previous school (Wychbold First School) where the type of provision made was different (and, in the local authority's view, inferior) to that provided at Westacre. The Tribunal said (paragraphs 61 and 62):

> "We are concerned that as at June 2019 which was the end of her time at first school, with an extremely high level of support, Crystal's attainment was not in accordance with her assessed academic ability.
>
> "This suggests to us that the provision available to her, whilst being undoubtedly intensive, was not properly addressing her Section B educational needs."

37. Despite the Tribunal's view that C did not make adequate progress at Wychbold First School, it went on to say that the provision at Westacre was "less intense" than at Wychbold:

> "It was noted that the support offered to [C] at Westacre is a considerable step down from the intensive 1:1 made available to her at Wychbold" (paragraph 32).

38. That did not acknowledge that at Westacre C was receiving intervention in small groups in the same way that she would be taught at Bredon (the school which the Tribunal ultimately found to be suitable). At Wychbold First School the intervention involved 1:1 teaching assistant support within a class of 30 children. That could not be considered to have been more "intense" and the Tribunal provided no explanation for reaching that conclusion. That was not addressed in the refusal of permission to appeal.

39. If the Tribunal considered that 1:1 support amounted to "intensive support" and that C required it, then it should have amended Section F of her EHCP to include that. It did not do so; thus it could not find Westacre unsuitable on the basis that it was not providing an intervention which (a) the Tribunal found to have been unsuccessful and (b) it was not determined to be required by the Tribunal.

40. In making its findings in relation to progress, the Tribunal misinterpreted the contents of the LST report of Pauline Smith. It said:

> "38. LST standardised assessments show no progress in [C]'s scores between June and December 2019. Per initial assessment (p.168) in June 2019, out of 16 areas of assessment, [C] scored 'below average' or 'well below average' in 11 areas. In December 2019 there was no change to [C]'s attainment scores in BPVS Receptive Vocabulary (below average), no change at all to any of her YARC (Reading Comprehension) scores (below average), no change to her HAST (spelling) scores (below average) and no change to her phonological processing scores."

41. However, the local authority noted that the data included in the December 2019 report was a copy of the assessment data obtained in June 2019. The assessments were not repeated; thus it was unsurprising that the scores remained the same. It was

clear that the Tribunal has completely misunderstood the assessment data within Ms Smith's report. If it had required clarity on that data, it should have put it to the parties to comment upon, or it should have sought clarification from Ms Smith.

42. To satisfy itself (and the Upper Tribunal) in respect of that point, the Council had sought clarification from Ms Smith. A copy of the email trail with Ms Smith's advice was enclosed (Annexure 1) and was provided to the First-tier Tribunal as part of the local authority's application for permission to appeal. That confirmed the local authority's understanding that the data was not correctly understood. Judge McCarthy had not acknowledged or addressed that evidence in the refusal of permission to appeal.

43. Not only had the Tribunal failed to understand the assessment data, it had also failed to acknowledge the progress that Ms Smith noted within her report: "Although [C] is working significantly below age related expectations, she is accessing the curriculum and making progress" (page 2 of the second Learning Support Team Report).

44. The only evidence before the Tribunal was that C was making progress; therefore the Tribunal's finding that she was not represented an error of law. Ms Thompson submitted that, had the Tribunal not erroneously found that C was not making progress, it would not have found Westacre unsuitable.

45. Judge McCarthy disputed that. The refusal of permission suggested that the "reason why [the Tribunal] found Westacre Middle School was not suitable was because the witnesses from that school identified that it could not deliver the special educational provision the panel found to be required". However, that failed to address the fact that the provision inserted into Section F of the EHCP was determined by the Tribunal using its own expertise after the hearing. The proposed provision was not put to the parties and thus the School had no opportunity to indicate how it would implement any such provision. The Tribunal could not assert that the School could not make the provision necessary as it was not asked whether it could do so. In its decision the Tribunal suggested that the School had done "all that it reasonably could do", but that was plainly not the case given that the Tribunal decision also recorded

Ms. Evans' evidence that she felt "there was more that the school could do" (paragraph 45).

46. Ultimately the Tribunal had no evidence that C was not making progress or that her needs could not be met by Westacre and thus the Tribunal's finding to the contrary represented an error of law.

The Sixth Ground of Appeal

47. The local authority agreed that Bredon was suitable based on its understanding of C's needs and the provision that she required, that being the provision identified in Section F of her EHCP.

48. As set out above, the Tribunal inserted provision which was not in evidence and was not put to the parties. It determined that staff working with C had to have "qualifications and experience in supporting children with "sensory, behavioural, developmental and communication and interaction difficulties" (paragraph 69). However, neither the Council nor the Tribunal knew whether the staff teaching and supporting C at Bredon would have such qualifications or what those qualifications and experience might look like. On that basis, neither the local authority nor the Tribunal could determine that the school was suitable.

49. Had the Tribunal indicated to the parties that it was considering inserting the above provision into C's EHCP, then the question of whether that was available at Bredon could have been explored during the hearing (albeit that Bredon was not in attendance). As it was, that did not happen and the Tribunal therefore had no evidence before it in order to determine that staff working with C at Bredon had those qualifications.

50. The decision of Scott Baker J in ***W v Gloucestershire County Council*** [2001] EWHC Admin 481 made clear that, if the Tribunal did not have the relevant information, it should have taken steps to obtain it. It did not do so and its decision was not, therefore, based on evidence.

51. In his refusal of permission Judge McCarthy suggested that because the local authority had accepted that Bredon was suitable, there was no duty on the panel to

also consider whether it was. The Council disputed that. It submitted that that approach amounted to an error of law. A tribunal should not simply 'rubber stamp' a decision, even if both parties were in agreement (***EC v North East Lincolnshire Council*** [2015] UKUT 648 (AAC)): the tribunal must make its own findings of fact. In this case, the Tribunal simply did not have the information before it in order to make the necessary findings and it therefore erred in finding the school suitable.

The Respondent's Submissions

52. In her submission at the hearing and in her subsequent submissions the Respondent said that she would be content for the Upper Tribunal to remove from Section F of the EHCP the words "This shall be subject to termly review" after the sentence which reads "[C] shall have 1 x 1 hr 1:1 support each week to facilitate and support work recommended by Speech and Language therapy on an individual basis and within the wider learning environment" if that offended against the decision in ***E v. Rotherham MBC***, or in the alternative to amend the wording of the remaining sentence so as to validate it.

53. She disagreed that the parties had not had time to think or reflect during the hearing and said that they had had a number of breaks. She said that the wording of the EHCP in its amended version was perfectly clear. If the Council had wanted to question any of the professionals, it could have asked for them to be telephoned, but did not do so.

54. As to the suitability of Bredon as a placement, the Council itself had agreed to it. The Council had been ordered to provide the Bredon prospectus before the hearing of 7 January 2020 and there was the evidence of the qualifications and experience of the staff at Bredon in the questionnaire which had been sent to them for completion. She was confident that the Tribunal had properly satisfied itself as to the suitability of the placement at Bredon, which had on site SALT and SLS.

55. As to whether C had been making progress at Westacre, she referred to paragraphs 41, 46 and 85 of the Tribunal's decision, none of which had been referred to by Ms Thompson in her submissions.

Analysis

The First Ground of Appeal

56. In order to resolve the first ground of appeal it is necessary to set out the caselaw in some detail and then apply it to the facts of this case. A number of the cases were cited by Ms Thompson in her written submissions, but I consider that it is appropriate to set out all of the authorities in more detail before analysing the instant facts in the light of them (it will also enable parties in future cases to have one decision in which all the authorities are set out rather than having to trawl through individual reports).

57. Chronologically the first case is the decision of the late Laws J (as he then was) in ***L v Clarke and Somerset*** on 29 August 1997**.** In that case S was severely dyslexic and had been attending a local authority community secondary school (Bishop Fox's School). An individual assessment of S's needs under the Education Act 1996 was initiated, whilst S's parents registered him with an independent school specialising with children with special educational needs (Edington and Shapwick School). S's final statement recommended that the contents of his educational plan be negotiated with him and the local authority school was named as the placement in Part 4. His parents appealed successfully against the placement on the basis that the statement was insufficient. Laws J held that the statement in the instant case was insufficient in that it made no specific statement as to the nature of the monitoring and the number of hours required for S. It is not necessary to set out here what Laws J said in his oft-quoted passage at pp.136H-137B since it is repeated in a number of the other cases which followed his decision and which are set out in some detail in the immediately following paragraphs. I note, however, that at p.137C-D, with reference to the particular statement in issue in that case, he said:

> "In the present case, it seems to me that the statement lacks sufficient specificity. I have already read two paragraphs from part 3 … It seems to me that a requirement that S's progress in spelling, reading and mathematics should be closely monitored, without more, is the first sign that the statement lacks sufficient specificity.
>
> The next paragraph requires that S's individual education plan should include regular, preferably daily, individual or small group work and so forth. As it seems to me this, and possibly other provision made in part 3 of the statement, might as a

> matter of language be fulfilled by various forms of provision. Overall, it does not seem to me that the statement is specific as the statute requires."

58. Next comes the decision of Sullivan J in ***S v. Swansea City Council*** [2000] ELR 315 (11 November 1999). R had particularly complex special educational needs. He was in mainstream schooling until withdrawn because of severe bullying. The local authority proposed that he be placed in the P comprehensive school, but his parents requested that F College near Bath be named in part 4. The Tribunal ordered that the specialist facility at P be named in part 4 and his parents appealed successfully against the contents of parts 2, 3 and 4. The earlier amended statement stated that R would receive weekly support from a specialist teacher of children with speech, language and communication difficulties plus 27.5 hours each week of learning assistance support pending the pursuit of an alternative placement in day provision to meet R's needs, but the parents stated that that level of provision was inappropriate and inadequate. There was thus an issue as to the appropriate level of support. The further amended statement omitted the reference to 27.5 hours of support and contained no quantification of the amount of support needed. The words "can't agree" had been written in manuscript beside that section of the statement. Notwithstanding the lack of agreement and the clear difference between the parties as to the appropriate level of support, the Tribunal's decision did not address that issue. Instead the provision to be specified in part 3 as found by the Tribunal stated of the speech and language therapy input

> "The individual sessions should be at least weekly, but we leave further detail of the sessions to the speech and language therapist"

and of the occupational therapy

> "We also accept that should occur on a weekly basis, with other details of the therapy to be decided by the therapist, having regard to [R]'s need for sensory integration therapy, a fine motor programme, a perceptual skills programme, and a separate programme to be carried out by facility staff".

59. In his judgment Sullivan J said at pp.327H-328F that:

> "The question identified by Laws J [in *L*] has, in my judgment, to be answered not in the abstract, but against the background of the matters in dispute between the parties. If the parties' contentions lack particularity, the tribunal may be forgiven for describing what it decides is required in Part 3 in less specific terms, for example, that provision shall be made 'weekly'. On the other hand, where parents have advanced a detailed case based upon experts' reports, setting out their view of the required level of provision expressed in numbers of hours of support or therapy, a statement which merely requires unspecified provision to be made 'weekly' may not be an adequate response. If there is a dispute as to whether therapy or support is required for, say, 2 hours or for 10 hours per week, simply directing that it be provided 'weekly' leaves room for doubt as to what has been decided.
>
> On the facts of the present case I have no doubt that the answer to Laws J's question is 'no'. This statement does leave room for doubt as to what has been decided is necessary for R. Perhaps because the tribunal did not appreciate that R's ADHD and Asperger's was in issue in part 2, part 3 contents itself with generalities under this heading. In relation to speech and language, Ms Arnaud's recommendations appear to have been largely accepted, but in response to her very specific recommendations (to which I have referred above), the tribunal merely states that sessions should be at least weekly. The tribunal had no details of what specific provisions the school would be able to make. In the case of occupational therapy it could not have had such details because an occupational therapist was not and is not available at the unit. It follows that under this heading there is still a complete lack of any detail as to what is needed save that such therapy should be provided weekly on a one-to-one basis. Both Ms Arnaud and Mrs Rush recommended that support of an LSA would be required to deliver their programmes. From being specific as to the number of hours' learning assistant support that were required in the amended statement to which the parents responded, the further amended statement leaves that matter entirely at large. Whilst there may have been a need for some flexibility, this should not have been used as an excuse for lack of specificity where detail could reasonably have been provided. I can see no reason why the further amended statement could not have prescribed an initial minimum number of hours of learning assistant support with provision for revision upwards or downwards in the light of the monitoring that is required in the later part of the statement."

60. The third case was the decision of Bell J in ***E v Rotherham MBC*** on 5 June 2001. The main points raised by the appeal related to the extent to which, if at all, provision of speech and language therapy in Parts 2 and 3 of the statement of special educational needs for the purposes of Part 4 of the 1996 Act could leave future levels of support for the decision of the local authority after discussion with a local NHS trust and the child's parents. Bell J set out the factual background to the case and in paragraph 12 set out the educational provision required for the child (C) ordered in Part 3 of the statement in relation to his speech and language therapy (most of which was uncontentious) and in the following paragraph explained the crux of the appeal:

> "12. … "2. In respect of speech and language therapy, [C] is to receive support based on Level 1 of the LEA National Health Trust protocol, modified as follows to meet his current needs:
>
> * The programme is to be established by a therapist and delivered by teaching and child support assistants.
>
> * The programme is to be delivered daily by a combination of individual and small group activities, but to include no less than 15–20 minutes daily of individual support from a child support assistant.
>
> * The programme is to be monitored at least weekly by a speech and language therapist and [C] is to be seen at least monthly by a speech and language therapist for an individual session lasting at least 30 minutes.
>
> * The programme is to be formally reviewed every 6 months by a speech and language therapist.
>
> * Any change in the level or support will require a formal discussion between the LEA, the NHS Trust and one or both of [C]'s parents, but the above level of support is to remain at no less than the present level until June this year."
>
> 13. The early part of that paragraph reflected the therapy that C was in fact receiving at the time of the Tribunal hearing on 11th January 2001. It was clear at the hearing before this court that there was no objection to provision for a review of the programme by a speech and language therapist every six months, taken on its own, and there was no objection to the level of support remaining at the present level until June 2001. The appeal was directed at the provision that:

> "… any change in the level of support will require a formal discussion between the LEA, the NHS Trust and one or both of [C]'s parents.""

61. He set out the relevant statutory framework and continued (incorporating what Laws J had said in ***L v. Clarke and Somerset***):

> "24. Paragraph 4.28 of the Code of Practice says that, amongst other matters, Part 3 of the statement should set out all the special educational provisions that the LEA consider appropriate for all the learning difficulties identified in Part 2. Later it says:
>
> > "The provision set out in this subsection should normally be specific, detailed and quantified (in terms, for example, of hours of ancillary or specialist teaching support) although there will be cases where some flexibility should be retained in order to meet the changing special educational needs of the child."
>
> 25. The degree of specificity required in the statement of the education provision to meet needs and objectives has received some judicial attention. I am particularly helped by the words of Laws J in *L v Clarke and Somerset County Council* [1998] ELR 129, at 136H to 137C:
>
> > "In my judgment a requirement that the help to be given should be specified in a statement in terms of hours per week is not an absolute and universal precondition of the legality of any statement. One can appreciate the force of the comment in the guidance. There will be some cases where flexibility should be retained. However it is plain that the statute requires a very high degree of specificity. The main legislation itself (and I refer to s 324(3)(a) and (b)) requires the statement to give details of the child's special educational needs and to specify the provision to be made.
> >
> > The terms of form B in the regulation, part of which I have read, are plainly mandatory and it seems to me that in very many cases it will not be possible to fulfil the requirement to specify the special educational provision considered appropriate to meet the child's needs, including specification of staffing arrangements and curriculum, unless hours per week are set out.
> >
> > The real question, as it seems to me, in relation to any particular statement is whether it is so specific and so

> clear as to leave no room for doubt as to what has been decided is necessary in the individual case. Very often a specification of hours per week will no doubt be necessary and there will be need for that to be done."

26. "The comment in the guidance" was a reference to the desirability of flexibility in some cases, mentioned in paragraph 4.28 of the Code of Practice.

27. The last words which I have quoted from the judgment of Laws J identifying the real question were referred to with approval by the Court of Appeal in *Bromley London Borough Council v SENT* [1999] ELR 260 at 297C.

28. In *S v City Council of Swansea* [2000] ELR 315 at 327H Sullivan J said that in his judgment the question identified by Laws J:

> "… has … to be answered not in the abstract, but against the background of the matters in dispute between the parties. If the parties contentions lack particularity, the tribunal may be forgiven for describing what it decides is required in Part 3 in less specific terms, for example, that provision shall be made 'weekly'. On the other hand, where parents have advanced a detailed case based upon experts' reports, setting out their view of the required level of provision expressed in numbers of hours of support or therapy, a statement which merely requires unspecified provision to be made 'weekly' may not be an adequate response. If there is a dispute as to whether therapy or support is required for, say, 2 hours or for 10 hours per week, simply directing that it be provided 'weekly' leaves room for doubt as to what has been decided."

29. Against those provisions and that judicial guidance the following matters seem to me to stand out in this particular case.

30. First, in my view, a high degree of specificity in respect of SALT provision was required in the statement of educational provision to meet the needs and objectives in C's case. His speech and language needs were and still are his primary educational needs. A genuine dispute had arisen between Mrs E, acting on expert advice, and the LEA as to the required level of provision, day by day, week by week and month by month which could only be satisfactorily resolved by the Tribunal particularising the appropriate level of SALT, as it did in fact in the first three bullet points of paragraph 2 of its amendment to Part 3 of the statement.

31. Secondly, there was, in my judgment, no good reason to believe at the time of the Tribunal hearing that the need for specificity in respect of SALT provision for C would be any less in June 2001 or indeed thereafter. Indeed the indications were that there would still be a need for the same degree of specificity because the LEA was contemplating the possibility of a reduction in the level of SALT to what was generally associated with Level 2 and Mrs E was not, in January 2001, prepared to contemplate any reduction.

32. Yet, by the terms of its order set in out as the last bullet point the Tribunal on my reading left the level of support after June 2001 to be decided by the LEA. In so doing it failed, in effect, in my judgment, to be specific at all as to what the level would be after June 2001. It thus achieved a statement which was in breach of section 324(3)(b) of the Act and Regulation 13 applying Part B of the schedule of the Regulations.

33. Thirdly, and in any event, the wording of the final bullet point in my view has the potential of depriving Mrs E of the right to appeal, which she would otherwise have by virtue of section 326(1) of the Act, against the amendment of the statement which would normally be required if the LEA decided to change the provision specified in the first three bullet points. Although the wording of the final bullet point does not expressly remove Mrs E's right of appeal against any amendment to the statement which is actually made by the LEA, it has the potential to which I refer because it allows the LEA to change the level of support in accordance with the wording of the statement and, therefore, without any need for an amendment of the statement which would trigger the right of appeal.

34. I do not believe that such a fundamental infringement of the policy of a right of appeal against the contents of a statement expressed in section 326 can be justified by any need for flexibility in the provision of SALT for a developing four year old child. It might be possible legitimately to achieve that end by specifying acceptable minimum and maximum levels of provision of therapy if the evidence justified such an approach, and I note that the difference between the support generally provided on Level 1 and the support generally provided on Level 2 is that there are daily sessions on the former and two or three sessions a week on the latter. But that might be a significant difference in the circumstances of the particular case, and in any event the Tribunal did not take the course of stating levels of maximum and minimum acceptable provision, e.g. Level 1 or Level 2 in C's case.

> …
>
> 37. … for the reasons which I have already given, I have come to the conclusion that the order under challenge was not an order which the Tribunal could lawfully or reasonably make.
>
> 38. Accordingly I allow Mrs E's appeal. The Chairman of the Tribunal has, through the Treasury Solicitor, suggested that it might be more appropriate to make a substitute order if the appeal succeeds, rather than order a rehearing by the Tribunal. It is now June 2001. Subject to any submissions on the appropriate form of the Court's order, I propose to allow the appeal by removing from the Tribunal's order the words beside the last bullet point:
>
> > "Any change in the level of support will require a formal discussion between the LEA, the NHS Trust and one or both of [C]'s parents, but the above level of support is to remain at no less than the present level until June this year." "

62. Chronologically next in time comes the decision of the Court of Appeal in ***E v. Newham London Borough Council*** [2003] ELR 286 (20 January 2003). That decision is quoted extensively in the decision of Upper Tribunal Judge Mesher to which I turn in paragraph 65 and it makes more sense to the narrative of that case to refer to the passages in ***E v. Newham LBC*** on which he relied in the context of that decision than to divorce them and take them separately. I pause, however, to note that the decision of the Court of Appeal refers to the decision of Laws J, but contains no reference to the decisions of Sullivan and Bell JJ, but equally there is no reference, save in one of the decisions of Upper Tribunal Judge Jacobs, to either the decision of the Court of Appeal or the decision of Upper Tribunal Judge Mesher in any of the subsequent cases decided after them.[2]

63. The next decision in the series is that of Holman J in ***S v SENDIST*** (2 May 2007). He explained that since September 1998 S had been a pupil at a maintained special school ("R School"), which had a maximum of 100 pupils and was originally set up for those with severe learning difficulties. For an appreciable period of time his

[2] Laws J's test was referred to with approval by the Court of Appeal in ***Bromley LBC v. SENDIST*** [1999] ELR 260, but that case was essentially concerned with what is meant by "special educational provision" and I do not derive particular assistance from it in the present context.

parents were extremely happy with his progress at that school and perceived it as able to offer him an environment in which he would be stretched to his full potential. However, there came a time by about 2005 when they were no longer happy with R School. They felt that it was no longer appropriate to meet his needs and that his needs could best (and in their view only) be met in a residential school which they identified ("P School"). Here was the rub: the cost of a residential placement in that school for 42 weeks a year would be about £137,500 which they hoped and expected the local authority would pay. By contrast, R School was a maintained school financed by the local authority, so in one sense it cost them nothing to keep him there, although it was said that the cost of him at R School "would equate to £11,552 per annum". The local authority considered the parents' proposals, but came to a conclusion that he was at least adequately placed at R School and that the additional expenditure for boarding at P School could not be justified. They prepared a statement of special educational needs accordingly. The parents disagreed and appealed. The outcome was that the Tribunal decided that R School could adequately meet S's needs and accordingly that it was not justifiable for it to amend the statement so as to require that he boarded at P School. However, and this was the heart of the appeal, it was clear that S had many needs which could not be met by the staff of, or within the four corners of, R School alone. It was upon those other needs that the appeal focussed. The major ground of appeal was that the Tribunal's decision was too lacking in specific detail as to be enforceable or to represent a proper statement of the required educational provision.

64. Holman J continued:

> "19. At paragraph letter I on page 24 [the Tribunal] said, and this is central to the case:
>
> > "Within school LS has secured a range of communication methods. But we have some concern about the way in which speech and language therapy is organised at the school where a lot appears to be dependant on PECS and we do accept Mrs Shaffer's [an expert called by the parents] view that something more is needed. We believe LS needs direct involvement with speech and language therapy in the classroom initially a visit once a week for term, thereafter reducing to once a fortnight ... A team teaching model for at least part of

> the provision would make a difference to enable what potential he has to develop methods of communication further . . . "

The next and last sentence in paragraph I is crucial:

> "The speech and language therapist also needs to manage a structured approach involving 'out of school' professionals to support them in offering a consistent approach and assisting LS in developing and generalising his skills in different settings."

…

23. Finally, within the body of the decision itself I quote paragraph letter R within which the tribunal said:

> "We are of the view that the authority should now be given an opportunity to put in place the range of provision we have identified as necessary, and that it is capable of so doing. The combination of the expertise on offer at R School and the improved package of services has not yet been tried. It is a big step from school to residential placement and we are insufficiently persuaded that such a disruption is wholly justified at this stage. This package may have been produced somewhat late in the day, but if good enough it will be sufficient to meet his needs. There is no need for a residential placement on educational grounds."

It seems to me crystal clear from that passage that the tribunal were saying that it is not necessary for him to attend a residential school provided there is "the combination of the expertise on offer at R School" and also, as part of his educational needs, "the improved package of services".

24. When one turns to the amended statement itself, there is within Part 2 an account of his special educational needs. It is true, as Mr Greatorex stresses, that one does not see clearly within Part 2 an identification of a need which ties in directly with what I am about to quote from Part 3. Nevertheless, the statement needs to be read as a whole and within Part 3 the tribunal describe the "special educational provision" required. The key passages for the purpose of this appeal are first at the top of page 33:

> "LS requires a specialist educational environment for children with autism and severe and complex learning difficulties. All those working with LS need to work closely together to support him in generalising his skills

> beyond the classroom. They will need regular and ongoing in service training in the needs of children with autism and learning difficulties."

And at the top of page 34:

> "LS needs direct involvement with speech and language therapy in the classroom, initially a visit once a week for a term, thereafter reducing to at least once a fortnight. This should involve joint planning and delivery with the class teacher. The speech and language therapist also needs to manage a structured programme, which will include training, to support 'out of school' professionals in providing a consistent approach and assisting LS in developing and generalising his skills in different settings. Similarly LS's parents and carers need support so they may embed more firmly the full range of communication methods used in school so he can apply them in other contexts, including home and respite provision. The speech and language therapist will visit the home at least three times a year."

…

31. I thus conclude, despite the submissions of Mr Greatorex, that the passage upon which Miss Lawrence focuses her attack is indeed a passage which is at the heart of providing for the educational needs of this child if he is to remain, as the tribunal thought he could remain, within a day school setting. The passage, which I will not read out again extensively, is the passage within Part 3 already quoted which begins "LS needs direct involvement with speech and language therapy" and ends "The speech and language therapist will visit the home at least three times a year". That passage is itself closely modelled on paragraphs I and J within the decision itself, and Miss Lawrence focuses attack both on I and J of the reasons and on this passage within the statement itself. But in the last analysis, it seems to me, it is upon the lawfulness of the statement itself that this appeal must stand or fall.

32. Miss Lawrence submits that it is far too general and lacks adequate specificity. In support of that submission she relies in particular on the authority of Laws J in *L v Clarke and Somerset County Council* [1998] ELR 129. It is not, I think, necessary to make any reference to the facts of that case. Laws J set out, and I will not repeat, the provisions of section 324(3) of the Act and then referred at page 136 letters F and G to paragraph 4.28 of the relevant code of practice which says that the provisions set out "should normally be specific, detailed

and quantified . . . although there will be cases where some flexibility should be retained . . . ". Laws J continued:

> "In my judgment a requirement that the help to be given should be specified in a statement in terms of hours per week is not an absolute and universal precondition of the legality of any statement. One can appreciate the force of the comment in the guidance. There will be some cases where flexibility should be retained. However, it is plain that the statute requires a very high degree of specificity. The main legislation itself (and I refer to section 324(3)(a) and (b)) requires the statement to give details of the child's special educational needs and to specify the provision to be made. The terms of form B in the regulation, part of which I have read, are plainly mandatory and it seems to me that in very many cases it will not be possible to fulfil the requirement to specify the special educational provision considered appropriate to meet the child's needs, including specification of staffing arrangements and curriculum, unless hours per week are set out. The real question, as it seems to me, in relation to any particular statement is whether it is so specific and so clear as to leave no room for doubt as to what has been decided is necessary in the individual case. Very often a specification of hours per week will no doubt be necessary and there will be a need for that to be done."

33. It is against that description of the needs of the law, and also the latitude and flexibility within those needs, that I turn to Miss Lawrence's submission. She says that in the passage referred to there is simply far too little detail and specificity. It says, for instance, that within the classroom he needs "initially a visit once a week for a term". Miss Lawrence says that that is totally vague as to whether the visit should be, for instance, of an hour or half a day, or indeed a day. She says that such vagueness is unacceptable because it leaves the statement unenforceable at the behest of the parents in the event of dispute.

34. Even more vague, in her submission, is the following paragraph. This identifies what I have now determined the tribunal to regard as an educational need. It says that the speech and language therapist "also needs to manage a structured programme which will include training to support out of school professionals in providing a consistent approach and assisting LS in developing and generalising his skills in different settings". That leaves utterly vague what sort of out of school professionals will be involved, the extent to which they will be involved, what sort of training may be required,

and what sort of structured programme is envisaged. It continues:

> "Similarly, LS's parents and carers need support so they may embed more firmly the full range of communication methods . . . "

That again leaves very vague what sort of level and intensity of support the parents and carers require and should be provided with so that they may do the important task of embedding the range of communication methods used in school so as hopefully to achieve generalisation.

35. Miss Lawrence submits that on the basis that the tribunal were being satisfied that continuation of a day school of itself was sufficient, then this whole penumbra of further support, both in school and out of school, is critical and needed to be specified much more particularly.

36. Mr Greatorex submits, however, that even if those passages describe educational needs, there is appropriate flexibility to meet the changing special educational needs of the child concerned. He relies in particular on paragraph Y of the decision itself in which the tribunal said:

> "In this case we have assessed the assurances made by the LEA . . . and have concluded that we can prudently and safely rely on the assurance that provision was specified on the basis of a promise or assurance as to the future."

He submits, therefore, that the tribunal were entitled to rely, and did rely, on the local authority in effect carrying out their promise or assurance so as to flesh out any lack of specificity in the package within Part 3 of the statement itself. Further, he says, and I accept, that where what is under consideration is a special school, then a lower degree of specificity may be appropriate. That is clearly right in relation to any specification of what provision may require to be supplied by the school itself. But in the present case the attack is not to the provision supplied by the school itself, but to the extra bought-in provision to be supplied, both with extra speech and language therapy in the classroom and also all the extra provision required outside the school altogether.

37. In my view, the challenge of Miss Lawrence is made out in this case. When one stands back and looks at this decision, the decision that LS may appropriately remain at R School is fundamentally underpinned by the surrounding package of educational provision to meet his educational needs. It was, in

> my view, essential that that package should be described in much more detail than that in which the tribunal described it."

65. By contrast there is the decision of Upper Tribunal Judge Mesher in ***CL v. Hampshire County Council (SEN)*** [2011] UKUT 468 (AAC) (17 November 2011), which (like the decision of Upper Tribunal Judge Jacobs in ***East Sussex County Council v. TW*** [2016] UKUT 528 (AAC), to which I refer in paragraph 69) does refer to, and deals with, the decision of the Court of Appeal in ***E v Newham LBC***. The context in which that case was decided was that the main issue was the school to be named in Part 4 of the statement, which the Tribunal eventually narrowed down to a choice between the maintained special school, Lakeside, preferred by the local authority, and Eagle House School, an independent special school preferred by the child's mother. The Tribunal named Lakeside, having found both schools to be suitable for the child, Samuel. There were other issues about the educational provision to be specified in Part 3 and in particular whether occupational therapy (OT) and speech and language therapy (SALT) should be specified. The appeal by Samuel's mother was dismissed.

66. Judge Mesher explained the issues in the appeal and then continued:

> "2. In relation to OT, Samuel's mother, advised and represented by IPSEA, was asking for the provision in Part 3 of the statement under the heading of literacy and numeracy requiring timetabled sessions on a daily basis to implement a handwriting skills programme with an emphasis on developing a cursive handwriting style and practising common patterns of letters to have this sentence added (the word eventually added by the tribunal has been underlined):
>
> > "This should incorporate <u>any</u> advice from an Occupational Therapist."
>
> Similar amendments were sought under the heading of motor and communication skills development so as to read as follows (words eventually deleted by the tribunal have been underlined):
>
> > "Suitably experienced staff will <u>follow the advice of the Occupational Therapist in</u> deliver<u>ing</u> programmes designed <u>by an occupational therapist</u> for Samuel to develop his motor and co-ordination skills.
> >
> > Daily handwriting practice will be put in place to improve pencil control using writing aids <u>as advised by the</u>

> Occupational therapist or Local Authority Advisory Teacher."

3. The tribunal's conclusions on that issue in relation to the handwriting programme in paragraph 23 of its statement of reasons were as follows:

> "The Tribunal was satisfied that Samuel should undergo assessment by an occupational therapist. He has a long standing diagnosis of dyspraxia. We were concerned that, in the absence of such an assessment, the Tribunal was not in a position to determine the amount of occupational therapy provision required if any. However, Samuel has been out of school for a long period of time and it was not in the interests of justice and would be against Samuel's interests to adjourn the case in order to see the results of any such assessment. In this regard, we relied on the case of *E v LB Newham and SENT* [2003] ELR 286. If the assessment reveals a need for provision the LA will be expected in these circumstances to amend the statement accordingly."

Paragraphs 27 and 28 of the statement of reasons in relation to motor and co-ordination skills were as follows:

> "27. … The Tribunal cannot anticipate the advice that will be given by the assessment by the occupational therapist and therefore the reference to a programme devised by the OT will be deleted.
>
> 28. … The Tribunal once again cannot anticipate the advice that will be given by the OT and will delete this reference."

4. In relation to SALT, the tribunal accepted what Samuel's mother was asking for, and had apparently been agreed by the local authority, to the extent of specifying that Samuel required a structured and systematic programme of social skills training with specific timetabled practice sessions, but substituted for the words "as advised by a qualified Speech and Language Therapist" the words "incorporating any advice from a qualified speech and language therapist". The reasons for that were given in paragraph 26 of the statement of reasons:

> "Similarly to the need for occupational therapy advice, Samuel has not had the benefit [of] speech and language therapy assessment and it was clearly important that such an assessment took place in order to set up baseline assessments so that his progress can be measured. Samuel has impaired social communication skills and forming and

> maintaining good relationships with his peers has been a longstanding issue for him. The Tribunal had expected there to be a speech and language therapist report given that it had been cited as one of the reasons for an adjournment at an earlier hearing. Again we were concerned about the lack of specificity but, for the reasons set out above, it was not in Samuel's interests to adjourn the case. If the case is that the assessment reveals a need for provision the LA will be expected in these circumstances to amend the statement accordingly.""

67. He set out the somewhat protracted chronology of the appeal and said that the primary focus of the appeal had to be on the statement of special educational needs as directed to be amended by the Tribunal and whether there was the necessary degree of specificity:

> "10. Here, the most authoritative statement of principle, although at a very general level, was in the judgment of the Court of Appeal, delivered by Schiemann LJ, in *E v London Borough of Newham and SENT* [2003] EWCA Civ 09, [2003] ELR 286. There are of course differences between the precise circumstances of that case and those of the present case, but they do not in my judgment take away anything from the relevance of the statement of general principle. In *E* the main dispute before the equivalent of the First-tier Tribunal had been whether the school named for the child concerned should be a mainstream school, as preferred by his parents, or a special school, as proposed by the local authority. The tribunal decided on the latter. Part 3 of the statement of SEN as amended by the tribunal included the following:
>
> > "An Individual Education Plan should be developed following assessment by a speech and language therapist, occupational therapist and physiotherapist which will offer a fully integrated teaching and therapy programme. Speech and language therapy, physiotherapy and occupational therapy to be provided by Newham Health Trust and reviewed on a termly basis."
>
> The child's parents had been contending for two one-hour sessions of physiotherapy a week, two two-hour sessions of SALT and one hour of OT, but had not put forward any reports from any practitioners in those areas. The tribunal concluded that there was therefore no evidence that the amount of therapy sought was appropriate or necessary and that it would not be in the child's interests to limit the amount of therapy to be received by specifying hours. Instead, the amount of therapy and the most appropriate way of delivering it should be determined and

monitored by the relevant therapist following an assessment of the child's current needs. The challenge to the tribunal's decision was put in the Court of Appeal on the basis that the statement of SEN was not lawful because it delegated to others than the tribunal the task of determining the special educational provision to be made for the child and that where a tribunal lacked the material to be able to make that determination it was obliged, except in cases of overwhelming urgency, to adjourn to enable such evidence to be obtained.

11. The Court of Appeal acknowledged the force in the abstract of the case made for the parents, in particular the general propriety of determining Parts 1 to 3 of the statement of SEN before Part 4, rather than working the other way round, and of not allowing statements to be so unspecific that they did not need to be changed when circumstances changed, but considered the countervailing arguments for allowing the degree of particularity to be determined, not in the abstract, but in the context of the particular case, to be overwhelming. Paragraphs 64 and 65 were as follows:

> "64. The following general considerations have weighed with us:-
>
> (i) At one extreme, a tribunal plainly cannot delegate its statutory duty to some other person or body, however well-qualified. Equally, the statutory duty will not be discharged if the description of the special educational provision which is to be made is framed in terms so vague and uncertain that one cannot discern from it what (if anything) the tribunal has decided in that respect.
>
> (ii) At the other extreme, the statutory duty plainly cannot extend to requiring a tribunal to 'specify' (in the sense of identify or particularise) every last detail of the special educational provision to be made (indeed Mr Wolfe [counsel for the parents] accepted that in an appropriate case a tribunal may lay down minimum requirements).
>
> (iii) Between those two extremes, the degree of flexibility which is appropriate in 'specifying' the special educational provision to be made in any particular case is essentially a matter for the tribunal, taking into account all relevant factors. In some cases a high degree of flexibility may be appropriate, in others not.
>
> (iv) In the particular circumstances of the instant case the tribunal was, in our judgment, fully entitled to conclude that the individual education plan referred to in Part 3 of the statement be determined not by it but by the

> designated special school in conjunction with the therapists.
>
> 65. On the facts of the present case the end result seems eminently sensible – this is a case where the educational and non-educational needs of the child overlapped and were highly complex. The following factors specific to this case have weighed with us:-
>
> (i) the tribunal was dealing with a situation where the parents had reconciled themselves to the fact that a special school rather than a mainstream school was, for the time being, appropriate;
>
> (ii) the reason for much of the argument on provision before the LES and the tribunal was the parents' desire that a mainstream school should be specified – in that context greater specificity might well be appropriate because staff had to be brought in, whereas in the context of a special school such staff were in principle available;
>
> (iii) [the child] had been out of school for a long time and it was important to get him back, yet the professional advice was out of date for reasons which could not primarily be laid at the door of the LEA;
>
> (iv) there was in any event much to be said for flexibility and assessing both needs and provision in the school context;
>
> (v) there were no conflicting assessments by experts – the parents had not themselves (probably for reasons with which we can sympathise) engaged any experts."

12. The differences in the underlying facts and the difference that in the present case the competition was between two special schools, one maintained and one not, and not between a mainstream school and a special school, do not in my judgment affect the relevance of those principles in the present case. Nor do the other cases cited by Mr Holland in the application for permission to appeal, which were in any event decisions only of High Court judges sitting alone. In *Re A* [2000] ELR 639 (which is what Mr Holland must have meant by *A v Sefton*) the main focus of Moses J was on the reasons given by the tribunal for its decision, not on the specificity of the statement of SEN itself. And in commenting on the weakness of the support, in the light of the particular evidence before the tribunal, for its statement that it did not have sufficient information to specify the exact amount of SALT that should be received, the judge said this at page 648:

> "(46) I accept that a Tribunal is entitled to reject a recommendation as to a specific provision in the interests of flexibility. It may be that a Tribunal would conclude that the needs should be met not by any specific provision but, as I have said, by a flexible arrangement. It is unfortunate, if that is what the Tribunal had in mind, that it did not clearly say so. …
>
> (47) I would not have quashed the decision on this ground alone. Whilst it is plain that specificity may be required in the circumstances of particular cases, in relation to this comparatively minor matter it would be quite wrong to give relief."

I have not been able to find a transcript of the other case on this point mentioned by Mr Holland – *S v SENDIST* [2007] EWHC 1139 (Admin). However, the isolated phrases cited do not seem to add anything of value to his case in law.

13. I have also looked at other authorities commonly relied on by representatives in support of a mechanistic and unrealistic application of the guidance in a pre-2001 version of the Special Educational Needs Code of Practice that the education provision set out in Part 3 of a statement of SEN should "normally be specific, detailed and quantified (in terms, for example of hours of ancillary or specialist teaching support)". They do not support such an approach, which is in any event undermined by the use of the word "normally" in the passage quoted above and by the immediately following words "although there will be cases where some flexibility should be retained in order to meet the changing special educational needs of the child". Much the same message is contained in paragraphs 8.36 and 8.37 of the November 2001 Code of Practice.

14. The decisions I have in mind include *L v Clarke and Somerset County Council* [1998] ELR 129 (Laws J), *S v City and Council of Swansea and Confrey* [2000] ELR 315 (Sullivan J) and *E v Rotherham Metropolitan Borough Council* [2001] EWHC Admin 432, [2002] ELR 266 (Bell J). In *L*, Laws J made it clear at [1998] ELR 136H that:

> "a requirement that the help to be given should be specified in a statement in terms of hours per week is not an absolute and universal precondition of the legality of any statement … There will be some cases where flexibility should be retained. However, it is plain that the statute requires a very high degree of specificity."

But he went on at 137B to say that the real question was whether any particular statement was so specific and so clear as

to leave no room for doubt as to what has been decided is necessary in the individual case. In *S*, Sullivan J in posing that question suggested that it had to be answered against the background of the matters in dispute between the parties and the particularity with which competing contentions had been put forward. In *E*, Bell J held, after mentioning the previous cases, that in the particular case a high degree of specificity of in respect of SALT provision was required. But the failure in that regard was that the amendments to the statement of SEN ordered by the tribunal in January 2001 said that the level of SALT support that had properly been specified was to remain at no less than that level until June 2001, thus leaving the level of support thereafter entirely to the local education authority.

15. All of those first instance decisions, apart from pre-dating the more authoritative decision of the Court of Appeal in *E*, plainly leave space for a good deal of flexibility to be applied according to the circumstances of each case and are entirely consistent with the principles laid down by the Court of Appeal, themselves supported by the earlier decision of that court in *Bromley Local Education Authority v Special Educational Needs Tribunal* [1999] ELR 260. There is in my view nothing to be gained by representatives scrabbling around in first instance decisions to find some particular phrase out of its context in the particular circumstances of the case in question or some surface similarity of facts in an attempt to challenge the contents of a statement of SEN as approved by a First-tier Tribunal. The broad, and, if I may say so, wise, general principles laid down in *E* must be applied to the particular circumstances of each case as they arise. Those principles might be said to inject a strong dose of pragmatism into matters, perhaps boiling down to the test being that the contents of a statement have to be as specific and quantified as is necessary and appropriate in any particular case or in any particular aspect of a case. But the wisdom lies in the emphasis on the statement of SEN being a realistic and practical document which in its nature, particularly in cases where the child in question is to start at a new school, must allow for a balancing out and adjustment of the various forms of provision specified as knowledge and experience develops on all sides. Wisdom lies also in leaving a wide scope to the expert judgment of the members of the First-tier Tribunal and not subjecting matters which fall rather uneasily within the framework of a judicial process to inappropriately technical standards.

16. Adopting that approach, I have no doubt that the elements of the statement of SEN put under challenge in the present case, as set out in paragraphs 2 and 4 above, did meet the required standard of specificity. Taking into account particularly the context mentioned by Sullivan J in *S* of the opposing contentions of the parties, I can see no significant difference in

relation to the specificity of what was being required on handwriting skills and motor and co-ordination skills between what was proposed on behalf of Samuel's mother (presumably at a level of specificity satisfactory to her) and what the tribunal ordered to be put into the statement of SEN. The requirement for daily timetabled sessions on handwriting and for experienced staff to deliver a programme designed to develop motor and co-ordination skills was still there and in my judgment constituted the substance of the provision. The only difference was that instead of requiring advice on that provision to be obtained from an occupational therapist the requirement was either for any advice that was obtained to be incorporated (handwriting skills) or to delete the reference to such advice (motor and co-ordination skills). Similarly, in relation to social interaction, the requirement for a timetabled structured and systematic programme was still there, with the only difference being the equivalent of that for handwriting skills. I regard those differences as marginal. In the situation that there were no reports following assessments by an occupational therapist or a speech and language therapist, it was entirely proper for the statement of SEN not to refer to such definite reports. The statement was clear and specific enough about what should be provided for Samuel until any such assessments were carried out, and that in terms of the statement itself is all that is necessary. The mere reference in the statement of SEN to an assessment that might take place fell nowhere near an impermissible delegation of the tribunal's duty to specify the special educational provision to be made. Whether or not the tribunal had the power to include in the statement of SEN a requirement that OT and SALT assessments be carried out (which is rather doubtful in the light of paragraphs 48 to 50 of Moses J's judgment in *Re* A, but is submitted by Mr Holland to be permissible under section 326 of the Education Act 1996 as an amendment consequential to the specification of educational provision), the tribunal was plainly entitled in its expert judgment to determine not to include such a requirement. I deal below with the question of whether the tribunal could be said to have erred in law by not adjourning for assessments to be carried out.

17. I also have no doubt that the tribunal of 15 February 2011 gave adequate reasons for amending the statement of SEN only in the way described above and for rejecting the wording put forward for Samuel's mother. It follows from what I have decided about the adequacy for the statement itself that there was no error of law in the tribunal's not making findings one way or the other about Samuel's need for OT or SALT."

68. There then followed a gap of several years after the decision of Judge Mesher. Thereafter the next case in chronological order is the decision of Upper Tribunal Judge Mitchell in ***JD v South Tyneside Council*** [2016] UKUT 9 (AAC) (4 January 2016) in which he held that the Tribunal did not adequately specify the required special educational provision and remitted the case for rehearing:

> "7. The requirements of the law in this respect are settled. In *L v Clarke & Somerset County Council* [1998] ELR 129 Laws J held "the real question … is whether [the statement] is so specific and clear as to leave no room for doubt as to what has been decided and what is needed in the individual case". I accept Mr D's argument that the statement ordered by the FtT does not meet this standard.
>
> 8. Part 3 of Edith's statement begins "it is recommended that the needs and objectives as previously outlined should be met by the following". A recommendation clearly leaves doubt as to what is being required; in fact it suggests nothing at all is *required*. It also raises doubt as to whether the FtT was aware that its task was to specify provision that the local authority would be required to arrange (section 324(5) EA 1996).
>
> 9. Part 3 of the statement also specifies "individual programmes tailored to her needs. She will require a handwriting programme, a PE programme and a reading programme. These programmes can be provided on an individual basis or in a group situation as deemed appropriate by her school (SENCO)". The bare provision for programmes tailored to needs adds nothing. It cannot possibly have been thought that, without this, the local authority would have set out to provide educational programmes that did not meet Edith's needs. And, while the programmes required are described, their content is not specified at all.
>
> 10. Part 3 also includes "access to multi-sensory teaching may be helpful using visual, auditory and kinaesthetic teaching". Whether provision may be helpful is beside the point. Part 3's purpose is to specify the educational provision that is required. It is not at all clear what, if anything, is required by this entry.
>
> 11. Finally, Part 3 specifies "opportunities to encounter success in her work in order to increase her confidence and self-esteem". Since it cannot seriously be suggested that, without this, the local authority would have designed opportunities for Edith to encounter failure, I cannot understand what this entry seeks to achieve.

> 12. For the above reasons, I decide the FtT's statement does not meet the required standard of specificity as described in *Clarke*. The local authority argued that the statement was not flawed simply because the provision was not quantified numerically. I accept that but it does not meet the other arguments put forward by Mr D. The FtT erred in law by making provision in Part 3 that did not meet the required standard of specificity."

69. That was followed later in the same year by the decision of Upper Tribunal Judge Jacobs in ***East Sussex*** (25 November 2016), to which I referred in paragraph 65 above. That case largely dealt with other matters and the Judge remarked at paragraph 36 that his analysis thus far had provided more than sufficient errors to require him to set aside the Tribunal's decision, but there were other issues on which he ought to comment. He added:

> *"Specificity*
> 39. Of much greater importance than the stray reference to 'care home' is the degree of specificity necessary in a plan. The position is clear on the caselaw. As Laws J explained in *L v Clarke and Somerset County Council* [1998] ELR 129 at 137:
>
> > "The real question … in relation to any particular statement is whether it is so specific and so clear as to leave no room for doubt as to what has been decided is necessary in the individual case."
>
> The Court of Appeal approved of Laws J's approach in *R (IPSEA) v Secretary of State for Education and Skills* [2003] EWCA Civ 7 at [14][3] and it is applied by the Upper Tribunal, most recently in *JD v South Tyneside Council* [2016] UKUT 0009 (AAC) at [9]. The passage I have quoted from page 165 of the *Guidance* is to the same effect.
>
> 40. Laws J accepted (at 136) that: 'There will be cases where flexibility should be retained.' The Court of Appeal said the same in *E v London Borough of Newham and the Special Educational Needs Tribunal* [2003] ELR 286 at [64]-[65]; the degree of flexibility required would depend on the

[3] Laws J's test was again referred to with approval by the Court of Appeal in that case, but the case was essentially concerned with a potential challenge to the legality of three paragraphs in the "SEN Toolkit". Permission to appeal was in fact refused and again I do not derive particular assistance from the case in the present context.

> circumstances of the case. But in *S v City and Council of Swansea and Confrey* [2000] ELR 315, Sullivan J said at 328:
>
> > "Whilst there may have been a need for some flexibility, this should not have been used as an excuse for lack of specificity where detail could reasonably have been provided."
>
> 41. Mr Friel argued that those cases showed that flexibility was permissible when provision was being made at a special school or college. I am not prepared to lay that down as a general proposition. I do, though, accept that this is a factor to be taken into account that may in an appropriate case permit more flexibility than when a mainstream school is involved."

70. The next case is the decision of Upper Tribunal Judge Rowley in ***B-M and B-M v Oxfordshire CC (SEN)*** (29 January 2018). In that case C's parents appealed to the First-tier Tribunal against the contents of Sections B, F and I of his EHCP dated 13 February 2017. By the time of the hearing, in July 2017[4], C was due to transfer from a mainstream primary school to secondary school. The local authority proposed that he should attend a school (the "L School") which was a secondary foundation school, with a specially resourced provision for students with special educational needs, in particular autistic spectrum disorder, run by the local authority. His parents meanwhile proposed that C should attend a school (the "P School") which was an independent special school for pupils aged between 11 and 18 with a diagnosis of autism. In its decision dated 7 August 2017 the Tribunal ordered a number of amendments to be made to Sections B and F of C's EHCP and dismissed the appeal in respect of Section I, ordering that the L School should be named in that section, as the additional cost of sending C to P School would amount to unreasonable public expenditure. C's parents appealed successfully to the Upper Tribunal.

71. Judge Rowley explained:

> "3. Ps submit that the EHC plan is not "so specific and clear as to leave no room for doubt as to what has been decided and what is needed in the individual case" (Laws J in *L v Clarke and Somerset CC* [1998] ELR 129). It is LA's case that, as the

[4] The hearing date is correctly recorded in paragraph 1 of the decision, but is wrongly said to have occurred in July 2016 in paragraph 1 in the body of the reasons.

tribunal ordered that C be placed in an SRP for pupils with autism, there was less need for specificity. Relying on *East Sussex CC v TW* [2016] UKUT 528 (AAC) LA submits that specificity is not necessary when a child is placed in specialist provision. In that case Upper Tribunal Judge Jacobs acknowledged the line of authority that provided that there will be cases where there should be flexibility, the degree of flexibility depending on the circumstances of each case. Judge Jacobs cited Sullivan J in *S v City and Council of Swansea and Confrey* [2000] ELR 315 at 328: "Whilst there may have been a need for some flexibility, this should not have been used as an excuse for lack of specificity where detail could reasonably have been provided". Judge Jacobs said that he was not prepared to lay down as a general proposition that flexibility was permissible when provision was being made at a special school or college, although he did "accept that this is a factor to be taken into account that may in an appropriate case permit more flexibility than when a mainstream school is involved".

…

5. Given the above, it may well be that the tribunal failed to have sufficient regard to the issue of support in the mainstream, and in this case I would lean towards finding that provision was not being made at the equivalent of a special school. However, it is not necessary for me to decide the point because, as Ps point out, the authorities do not suggest that, even for children in specialist provision, the requirement of specificity can be abandoned where detail could reasonably be provided. Ps rely upon a number of alleged deficiencies in the EHC plan as ordered by the tribunal. On balance I find that, in the circumstances of this case, in the examples given below (under Section F of the Plan) detail could reasonably have been provided.

(a) "[C] will have support from a Learning Support Assistant". This fails to identify how much support he will have, or what training and experience the LSA should have. Given the complexity of C's difficulties, this is important.

(b) "[C] requires a programme to develop his social communication and social interaction skills delivered in 1:1 and small group settings with opportunities to practice (sic) new skills learnt throughout the day." Ps rely on Upper Tribunal Judge Mitchell's observation in *JD v South Tyneside Council (SEN)* [2016] UKUT 0009 (AAC) that "the bare provision for programmes tailored to needs add nothing". In that case, as in this, while the required programme was described, its content was not specified at all. Further, the

> word "opportunities" is vague, meaningless and unenforceable.
>
> (c) "Daily opportunities with a teacher to improve self esteem and develop a positive self through increased awareness of individual strengths and attributes and through achieving success in a variety of contexts". This is not radically dis-similar from a provision which was struck down by Judge Mitchell in *JD.*
>
> (d) "[C] requires a structured programme to develop his motor planning coordination skills." The points made under (b) above apply here.
>
> (e) "[C] requires the equivalent 25 hours of support to be used flexibly across the school day to include individual, small group and whole class teaching to meet the outcomes described." This, again, is vague and lacks the required specificity. For example, what is meant by "equivalent"? Who is to provide the support?
>
> 6. For these reasons the tribunal erred in law in making provision which lacked the necessary degree of specificity. Accordingly, I set aside its decision …"

72. Finally in the sequence comes the decision last year of Upper Tribunal Judge Jacobs in ***BB v. Barnet London Borough Council*** [2019] UKUT 285 (AAC) (16 September 2019). The appeal was dismissed and it was held that the Tribunal did make sufficient findings on the child's needs which led to the occupational therapy provision. The content of the special educational provision for sensory and physical set out in Section F contained the therapy which the occupational therapist would devise and that provision related back to the special educational needs in respect of sensory and physical in Section B. Judge Jacobs continued:

> *"Specific provision*
> 22. Mr Friel emphasised the importance that the plan be as specific as possible. He cited Laws J in *L v Clarke and Somerset County Council* [1998] ELR 129 at 137:
>
> > "The real question, as it seems to me, in relation to any particular statement is whether it is so specific and so clear as to leave no room for doubt as to what has been decided is necessary in the individual case. Very often a specification of hours per week will no doubt be necessary and there will be a need for that to be done."

> And the first sentence of that paragraph was approved by the Court of Appeal in *Bromley London Borough Council v Special Educational Needs Tribunal* [1999] 3 All ER 587 at 597. But notice that the whole paragraph is carefully worded to depend on what is appropriate in the particular: *so* specific, *so* clear, necessary in the *individual case*, and *Very often*. Indeed, the passage follows shortly on Laws J's comment at 136:
>
> > "In my judgment a requirement that the help to be given should be specified in a statement in terms of hours per week is not an absolute and universal precondition of the legality of any statement. One can appreciate the force of the comment in the guidance. There will be some cases where flexibility should be retained."
>
> 23. In distinguishing between cases where provision is sufficiently specific and those where it is not, it is important that the plan should not be counter-productive or hamper rather than help the provision that is appropriate for a child. The plan has to provide not just for the moment it is made but for the future as well. Indeed, in this case the plan was only intended to apply when Alyssa changed schools a few months later. It is likely that the provision that is required will vary according to the child's needs at a later date. If absolute precision was required, it could only be obtained by a continual process of revision of the plan, and the time involved in investigating and decision-making on exactly what was now required, with possible appeals, could disrupt the professional's ability to provide what the child requires and disrupt the child's progress. That cannot be right. A plan must allow professionals sufficient freedom to use their judgment on what to do in the circumstances as they are at the time. The tribunal was entitled to use their expertise to decide on the proper balance between precision and flexibility. I am satisfied that that is what it did in this case.
>
> *A final word*
> 24. I cannot end this section better than by quoting what Collins J said in *Secretary of State for Children, Schools and Families v Philliskirk* [2009] ELR 68 at [30]: 'that is what the Tribunal is there for - to form its own judgment'".

73. Naturally, the terms in which the various judges express themselves are not exactly coterminous and are obviously shaped by the particular context of the statement or EHCP with which they were concerned in the individual cases before them. Properly interpreted I do not believe that there is any conflict between them

(see Judge Mesher in ***CL*** at [15]) nor do I consider that any of them is wrongly decided (and in any event I am bound by the decision of the Court of Appeal in ***E v. Newham LBC***). To the extent, however, that there is any tension between them, I prefer the more nuanced approach of Judges Jacobs and Mesher.

74. On the basis of this survey of the decided cases, it seems to me that a number of principles can be distilled from them:

(i) the test of the required degree of specificity is that laid down by Laws J in ***L v Clarke and Somerset*** at p.137B-C as approved by the Court of Appeal in ***E v Newham LBC***, namely

> "The real question … in relation to any particular statement is whether it is so specific and so clear as to leave no room for doubt as to what has been decided i3s necessary in the individual case. Very often a specification of hours per week will no doubt be necessary and there will be a need for that to be done."

(ii) but as Judge Jacobs said in ***BB*** at [22]

> " … the whole paragraph is carefully worded to depend on what is appropriate in the particular: *so* specific, *so* clear, necessary in the *individual case*, and *Very often."*

(and see too Judge Mesher in relation to the Code of Practice in ***CL*** at [13]).

(iii) moreover, as Sullivan J explained in ***S v Swansea CC*** at p.327H

> "The question identified by Laws J has … to be answered not in the abstract, but against the background of the matters in dispute between the parties."

Lack of particularity may allow less specific provision; a more detailed case may require more detailed provision.

(iv) a requirement that the help to be given should be specified in a statement in terms of hours per week is nevertheless not an absolute and universal precondition of the

legality of any statement: see Laws J in ***L v Clarke and Somerset*** at p.136H and ***E v Rotherham MBC*** at [25].

(v) the statutory duty plainly cannot extend to requiring a tribunal to specify (in the sense of identify or particularise) every last detail of the special educational provision to be made: see ***E v. Newham LBC*** at [64(ii)].

(vi) failure to specify a level of support after a particular date may lack the required degree of specificity: see ***E v. Rotherham MBC*** at [31-32].

(vii) provision cast in the form of recommendations as opposed to requirements may lack the requisite degree of specificity: see ***JD*** at [8]; likewise the inclusion of "programmes tailored to need": see ***JD*** at [9], ***B-M*** at [5]; or "opportunities": see ***JD*** at [11], ***B-M*** at [5], but that must be read in the light of the following principles (viii) to (xi).

(viii) there will nevertheless be some cases where flexibility should be retained: see Laws J in ***L v Clarke and Somerset*** at p.136H. The degree of flexibility which is appropriate in specifying the special educational provision to be made in any particular case is essentially a matter for the tribunal, taking into account all relevant factors. In some cases a high degree of flexibility may be appropriate, in others not: see ***E v Newham LBC*** at [64(iii)].

(ix) in distinguishing between cases where provision is sufficiently specific and those where it is not, it is important that the plan should not be counter-productive or hamper rather than help the provision which is appropriate for a child. The plan has to provide not just for the moment it is made, but for the future as well. If absolute precision is required, it can only be obtained by a continual process of revision of the plan, and the time involved in investigating and decision-making on exactly what is now required, with possible appeals, could disrupt the professional's ability to provide what the child requires and disrupt the child's progress. A plan must allow professionals sufficient freedom to use their judgment on what to do in the circumstances as they are at the time. A tribunal is entitled to use its expertise to

decide on the proper balance between precision and flexibility: see Judge Jacobs in ***BB*** at [23].

(x) the broad general principles laid down by the Court of Appeal in ***E v Newham LBC*** must be applied to the particular circumstances of each case as they arise. The contents of an EHCP have to be as specific and quantified as is necessary and appropriate in any particular case or in any particular aspect of a case, but the emphasis is on the EHCP being a realistic and practical document which in its nature must allow for a balancing out and adjustment of the various forms of provision specified as knowledge and experience develops on all sides. Wisdom lies also in leaving a wide scope to the expert judgment of the members of the First-tier Tribunal and not subjecting matters which fall rather uneasily within the framework of a judicial process to inappropriately technical standards: see Judge Mesher in ***CL*** at [15].

(xi) the fact that provision is being made at a special school or college is a factor to be taken into account which may in an appropriate case permit more flexibility than when a mainstream school is involved: see ***S v SENDIST*** at [36], ***East Sussex*** at [41], ***B-M*** at [3]. Greater specificity might well be appropriate in the case of a mainstream school where staff have to be brought in, whereas in the context of a special school such staff may well in principle be available: see ***E v Newham LBC*** at [65(ii)].

75. Ms Thompson sought to argue that Bredon was not a special school for the purposes of principle (xi) above, but it was nevertheless a dyslexia-specialist school and for the purposes of principle (xi) I am satisfied that it was a specialist school rather than a mainstream school and that that factor should be taken into account such that more flexibility should be permitted in the EHCP than if a mainstream school were involved.

76. The decision of Judge Mesher in ***CL*** setting out the decision of the Court of Appeal in ***E v. Newham LBC*** was not originally in Ms Thompson's list of authorities, but I asked her before the hearing to be prepared to deal with that decision at the hearing itself, which she duly did. She sought to distinguish the decision in ***E v Newham LBC*** on the basis that (a) the child in that case had been out of school for a long time and it was important to get him back and that (b) the statement in that case

did not refer to recommendations as that in the instant case did. She sought to distinguish ***CL*** on the basis that the child in that case had also been out of school for a long time and it was important to get him back. I do not find that those features suffice to distinguish those cases from this one in the present context. Of course the instant case and that case arise out of different facts, and as Judge Mesher said in ***CL*** at [15] there is nothing to be gained by representatives scrabbling around in first instance decisions to find some particular phrase out of its context in the particular circumstances of the case in question or some surface similarity of facts in an attempt to challenge the contents of an EHCP as approved by a First-tier Tribunal, but as I put to her in the course of the argument, if the provision upheld by the Court of Appeal in ***E v Newham LBC*** (referred to and repeated in ***CL*** at [10]) were sufficiently specific, it was difficult to see why the provision in this case was not similarly sufficiently specific.

77. In the light of the foregoing principles, does the amendment to Section F that C "shall have 1 x 1hr 1:1 support each week to facilitate and support work recommended by Speech and Language therapy on an individual basis and within the wider learning environment. This shall be subject to termly review" pass muster? I shall deal first with the provision for 1:1 support and will deal with the provision for termly review below.

78. In the first place the amount of the provision of speech and language therapy is specified: it is 1 x 1 hour of 1:1 support each week. That is different from vague provision with which Laws J found fault in ***L v Clarke and Somerset*** or the "weekly" provision which fell foul of Sullivan J in ***S v Swansea CC*** or the "once a week for a term" provision which Holman J struck down in ***S v SENDIST.***

79. Secondly, the provision does not stand alone. It must be read in the context of the other major amendment to Section F to the effect that "[C] shall be taught and supported by staff with qualifications and relevant experience in supporting children with learning difficulties, specifically dyslexia as well as associated sensory, behavioural, developmental and communication and interaction difficulties". It seems to me that the amendments to Section F read as a whole emphasise the EHCP being a realistic and practical and not overly prescriptive document. Of its nature it allows for a

balancing out and adjustment of the various forms of provision specified as knowledge and experience develops on all sides. The provision ordered gives wide scope to the expert judgment of the members of the Tribunal and does not subject matters which fall rather uneasily within the framework of a judicial process to inappropriately technical standards. In other words, it is consistent with the principles laid down by Judge Mesher in ***CL*** (and indeed those laid down by Judge Jacobs in ***BB***, to which I refer further in paragraph 83 below). Moreover, as I have explained in paragraph 75, Bredon was a dyslexia-specialist school and that factor should be taken into account with the result that more flexibility is permissible in the EHCP than if a mainstream school were involved. Absolute precision in the form suggested by the Council, could only be achieved by continual revision of the plan. By contrast, the plan adopted by the Tribunal, using its expertise to decide on the proper balance between precision and flexibility, allows professionals sufficient freedom to use their judgment on what to do for C in the circumstances as they are from time to time. The statutory duty does not extend to requiring the Tribunal to specify (in the sense of identify or particularise) every last detail of the special educational provision to be made for C.

80. Thirdly, so far as the phrase "to facilitate and support work recommended by Speech and Language therapy on an individual basis" is concerned, although that is cast in terms of work recommended by speech and language therapy, I am satisfied that in its context it is different from the "recommendations" criticised by Judge Mitchell in ***JD.*** In that case it was the EHCP which recommended rather than required the meeting of the needs and objectives by the following provisions. In this case the Tribunal had required or ordered the concrete provision that C was to have 1 x 1hr 1:1 support each week; the purpose of that concrete provision was to facilitate and support work recommended by speech and language therapy on an individual basis.

81. I am therefore satisfied that the provision for speech and language therapy does not offend against the test of specificity laid down by Laws J in ***L v. Clarke and Somerset***.

82. With regard to the provision for termly review, it is important to note that the appeal in ***E v Rotherham MBC*** was *not* directed at the fourth bullet point, viz. the provision for review every 6 months; rather the appeal was directed to the fifth bullet

point and the potential consequences for the level of support after June 2001: see [13]. That bullet point was vulnerable to challenge in that

> "31. Secondly, there was, in my judgment, no good reason to believe at the time of the Tribunal hearing that the need for specificity in respect of SALT provision for C would be any less in June 2001 or indeed thereafter. Indeed the indications were that there would still be a need for the same degree of specificity because the LEA was contemplating the possibility of a reduction in the level of SALT to what was generally associated with Level 2 and Mrs E was not, in January 2001, prepared to contemplate any reduction.
>
> 32. Yet, by the terms of its order set in out as the last bullet point the Tribunal on my reading left the level of support after June 2001 to be decided by the LEA. In so doing it failed, in effect, in my judgment, to be specific at all as to what the level would be after June 2001."

I do not therefore accept Ms Thompson's proposition that the appeal was directed at the provision for the termly review in the fourth bullet point.

83. Moreover, in ***E v Newham LBC*** the provision for an individual plan was to be developed following assessment by the relevant professionals and speech and language therapy, physiotherapy and occupational therapy were to be provided and reviewed on a termly basis and that provision was found to be sufficiently specific. In my judgment, in the instant case the provision for termly review was consistent with the principle explained by Judge Jacobs in ***BB*** that an EHCP plan has to provide not just for the moment it is made, but for the future as well. If absolute precision without possibility of review were required, it could only be obtained by a continual process of revision of the plan, potentially disrupting the professionals' ability to provide what the child requires and disrupting her progress. The ECHP as amended with the review provision allowed professionals sufficient freedom to use their judgment on what to do in the circumstances as they are at the time. I am therefore satisfied that the provision for termly review also does not offend against the principle laid down by Laws J in ***L v. Clarke and Somerset***.

84. C's mother agreed that, if it were necessary to excise that provision to preserve the validity of the rest of the amendments to Section F, she would agree to it. Ms

Thompson did not make a specific submission on that basis, although she argued that the excision of the provision would not save an amendment which was otherwise bad for other reasons. It seems to me that as a matter of jurisdiction it would be open to me to remake the Tribunal's decision by excising the last sentence in that amendment to Section F if that were necessary to uphold the validity of the rest of the amendment, as was done in ***E v Rotherham MBC*** at [38]. It would clearly be preferable to remake the decision and substitute a different order than to remit the matter for further rehearing, potentially before a different panel. Had it been necessary to excise the provision for termly review, I would have done so and remade the decision accordingly, but in my judgment the amendment to Section F, including the provision for termly review, is sufficiently specific to be lawful and in that event I do not need to consider the excision of that sentence any further.

85. As can be seen from the foregoing exegesis on the decided cases, I am satisfied that Ms Thompson's first ground of appeal was eminently arguable and I therefore grant permission to appeal in respect of it. However, I am also satisfied that the Tribunal was entitled to make the amendments to Section F which it did, namely that C "shall have 1 x 1hr 1:1 support each week to facilitate and support work recommended by Speech and Language therapy on an individual basis and within the wider learning environment. This shall be subject to termly review" and that its decision in that respect did not constitute an error of law on the basis of lack of specificity. Accordingly, whilst I give permission in respect of it, I dismiss it as a ground of appeal.

The Second Ground of Appeal

86. I shall begin with the Tribunal's alleged misunderstanding of the documentation. In paragraph 60 of its decision the Tribunal stated that

> "We have taken note of [C]'s attainment scores: per p.168 Learning Support Team initial assessment from June 2019, out of 16 areas of 11 assessment, [C] scored 'below average' or 'well below average' in 11 areas. This was at a time, where according to the documentation (p.132-133) [C] was receiving full time 1:1 TA support including for 5hrs per week in both literacy and numeracy and 4hrs pw of individual SALT."

87. The first sentence from the extract was correct. That can be seen from the table on page 168: out of 16 areas of 11 assessment, C did indeed score 'below average' or 'well below average' in 11 areas. I accept, however, that the Tribunal erred in its understanding of the documentation referred to in the second sentence. The documentation referred to pages 132 to 133 was Wychbold First School's application for an EHC needs assessment, prepared in January 2018 which set out what Wychbold First School considered C *could* receive if she had an EHCP. To that extent the Tribunal made an error of law. It is not, however, every error of law which means that the decision of the Tribunal must be set aside. A decision should only be set aside if the error of law was material to the Tribunal's decision.

88. If what was said in the second sentence of paragraph 60 had been the sole basis for the Tribunal's conclusion in paragraph 69 as to the amendments to Section F of the EHCP, that sentence would have been material to the decision as to the terms of Section F. It was not, in fact, the sole basis of the decision, which was based on the totality of the evidence set out in paragraphs 56 to 69, which included the report of Dr Tesoi and the Learning Support Team assessment undertaken in June 2019, and it also used its own expertise as a specialist tribunal to reach the conclusions which it did. In the context of paragraphs 56 to 69 taken as a whole, I am satisfied that there was other evidence on which the Tribunal relied in reaching its decision and that, if the error in the second sentence of paragraph 60 stood alone, that would not have been a material error such as to justify the setting aside of the decision for material error of law.

89. Of more consequence was Ms Thompson's second point based on the distillation of what Beaton J said in ***L v London Borough of Waltham Forest*** to the effect that:

> "Secondly, a specialist Tribunal, such as the Special Educational Needs and Disability Tribunal, can use its expertise in deciding issues, but if it rejects expert evidence before it, it should state so specifically. In certain circumstances it may be required to say why it rejects it: see *H v Kent*, per Grigson J at paragraph 50.
>
> …
>
> Fourthly, and linked to the second point, where the specialist Tribunal uses its expertise to decide an issue, it should give

> the parties an opportunity to comment on its thinking and to challenge it. That is established in the Mental Health Review Tribunal context by the *Clatworthy* case, and in the context of this Tribunal in *Lucie M v Worcestershire County Council*.

90. Ms Thompson's submission was twofold:

(i) the Tribunal's amendment was not based on any speech and language therapy (or other) evidence (and the speech and language therapy report of Mandy Martin, dated 20 February 2018 (pages 135 to 141) made no such recommendation, nor did it say that that was what she was receiving at that time). Moreover, at paragraph 52 the Tribunal accepted the unchallenged evidence of Ms Jordan, that C had a developmental language delay, but then seemingly decided to use its own expertise to determine the level of speech and language provision which C required, rather than including Ms Jordan's recommendations at page 369. The Tribunal could use its expertise in deciding between competing expert views, but here there were no competing experts in the appeal and the Tribunal provided no explanation for rejecting Ms Jordan's recommendations. That offended against Beatson J's second point

(ii) the Tribunal gave no indication during (or prior to) the hearing that it considered that any alternative provision might be necessary; thus, neither party was given an opportunity to comment on the Tribunal's thinking or to challenge it. That offended against Beatson J's fourth point.

91. The two points are to some extent intertwined and the essence of the complaint which is common to both is that the Tribunal erred in law in using its expertise in the way it did. To deal with the second of those points first, I note that in the case of ***S v. SENDIST***, which postdates the decision in ***L v. Waltham Forest***, Holman J said that:

> "11. I will describe them more fully in a moment, but the essence of the argument is as follows. On behalf of the parents, Miss Lawrence says, first, that in determining and describing those other needs and the required provision for them, the tribunal reached an outcome which was not based on the evidence adduced by either side and, as it were, was something that they invented or arrived at themselves. She

> says, second, that the outcome to which they came was not one which the tribunal had canvassed during the hearing itself, and accordingly there was an injustice in that they reached a conclusion without giving either side -- but in particular the parents -- an opportunity to comment upon it. She says, thirdly, and to my mind most importantly, that the outcome to which they came was too lacking in specific detail as to be enforceable or to represent a proper statement of the required educational provision.
>
> 12. I say at once, and briefly, that I am not prepared to consider the first two of those three grounds of complaint. In the first place, it seems to me that a specialist tribunal such as this must, at any rate to some degree, be entitled to come to a conclusion, or outcome of their own, even if it is not one that was advocated by either side, nor even necessarily supported by "evidence" by either side. A specialist tribunal must surely be able to bring its own expertise and judgment to bear in formulating their view as to the needs and required provision for the child."

92. More recently, Judge Jacobs said in ***BB v. Barnet LBC***

> "16. The ways in which a tribunal may use its expertise are various, and the circumstances in which they may do so are subject to (possibly infinite) variation. And it is always relevant and necessary for the Upper Tribunal to consider whether what happened affected the outcome of the case: see the emphasis on materiality in *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982 at [10] and the approach of the Court of Appeal in *Richardson v Solihull Metropolitan Borough Council and the Special Educational Needs Tribunal* [1998] ELR 319 at 342-343 (Beldam LJ) and 343-344 (Peter Gibson LJ). That makes it difficult to establish precise rules. And this, in turn, affects the way that it is appropriate to rely on earlier decisions. They can properly be relied on for statements of principle. It is wise, though, not to elevate what is really no more than the application of a general principle into a sub-principle or rule. And it is dangerous to reason by comparison from case to case when so much can depend on the particular combination of circumstances and their context, and on their impact on the outcome of the case.
>
> 17. I have made the point about the use of authority in order to deal with one of Mr Friel's argument. He referred to *M v Worcestershire County Council and Evans* [2003] ELR 31 in which Lawrence Collins J found no fault with a tribunal that had used its expertise. Mr Friel sought to distinguish that case on the ground that the tribunal had been presented with a

choice of provision in that case, whereas in this case it had not. I do not accept that argument or that approach to the authority. The distinction does not figure in the judge's reasoning and, applying the touchstone of principle, it is not appropriate. The issue is the fairness of the proceeding, not the particular context or the way in which fairness was said to be compromised. Whether the tribunal had a choice or not may be relevant, but it does justify two categories of case or even of outcome.

18. Fairness depends on the context. In this case, the local authority had not put forward any evidence on occupational therapy. It was clear that the tribunal would have to make a decision on the limited evidence available, with the benefit of its expertise. The duty of fairness does not solely rest on the tribunal. The parties are under a duty to cooperate under rule 2 of the rules of procedure, and that duty applies to their representatives as well (*Geveran Trading Co Ltd v Skjevesland* [2003] 1 WLR 912 at [37]). That meant that the parties should have provided evidence, if they wished to do so, and assisted the tribunal by inviting the members to put their ideas to the parties and the witnesses. They should not sit back and then criticise the tribunal for not doing what they could have prevented. I am not saying that this absolved the tribunal from its duty of fairness, only that the parties were required to assist the panel.

19. The difficulty for a tribunal is how to allow the parties to comment effectively on the case before it has fully deliberated on the case and made its findings of fact. How can the parties effectively comment without knowing what the members are thinking? What should the tribunal do if something new occurs to the members after the hearing? That depends on what it is that arises. It may be an entirely new issue or basis for decision that no one contemplated during the hearing. In that case, fairness will require the tribunal to put it to the parties (*Richardson* at 332 (Beldam LJ)). In other cases where the tribunal's thinking has been effectively, albeit not perhaps directly addressed, putting any new idea to the parties for comment and perhaps more evidence would prolong the proceedings. The tribunal is entitled to proceed on the basis that the submissions and evidence are complete at the end of the hearing and that further reference back to the parties is not necessary unless something new arises that has not been fairly covered. The tribunal is entitled to expect the representatives to anticipate the likely range of options that the tribunal will consider and present their case accordingly."

93. Those authorities, it seems to me, provide the answer to Ms Thompson's second point. The issue is the fairness of the proceedings, not the particular context or the way in which fairness was said to be compromised. Fairness depends on the context. If there is an entirely new issue which no one contemplated during the hearing, fairness will require the Tribunal to put it to the parties. By contrast, in other cases where the Tribunal's thinking has been effectively, albeit not perhaps directly addressed, putting any new idea to the parties for comment and perhaps more evidence would prolong the proceedings. In the latter event the Tribunal is entitled to proceed on the basis that the submissions and evidence are complete at the end of the hearing. Further reference back to the parties is not necessary unless something new arises which has not been fairly covered. The Tribunal is entitled to expect the representatives to anticipate the likely range of options that it will consider and present their case accordingly.

94. Judged by those principles, the course of action adopted by the Tribunal was not unfair. The issue of alternative provision in the form of 1:1 support and specialist input in speech and language therapy had been canvassed by Dr Tesoi's report (as to which see in more detail below in relation to the third and fourth grounds of appeal). The question of the provision of "1:1 SaLT" was not therefore an entirely new issue which no one had contemplated during the hearing. Rather it was an issue which was not perhaps directly addressed, but was one which was effectively in the ring for decision. The expedient of going back to the parties on that point for yet further comment and possibly yet more evidence would simply have prolonged the proceedings. In my judgment the Tribunal was entitled to proceed on the basis that the submissions and evidence were complete at the end of the hearing and to make its decision on the issue of 1:1 support using its own expertise on the basis of those submissions and that evidence.

95. As to Ms Thompson's first point, I accept that the speech and language therapy report of Mandy Martin made no recommendation for 1:1 support and that the Tribunal accepted the unchallenged evidence of Ms Jordan that C had a developmental language delay, but did not then make any further reference to the report. I do not, however, accept that the Tribunal's amendment to Section F was not based on any evidence. The issue of alternative provision in the form of 1:1 support

and specialist input in speech and language therapy had been canvassed by Dr Tesoi's report (as to which see in more detail below). The Tribunal had to reach a decision in a case where the expert evidence was not *ad idem.*

96. I also accept that it would have been better if the Tribunal had commented specifically on the evidence of Mandy Martin and Ms Jordan (over and above the adoption of the latter's evidence that C had a developmental language delay), but that absence was not fatal to its decision. As Mr Commissioner Temple said in ***R(A) 1/72*** at paragraph 8

> "It is not, of course, obligatory thus to deal with every piece of evidence or to over-elaborate, but in an administrative quasi-judicial decision the minimum requirement must at least be that the claimant, looking at the decision, should be able to discern on the face of it the reasons why the evidence has failed to satisfy the authority".

97. To that I would add what Lord Hope said in ***Shamoon v. Chief Constable for the Royal Ulster Constabulary*** [2003] UKHL 11, [2003] ICR 337 at [59]:

> "It has also been recognised that a generous interpretation ought to be given to a tribunal's reasoning. It is to be expected, of course, that the decision will set out the facts. That is the raw material on which any review of its decision must be based. But the quality which is to be expected of its reasoning is not that to be expected of a High Court judge. Its reasoning ought to be explained, but the circumstances in which a tribunal works should be respected. The reasoning ought not to be subjected to an unduly critical analysis."

98. As he also said in ***R (Jones) v. First-tier Tribunal (Social Entitlement Chamber) & Criminal Injuries Compensation Authority*** [2013] 2 AC 48 at [25]:

> "It is well established, as an aspect of tribunal law and practice, that judicial restraint should be exercised when the reasons that a tribunal gives for its decision are being examined. The appellate court should not assume too readily that the tribunal misdirected itself just because not every step in its reasoning is fully set out in it."

99. I would also draw attention in this context to what I say in paragraphs 113 to 116 in relation to the fourth ground of appeal, which apply with equal force to the second ground of appeal. I am satisfied that in reaching the conclusion which it did, the Tribunal exercised its own judgment and exercised it in a permissible way - and as Collins J said in ***Secretary of State for Children, Schools and Families v Philliskirk*** at [30]: "that is what the Tribunal is there for - to form its own judgment."

100. I consider that Ms Thompson's argument - that the Tribunal's decision that C required "1:1 SaLT" (paragraph 68) was unlawful as it was not based on any evidence/ignored relevant evidence/otherwise failed to explain why it did not consider it relevant - was an eminently arguable point and I therefore grant permission to appeal in respect of it. However, I have ultimately reached the conclusion that the Council has not made out that the Tribunal's decision constituted a material error of law and accordingly I dismiss it as a ground of appeal.

The Third Ground of Appeal

101. Dr Tesoi's report stated (at page 151) that

> "In conclusion, it is my opinion that to achieve the specified outcomes and SMART targets [C] will require the following provision:
>
> …
>
> Staff Qualifications and experience: knowledge and experience in supporting children with learning difficulties as well as associated sensory, behavioural, developmental and communication and interaction difficulties".

102. In its decision the Tribunal determined (in paragraph 69) that

> "[C] shall be taught and supported by staff with qualifications and relevant experience in supporting children with learning difficulties, specifically dyslexia as well as associated sensory, behavioural, developmental and communication and interaction difficulties"

103. Ms Thompson sought to argue that that was a significant departure from the advice of Dr Tesoi and altered its meaning. Dr Tesoi did not state that specific

qualifications were necessary; she plainly considered whether specific 'qualifications' were necessary, but determined that only sufficient 'knowledge and experience' was required.

104. However, as I pointed out during the hearing, the obvious way in which a person demonstrates relevant knowledge of a subject is by obtaining a qualification in it. Moreover, it is clear that Dr Tesoi considered that staff qualifications and experience and knowledge and experience were essentially synonymous and coterminous. The Council's point is altogether devoid of substance.

105. Ms Thompson further submitted that the Tribunal further misinterpreted Dr Tesoi's advice in paragraph 67 by stating that

> "Contrary to Dr. Tesoi's advice, [C] has not received teaching by specialist trained educators with experience in dyslexia and associated learning profiles".

However, Dr Tesoi's report did not say that that was what C required.

106. What Dr Tesoi's report said in relation to C's educational provision was that

> "In conclusion, it is my opinion that to achieve the specified outcomes and SMART targets [C] will require the following provision:
>
> Additional support: TA support from a designated and consistent Teaching Assistant to provide daily support and activities specified. 1:1 support to be subject to annual review according to progress towards goals, with full parental involvement. [C] will require guaranteed supervision, individual and small-group input and the provision of targeted therapeutic intervention in order to allow her to access and engage in the learning environment. If needed, specialist provision should be taken into consideration.
>
> Staff Qualifications and experience: knowledge and experience in supporting children with learning difficulties as well as associated sensory, behavioural, developmental and communication and interaction difficulties.
>
> Specific Intervention: Specialist Input to be provided by Psychology, Speech and Language Therapy and Occupational

> Therapy, as required and recommended. Support should also include oversight and review of programmes, with suggested modifications.
>
> …
>
> Environment: Low arousal space to [sic] with 1:1 support within small-group and class setting. Access to withdrawal space when needed".

107. It is correct that that is not entirely accurately summarised in paragraph 67 of the statement of reasons, but by contrast in paragraph 58 the Tribunal had much more accurately summarised her recommendations in the following words:

> "[C] will require guaranteed supervision, individual and small-group input and the provision of targeted therapeutic intervention in order to allow her to access and engage in the learning environment. If needed, specialist provision should be taken into consideration.
>
> Staff Qualifications and experience: knowledge and experience in supporting children with learning difficulties as well as associated sensory, behavioural, developmental and communication and interaction difficulties.
>
> 1:1 support to facilitate and support work recommended by Speech and Language therapy on an individual basis and within the wider learning environment".

108. It was on that basis that the Tribunal ordered the substitution in the last sentence of Section F of the words

> "C shall be taught and supported by staff with qualifications and relevant experience in supporting children with learning difficulties, specifically dyslexia as well as associated sensory, behavioural, developmental and communication and interaction difficulties"

which, as I have found above, it was entitled to do and which did not disclose any error of law.

109. The fact that the Tribunal may not have entirely accurately summarised the recommendations of the report in paragraph 67 when it had already accurately

summarised them in paragraph 58 and based its amendment to Section F on that accurate summary does not disclose an error of law, certainly not a material error of law. I do not give permission to appeal on that ground

The Fourth Ground of Appeal

110. The fourth ground of appeal was that, even if the Tribunal did properly interpret Dr Tesoi's evidence, it had placed undue weight on her report.

111. Dr Tesoi's report was over two years old by the date of the hearing, but it was, as the Tribunal found, the only comprehensive Educational Psychology report in the papers (paragraph 58). Contrary to the local authority's submission, the Tribunal did not "criticise" Dr Beck. What it stated was that, as was indeed the fact, the later report did not repeat Dr Tesoi's assessments and clinical evaluations and merely adopted them. It may well be that professional guidance on repeating tests meant that Dr Beck would have been unable to repeat the same assessments within a certain period of time, but nothing in the Tribunal's decision can be read as a criticism of Dr Beck. Dr Beck's advice may have been more recent than Dr Tesoi's, but given that it did not repeat Dr Tesoi's assessments and clinical evaluations and in fact adopted them, it seems to me that the Tribunal was entitled to prefer the conclusions of Dr Tesoi's report to those of Dr Beck insofar as they differed and that it was not an error of law for it to do so.

112. The real thrust of Ms Thompson's submission was that the Tribunal failed to explain why it gave greater weight to Dr Tesoi's report when it also had two reports from Ms Smith of the Learning Support Team which considered C's needs and the provision required. The Tribunal, she argued, ignored all of that advice without a reasonable explanation. The later report, which was the one which diagnosed C with dyslexia, made no recommendation for C to be taught by staff with specialist dyslexia qualifications. If that provision was necessary, submitted Ms Thompson, that would have been recommended by Ms Smith (and Dr Ashmore), but it was not.

113. The Tribunal did refer to Ms Smith's reports, particularly the later report which had diagnosed dyslexia in December 2019 in paragraph 70 of the statement of reasons. It also adopted and incorporated her very recent diagnosis of dyslexia which

she had made (although it misdated it to January 2020) in paragraph 53. It noted the recommendations which she had made, although it did not repeat them. It also, correctly, noted that she mostly prescribed strategies which were not appropriate for inclusion within an EHCP, although it found that access to IT did comprise provision required for C and that Section F should be amended to include a new bullet point to the effect that a word processor should be available to her for her use in producing written work.

114. Dr Tesoi had made recommendations for specialist teaching provision for C; Ms Smith did not. The Tribunal was therefore faced with making a decision on the question where the experts did not all speak with one voice, a common situation in such cases. It reached its conclusions and explained why it had done so. It might have made more and referred in more detail to the advice of Ms Smith, who diagnosed C's dyslexia, although it did make the point that she had mostly prescribed strategies which were not appropriate for inclusion within an EHCP. I can, however, see no error of law in the way in which it went about its task or the conclusion which it expressed on the point now in issue.

115. It is important in this context to remember what Upper Tribunal Judge Wikeley said in ***Basildon DC v. AM*** [2009] UKUT 113 (AAC)

> "27. There is ample authority in the case law about the standards of reasoning expected of fact-finding tribunals in explaining their decisions. There is, for example, a helpful and realistic discussion by Mr Commissioner (now Judge) Rowland in *CIB/4497/1998* (at paragraph 5):
>
> > '5. It cannot be overemphasised that there is no simple formula for writing reasons for a decision. The minimum requirements are that the unsuccessful party must know why his or her principal submissions have been rejected and that the process of the tribunal's reasoning must be sufficiently clearly outlined to avoid any reasonable suggestion that the tribunal have made an error of law. Obviously, the more clearly the reasons are expressed in the decision itself the better, but lack of clarity will not render a decision erroneous in point of law if the reasons can nevertheless be discerned with reasonable diligence from the decision and surrounding documents. A statement of reasons may be adequate even though it could have been improved … Those who

> assert that a tribunal's reasoning is inadequate must themselves explain clearly both the respect in which it is inadequate and why the inadequacy is of significance. It must be borne in mind that there are limits to the extent to which a tribunal is obliged to give reasons for reasons and to the extent to which they can be expected to give reasons for matters of value judgement. Furthermore, it is clear from *R(A) 1/72* that it is not obligatory to deal with every piece of evidence and that, while "a decision based, and only based, on a conclusion that the total effect of the evidence fails to satisfy, without reasons given for reaching that conclusion, will in many cases be no adequate decision at all", that will not always be the case. What is required by way of reasoning depends very much on the circumstances of the particular case before the tribunal.'

28. It is also well established that when explaining how it has exercised its judgment, a first instance tribunal is not bound to deal with every matter raised in the case. As Tucker L.J. explained in *Redman v Redman* [1948] 1 All E.R. 333 at 334:

> 'I desire to emphasise as strongly as I can that the fact that judge or commissioner does not set out every one of the reasons which actuate him in coming to his decision will not be sufficient to support an argument in this court that he has not applied his mind to the relevant considerations … The mere fact that, in his judgment, the commissioner may not have mentioned some fact or other or that he emphasised some other fact is quite insufficient to persuade me that he did not, in fact, apply his mind properly to the relevant matters which he does not in terms mention.'

29. Similarly, in a more recent decision in the matrimonial and family jurisdiction, Holman J. in *B v B (Residence Order: Reasons for Decision)* [1997] 2 F.L.R. 602 (at 606) stated that:

> 'I cannot emphasise strongly enough that a judgment is not to be approached like a summing-up. It is not an assault course. Judges work under enormous time and other pressures, and it would be quite wrong for this court to interfere simply because an ex tempore judgment given at the end of a long day is not as polished or thorough as it might otherwise be.'

30. A tribunal's Statement of Reasons is not usually an ex tempore (unreserved) judgment, but the observations of Holman J. are just as applicable to decisions of fact-finding tribunals as they are to decisions of courts of first instance.

> 31. This tribunal made a clear and categorical credibility finding in favour of the claimant which in my judgment is unimpeachable and central to its decision. The credibility finding underpinned the tribunal's conclusions on the nature of the relationship between the claimant and her landlord and its acceptance of her evidence about e.g. the rental agreement and the payment of rent. That amounted to "clear and overwhelming evidence" which was not undermined by the "unusual" features of the case. The tribunal evaluated the evidence and explained why those factors did not alter its conclusion.
>
> 32. My conclusion therefore is that the tribunal's decision discloses no error of law in this respect. It is important to read the decision as a whole. I am satisfied that this tribunal applied the correct legal tests, found facts that it was entitled to do on the evidence before it and provided adequate reasoning."

116. The local authority itself acknowledged that the Tribunal had rightly considered provision for C's dyslexia and the inclusion of that need within Section B of the EHCP and did not challenge the inclusion of the last bullet point in Section F. Although in my judgment it might have made more and referred in more detail to the advice of the professional who diagnosed her dyslexia, when the decision is read as a whole I am satisfied that the Tribunal applied the correct legal test, found facts which it was entitled to do on the evidence before it and provided adequate reasoning for its conclusions on the point now in issue.

117. I do not give permission to appeal on that ground.

The Fifth Ground of Appeal

118. The Tribunal determined that C had not made sufficient progress, on that basis identifying that C required additional provision and finding that Westacre was unsuitable. As part of its finding that Westacre was unsuitable, the Tribunal recorded that the evidence from Westacre was that they had done all that they reasonably could (which the Tribunal accepted) (paragraph 89).

119. Ms Thompson submitted that that conclusion contradicted the evidence before the Tribunal and that identified within its own decision in the witness statement of

Laura Brighton and its recording of the evidence of Ms Evans. What the witness statement of Laura Brighton stated was that "We are aware that [C] has previously had involvement from the Learning Support Team, speech and language therapy, paediatrics and educational psychology. The school could seek further involvement from these services if necessary" (page 349). What Ms Evans said was that "there is more we could do, the more reports we get the more we think of - the dyslexia report has triggered more thoughts for us …" " (paragraph 45).

120. However, it is important to see the whole of Ms Brighton's and Ms Evans' evidence in context, both the written evidence before the hearing and the oral evidence at the hearing. It is clear that the oral evidence was much less optimistic and upbeat than the written evidence and that obviously weighed heavily with the Tribunal.

121. Thus questions were put to Ms Brighton about C's rate of progress and she accepted in general terms Bredon's assessment of her learning needs and that Westacre assessed her as operating around 6 years 3 months (3 years below her age). She added (paragraph 39)

> " … she is making small steps of progress, she is making progress with support but we are aware that she has very big gaps in her maths and has very specific things that she needs to work on"

and when asked whether the provision at Westacre was adequate to support material progress replied (paragraph 40)

> "that is a very difficult question – she has been making small steps – we are constantly reviewing and if we think she needs more then we will put in the paperwork."

122. She was asked whether Westacre would expect to see the gap narrowing between C's and her peers, given her underlying cognitive ability and replied (paragraph 43)

> "she is significantly below – she may be in that band the whole time. It doesn't mean she's not making small steps but I

> can't say if she should be catching up but I can always make sure we're doing as much as we can to ensure they're making progress"

and when asked if she had concerns about C's general lack of progress and whether as SENCO she was satisfied with the progress she said (paragraph 44)

> "As with any child significantly below, we are concerned; we know, we are aware of it … Of course she could be making more progress as could all children – she's making steps and achieving some of the things we are teaching her …"

123. For her part Ms Evans was asked if C's current funding band at E2 could be increased in some way and she answered (paragraph 41)

> "E3 is a high level of need for a mainstream school, at the point where you have to weigh up whether we can meet need"

and added (paragraph 42)

> "If "money were no object" … additional 1:1 "would help of course". In relation to specialist teaching, "I can't say it wouldn't help". … "she is someone already having a lot of support – the more support the better – she benefits from extra support"".

124. She also stated (paragraph 45)

> "there is more we could do, the more reports we get the more we think of – the dyslexia report has triggered more thoughts for us. In terms of her potential, there is more there but we are working within the mainstream school that we are"

and with regard to C's withdrawal from school at the beginning of December (paragraph 46)

> "if she were to come back – she has missed 4 weeks of teaching – we have worries in terms of catching up as well as keeping up – would have to look at that, and how to consider that she is emotionally supported. It would need to be a very careful transition."

125. It is in that context that the reasons given by the Tribunal as to the unsuitability of Westacre must be understood. It is against that background that the Tribunal found that

> "87. It is our finding that whilst Westacre have done all that they could reasonably do, within their remit as a mainstream school, to support [C], they are not able fully to meet her Section B special educational needs, by inputting the required Section F special educational provision.
>
> 88. We were concerned that Westacre did not have particularly high aspiration for [C]. The phrase we heard over and again was "small steps of progress". Westacre found it difficult to concede that [C] should be making more decisive progress in her attainment, given the repeated assessments of her average underlying cognitive abilities. Evidence from Westacre repeatedly fell into general comment: in answer to the question, "are you concerned about [C]'s lack of progress?", answer, "As with any child significantly below, we are concerned, we know, we are aware of it".
>
> 89. We agree with [her mother] that this appeal and our discussions concerned [C] specifically with her strengths and weaknesses. We find it more likely than not that [C] has academic potential which to date has not been properly supported. The evidence from Westacre is that they have done all that they reasonably can (which we accept). We therefore have no choice but to find that Westacre is not a suitable educational placement."

126. Against the background of the evidence set out in paragraphs 121 to 124, I am satisfied that the Tribunal was entitled to find that Westacre had done all that it could *reasonably* do to support C, within its remit as a mainstream school. It is, however, apparent that the oral evidence of Ms Brighton and Ms Evans was much less optimistic than the written evidence would have suggested and that the Tribunal was concerned by it. In my judgment, there was material on which the Tribunal could legitimately conclude that Westacre did not have particularly high aspirations for C, given the use of the phrase over and again of "small steps of progress" and that evidence from the school repeatedly fell into general comment. I am also satisfied that the Tribunal could legitimately conclude that the school found it difficult to concede that C should be making more decisive progress in her attainment, given the repeated assessments of her average underlying cognitive abilities. An appellate court, which

does not have the advantages of seeing the witnesses, should be very wary of retrying the case on the papers. On that basis I am satisfied that the Tribunal did not fall into error of law in holding that Westacre was not able fully to meet C's Section B special educational needs by inputting the required Section F special educational provision and that it was therefore entitled to conclude that it was not a suitable educational placement.

127. I therefore see no contradiction between the Tribunal's acceptance that C was making "small steps of progress" and its findings that Westacre did not have particularly high aspirations for C and that the school found it difficult to concede that C should be making more decisive progress in her attainment. It is not therefore the case that the only evidence before the Tribunal was that C was making adequate progress; the Tribunal's finding that she was not consequently did not represent an error of law. Given that the Tribunal was entitled to find that C was not making adequate progress, it was entitled to find that Westacre was unsuitable as a placement.

128. Ms Thompson sought to buttress her submission by three supporting arguments:

(i) the Tribunal's suggestion that C had not made sufficient progress failed to acknowledge the fact that she had attended the school for less than a term

(ii) in determining the progress made by C, the Tribunal placed a great reliance on progress made at her previous school where the type of provision made was different and inferior to that provided at Westacre; if the Tribunal considered that 1:1 support amounted to "intensive support" and that C required it, it should have amended Section F of her EHCP to include it. It did not do so and could not find Westacre to be unsuitable on the basis that it was not providing an intervention which the Tribunal had found to be unsuccessful and which it had not determined was necessary

(iii) in making its findings in relation to progress, the Tribunal misinterpreted the contents of the LST report of Pauline Smith.

129. As to the first point, it was not in dispute that C had only attended Westacre for less than a term, but given the evidence and the Tribunal's findings, to which I have

referred above, it is apparent that the underlying problems with the placement had already become evident. I do not see that that advances the ground of appeal. I have already dealt with the question of progress or lack thereof at Westacre.

130. As to the second, the Tribunal found that (paragraphs 61 and 62):

> "We are concerned that as at June 2019 which was the end of her time at first school, with an extremely high level of support, [C]'s attainment was not in accordance with her assessed academic ability.
>
> "This suggests to us that the provision available to her, whilst being undoubtedly intensive, was not properly addressing her Section B educational needs."

131. Having considered that C did not make adequate progress at Wychbold First School, it went on to say that the provision at Westacre was less intense than at Wychbold:

> "It was noted that the support offered to [C] at Westacre is a considerable step down from the intensive 1:1 made available to her at Wychbold" (paragraph 32).

132. Ms Thompson sought to argue that that did not acknowledge that at Westacre C was receiving intervention in small groups in the same way in which she would be taught at Bredon (the school which the Tribunal ultimately found to be suitable). At Wychbold First School the intervention involved 1:1 teaching assistant support within a class of 30 children. That could not be considered to have been more "intense" and the Tribunal provided no explanation for reaching that conclusion.

133. I do not accept that proposition. So far as the difference between Wychbold and Westacre was concerned, what the Tribunal went on to say in paragraph 32 after the opening sentence set out above was that

> "Ms Evans added as follows: "We are a large 5 class entry school. We have allowed some of our funding streams to go into these small groups and it [[C]'s educational provision] can't look exactly the same as her first school – we have to adapt to our environment. The two schools are very different; the primary is very small. We do try to accommodate

> [children's needs] as best we can, within our setting and the funding stream."

134. So far as the level of provision at Westacre and Bredon respectively was concerned, that was not the only question which had to be considered in relation to the respective suitability of the two schools (I shall deal in more detail under the sixth ground of appeal with the question of the suitability of Bredon). The Tribunal found that Westacre was an unsuitable placement for a number of reasons, with which I have dealt above; the question of the level of provision was not the only consideration in determining that question. Moreover, the Tribunal did not simply find that Westacre was unsuitable on the basis that it was not providing an intervention which the Tribunal had found to have been unsuccessful elsewhere; it found Westacre to be unsuitable for all of the reasons set out in paragraphs 83 to 89 of its decision, with which I have dealt in some detail in paragraphs 121 to 127 above, not just the intensity or otherwise of its intervention.

135. I have already addressed the argument that the provision inserted into Section F of the EHCP was determined by the Tribunal using its own expertise after the hearing and do not need to repeat what I have already said on that score.

136. Finally and in relation to the third point, Ms Thompson sought to adduce further evidence on that point from Pauline Smith. I did not admit that evidence, any more than I did the additional evidence which C's mother originally sought to introduce, but the point did not in fact need any additional evidence in order to be explained.

137. However, I accept that the data included in Ms Smith's December 2019 report was a copy of the assessment data obtained in June 2019. Given that the assessments were not repeated, it was unsurprising that the scores remained the same. In that event the Tribunal misunderstood the assessment data within Ms Smith's report. Nevertheless, it remains the case that in June 2019 out of 16 areas of assessment, C scored 'below average' or 'well below average' in 11 areas (page 168). Although the Tribunal mistakenly thought that there was no progress in those areas because of its misreading of the second report from December 2019, I am satisfied that there were other reasons based on the report of Dr Tesoi (with which I have dealt in relation to

the third and fourth grounds of appeal) which entitled the Tribunal to conclude as it did in paragraph 65 that C required the specialist provision, knowledge and experience described by Dr Tesoi to meet her assessed Section B needs, including the 1:1 support around speech and language therapy. The mistaken reason was not the sole reason for the conclusion and in the context I do not find that the mistake was material to the Tribunal's conclusion as to the contents of, and amendments to, Section F. In that context I would repeat the wise words of Judge Wikeley in ***Basildon DC v. AM*** (paragraph 115 above).

138. Ms Thompson added that the Tribunal had failed to acknowledge the progress that Ms Smith noted within her report, but I have already dealt with the question of progress or lack thereof at Westacre and do not need to repeat what I have said about that issue.

139. I am satisfied that Ms Thompson's fifth ground of appeal was reasonably arguable and I therefore grant permission to appeal in respect of it. However, for the reasons set out above, I am also satisfied that the Tribunal was entitled to make the findings which it did and that they betrayed no error of law. Accordingly, whilst I give permission in respect of it, I dismiss it as a ground of appeal.

The Sixth Ground of Appeal

140. Ms Thompson submitted that the local authority agreed that Bredon was suitable based on its understanding of C's needs and the provision which she required, that being the provision identified in the originally existing Section F of her EHCP.

141. It was, however, apparent from the outset of the hearing that the contents of Section F were in issue (as were the contents of Section B) and there was no suggestion from the Council that its agreement as to the suitability of Bredon was conditional on the contents of Section F remaining untouched by the Tribunal. If that had been the Council's position, it should have made it clear at the outset.

142. The Council went on to submit that neither it nor the Tribunal knew whether the staff teaching and supporting C at Bredon would have "qualifications and experience in supporting children with sensory, behavioural, developmental and communication

and interaction difficulties" (paragraph 69) or what those qualifications and experience might look like. On that basis, neither the local authority nor the Tribunal could determine that the school was suitable. Had the Tribunal indicated to the parties that it was considering inserting the above provision into C's EHCP, then the question of whether that was available at Bredon could have been explored during the hearing. As it was, that did not happen and the Tribunal therefore had no evidence before it in order to determine that staff working with C at Bredon had those qualifications.

143. I do not accept that contention. I have already dealt with the contention that the Tribunal inserted provision which was not in evidence or was not put to the parties and I do not need to repeat that I said above in that context.

144. Moreover, in paragraphs 80 and 81 the Tribunal specifically addressed the question of whether Bredon could accommodate the additions to Sections B and F which it had previously set out and found that it could:

> "80. … We note that (per the letter to [C's mother] from Bredon inclusion manager, Ms Weston, at pp.356-359) all staff at Bredon are "working towards the Level 3 dyslexia qualification with the BDA. Many have already achieved this. One English teacher also has L7 SpLD. Many of the staff have a number of years' experience in working with young people with additional needs. Within the Access centre, the staff have the following qualification: 3 x SpLD7, 2 x SpLD5 and 1 x SpLD3".
>
> 81. In relation to her SALT, Bredon have quoted for weekly 1:1 SALT sessions at a cost of £990 a term. Bredon have commented on the use of IT/ICT in school and state "teachers also support young people to develop their use of assistive technologies and ICT within the classroom". We are told that basic fees cover "access to a chromebook" [computer]."

145. It therefore concluded that

> "82. For all these reasons we find that Bredon is a suitable educational placement to support [C]'s education, taking account of her newly stated Section B needs and Section F provision requirements".

146. I am satisfied that on the evidence before it, it was entitled to reach that conclusion and I can see no error of law in that conclusion.

147. I entirely agree that a tribunal should not simply 'rubber stamp' a decision, even if both parties are in agreement (***EC v North East Lincolnshire***), but that is not what the Tribunal in this case did. Simply because the local authority had accepted that Bredon was suitable, it does not follow that there was no duty on the Tribunal to consider whether it was. However, the Tribunal carefully considered the evidence before it in paragraphs 79, 80, 81 and 82 and made its findings of fact on the basis of that evidence. It did not simply say in paragraph 79 that it was agreed by the parties that Bredon would be a suitable placement for C and that it saw no reason to dispute that consensus. If it had said only that, that might have been rubber-stamping, but that is not what happened.

148. In ***EC***, by contrast, according to Upper Tribunal Judge Lane

> "28. The Statement that was accepted in this case was vague on the 'who, what, when and how long' details that are meant to spell out the Local Authority's duties to the statemented pupil. The language of paragraph 17 of the Statement, for example, is certainly less than clear. It requires the Local Authority to provide funds to the school for a full time [LSA], but this is only to 'assist the school in providing the pupil with "access" to a full time [LSA]'. Paragraph 17 does not actually say that E will get a full time, designated LSA, as the F-tT assumed in [20], but that a LSA who works full time will be engaged."

149. In further contrast to this case, the Tribunal in that case had hardly covered itself in glory since she also said that

> "18. The F-tT dodged the first question posed by Upper Tribunal Judge Levenson as to whether SJ was suitable (which I will take to mean 'appropriate'). It was its job to make that decision. Its failure to do so was an error of law, though that alone might not have justified setting the decision aside if the rest of its reasoning had been sound.
>
> 19. The remainder of the F-tT's consideration of SJ School is also unsatisfactory. It simply failed to make any findings of fact about the provision SJ could make for E. The need to

> make findings of fact on relevant issues is so fundamental that it should be unnecessary for the Upper Tribunal to remind a First-tier Tribunal of this duty."

150. I accept that the decision of Scott Baker J in ***W v Gloucestershire CC*** makes it clear that, if the Tribunal does not have the relevant information, it should take steps to obtain it, but the question of adjournment did not arise on the facts of this case.

151. It seems to me that this was a forlorn attempt to get round the concession which had been properly made before the Tribunal. I do not give permission to appeal on that ground.

Conclusion

152. The Tribunal's decision is meticulous, comprehensive and detailed, running to 98 paragraphs to just over 16 pages. It has considered all relevant evidence in frankly exhaustive detail and has provided cogent and comprehensive reasons for the findings of fact which it made. I can see no material error of law in its determination. Essentially the Council does not agree with certain of the findings of fact made by the First-tier Tribunal, but it is not open to it to seek to appeal the findings of fact made by the Tribunal nor to seek to relitigate questions of fact determined by the Tribunal. It has not identified a material error of law on the part of the Tribunal.

153. It is important to understand the proper approach of an appellate tribunal such as the Upper Tribunal in determining whether to grant permission to appeal from a fact-finding tribunal (and to allow the substantive appeal if permission is granted). That was most recently explained by the Court of Appeal in ***Group Seven v. Notable Services*** [2019] EWCA Civ 614. The facts of the case were far different from this and the Upper Tribunal judge usually sits alone rather than as a court of three, but the principles underlying the approach of the appellate court are the same. The Court said that

> ***"Appellate restraint***
>
> 21. Before turning to the issues themselves, it is important to bear in mind the proper approach of an appeal court. First-instance decisions will contain judicial conclusions that fall on a spectrum ranging from pure findings of primary fact at one

> end to pure questions of law at the other. In between are multifactorial assessments, evaluations and inferences drawn from primary facts, exercises of judicial discretion and mixed questions of fact and law. At one end of the spectrum, the appeal court will rarely even contemplate reversing a trial judge's primary findings of fact. This appellate restraint extends also to the trial judge's evaluation of the significance of factual findings or the inferences to be drawn from them. The degree to which this restraint should be exercised in the individual case may, however, be influenced by the nature of the conclusion and the extent to which it depended upon an advantage possessed by the trial judge, whether from a thorough immersion in all angles of the case or from first-hand experience of the testing of the evidence. In the end, however, no first-instance judicial conclusion is altogether immune from appeal and where a decision is shown to be wrong or to result from a serious procedural error, it is the duty of the appeal court to say so."

154. The Court continued by citing the recent judgment of Longmore LJ in ***JSC Bank v Ablyazov*** [2018] EWCA Civ 1176 at [40-43]:

> "40. It is convenient to distinguish – although the difference is really one of degree – between findings of primary fact and factual findings which involve evaluating and drawing inferences from such primary facts. The reasons for the reluctance of appellate courts to interfere with findings of fact made following a trial apply in both cases: indeed, the reasons for restraint are often stronger where the finding involves an evaluation of primary facts.
>
> 41. Those reasons are by no means limited to the advantage enjoyed by the trial judge in a case in which oral testimony plays a significant part of having seen and heard the witnesses give evidence. The reasons also include recognition that the judge who presides over the trial is immersed in the evidence in a way that an appeal court cannot replicate ...
>
> 42. Even where it could in principle be done, for an appellate court in a case involving a substantial body of evidence to attempt to acquire the same absorption in the detail of the case as the judge of first instance would be a disproportionate use of judicial resources and would hugely increase the length, cost and delay of litigation in return for little likely improvement in decision-making. Unlike conclusions of law, findings of fact have no status as precedent in future cases and are therefore only capable of affecting the result of the case at

hand. Considerations not only of efficiency in time and cost but also of fairness dictate that the judge's conclusions on such points should generally be treated as final. In the words of White J giving the opinion of the United States Supreme Court in *Anderson v City of Bessemer* [1985] 470 US 564, 575 (quoted with approval by the UK Supreme Court in the *McGraddie* case at para 3):

> "… the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the court has stated in a different context, the trial on the merits should be "the 'main event' … rather than a 'tryout on the road'"…"

The same point has been made using a different metaphor by Lewison LJ in *Fage UK Ltd v Chobani* UK Ltd [2014] EWCA Civ 5, para 114(ii), when he said:

> "The trial is not a dress rehearsal. It is the first and last night of the show."

43. For these reasons the principle is firmly established that an appellate court should only interfere with a finding of fact made by the trial judge if satisfied that the conclusion is "plainly wrong": see e.g. *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477; *Henderson v Foxworth Investments Ltd* [2014] UKSC 41; [2014] 1 WLR 2600. As Lord Reed explained in the latter case, what this amounts to is that it must either be possible to identify a material error in the judge's process of reasoning – such as "a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence" (para 67); or, if there is no such identifiable error and the question is simply one of judgment as to the appropriate weight to be given to the relevant evidence, the appellate court must be satisfied that the judge's conclusion "cannot reasonably be explained or justified" (ibid). As Lord Reed also stated in the *Henderson* case (at para 62):

> "It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge would have reached."

> Another formulation of the test, which has also been approved at the highest level, is that the appellate court ought not to interfere "unless it is satisfied that the judge's conclusion lay outside the bounds within which reasonable disagreement is possible": *Todd v Adams & Chope (trading as Trelawney Fishing Co)* [2002] 2 Lloyd's Rep 293, para 129 (Mance LJ) approved in *Assicurazioni Generali SvA v Arab Insurance Group* [2002] EWCA Civ 1642; [2003] 1 WLR 577, para 17 (Clarke LJ) and by the House of Lords in *Datec Electronics Holdings Ltd v UPS Ltd* [2007] UKHL 23; [2007] 1 WLR 1325, para 46."

155. There is no material error of law made out by the Council and in a number of the grounds of appeal the question is really one of judgment as to the appropriate weight to be given to the relevant evidence. I am not satisfied that the Tribunal's conclusions cannot reasonably be explained or justified nor do I consider that the Tribunal's conclusions lay outside the bounds within which reasonable disagreement is possible. That I myself might, or might not, have reached a different conclusion on the evidence does not matter. What matters is whether the decision under appeal is one that no reasonable tribunal would have reached and I am not so satisfied.

156. I therefore grant permission to appeal on grounds one, two and five, but not on the other grounds relied on by the Council. In respect of those grounds one, two and five for which permission is given, the appeal is nevertheless dismissed.

157. Although the decision is dated as of 2 July 2020, there will in the present circumstances inevitably be some delay in issuing it. As of today's date it is not clear how long that delay will be, but the Upper Tribunal Office will do its level best to issue it as soon as circumstances permit.

Signed **Mark West**
Judge of the Upper Tribunal

Dated **2 July 2020**