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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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2015/60783

KE's Application [2016] NIQB 9

IN THE MATTER OF AN APPLICATION BY KE FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS BY THE DEPARTMENT OF EDUCATION IN RESPECT OF DEVELOPMENT PROPOSALS 260, 261 and 262

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COLTON J

Introduction

[1] The applicant is a year ten (Form 3) student at the Collegiate Grammar School, Enniskillen.

[2] She challenges the decision made by the Minister for Education ("the Minister") on 27 November 2014 to approve development proposals 260, 261 and 262.

[3] The relevant development proposals ("DP") were made under Article 14 of the Education and Libraries (Northern Ireland) Order 1986. DP260 was a proposal to discontinue Collegiate Grammar School, Enniskillen ("CGS"/"Collegiate") (a controlled grammar school); and was proposed by the Western Education and Library Board. DP261 was a proposal to discontinue Portora Royal School, Enniskillen ("PRS"/"Portora") (a voluntary grammar school). DP262 was a proposal to establish a new co-educational 11-18 non-dominational voluntary grammar school for 900 pupils to operate initially on a split site campus of the current sites of CGS and PRS pending DE approval and funding being obtained for the construction of a new build school. Proposals 261 and 262 were made by the Fermanagh Protestant Board of Education ("FPBE") who are the Trustees of PRS.

[4] The respondent is the Department of Education and the WELB (now the Education Authority) and the FPBE are notice parties to this application.

Mr Dunlop BL appeared for the applicant, Mr Tony McGleenan QC and Mr Philip McAteer BL for the respondent; Mr Paul McLaughlin BL for the WELB and Mr David Scoffield QC and Ms Fiona Fee BL for the FPBE. I wish to place on record my appreciation for all counsel involved in this case. All counsel involved demonstrated a detailed knowledge of the complicated background to the dispute. Their written and oral submissions and presentation were of the highest order. All of the parties involved can justifiably feel that their arguments and cases were expertly presented.

[5] These proposals were to take effect from 1 September 2015 or as soon as possible thereafter, with a current intention that they take effect on 1 September 2016.

[6] In effect the Minister approved the amalgamations of CGS and PRS with the new school to operate on a split site initially pending the construction of a new school on a single site.

[7] Both Portora and the Collegiate are long established grammar schools in Enniskillen with a deserved and proud reputation for the provision of education to generations of students from the Fermanagh area and beyond. Portora Royal School was established in 1618 moving to its current site on Portora Hill in 1778. The school consisted of both boarders and day boys and developed over the years as its numbers increased. By 1967 the numbers had risen to 203 day boys and 232 boarders which was to be its greatest number of pupils. In 1979 a small number of girls were accepted as pupils. In 1993 the boarding department closed and Portora became a day school. It currently has an enrolment of approximately 500 with year 8 to 12 enrolment being at 350 with a co-educational sixth form with approximately 150 pupils.

[8] The Collegiate is an all-girls grammar school. Its history can be traced back to 1916 when the Enniskillen Royal School for Girls was established. In 1925 the Fermanagh Regional Education Committee took over the school and changed its name to the Enniskillen Collegiate School for Girls. The school moved to its current site in October 1931 when it had 88 pupils. The school has developed since to provide accommodation for approximately 500 students. Again the breakdown is similar to Portora in that its year 8 to 12 enrolment is approximately 350 students with the sixth form being approximately 150.

[9] It is inevitable that the closure of schools with this history will have a huge emotional impact on all those associated with them, be it the staff, pupils, parents of pupils and past pupils. It is understandable that such schools will develop strong loyalties which will be resistant to change.

[10] It is clear that the decision to discontinue the Collegiate and Portora schools and create a new amalgamated school has caused controversy in the Fermanagh area. Since the possibility of this occurring was mooted in 2007 the leadership of the

Collegiate has strongly opposed the proposal. The consultation process leading to the approval of the proposals reflects the depth of the opposition. Evidence of this can be found, for example, from the minutes in relation to the Western Education and Library Board's consultation with the Collegiate Board of Governors on 2 April 2014, the consultation with staff and parents of Collegiate pupils on 9 April 2014, the consultation with pupils of the Collegiate on 6 May 2014, the adjournment debate in the Assembly of 24 June 2014, the receipt of 507 letters objecting to the proposals, a 7,000 plus signature petition laid in the Assembly on 17 June 2014 opposing the amalgamation, the minutes of the Minister's meeting with the Collegiate representatives on 2 July 2014 and the Assembly debate on 22 December 2014. As against that the proposals have the unanimous support of the Western Education and Library Board, now the Education Authority, the Governors and Trustees of Portora Royal School, the Governors of Devenish College which is the only non-selective secondary school in Enniskillen in the non-denominational sector and the Education and Training Inspectorate. In the course of consultation the Department received 204 letters in support of the proposals. It is difficult to disagree with the assertion of Mr Morton, Principal of Portora Royal School that the proposals and campaign against the amalgamation has pitted neighbour against neighbour.

[11] In any event, fully aware of the contrasting views, the Minister approved the proposals on 27 November 2014 and it is that decision which is the subject matter of this challenge.

The Statutory Framework for Development Proposals

[12] The statutory process for development proposals is set out in Article 14 of the Education and Libraries (Northern Ireland) Order 1986. It provides for a tripartite process of approval involving consultation with the school, publication of a development proposal by the relevant board for public consultation and subsequent consideration by the Department. In the case of a controlled school, the process may be summarised as follows:

(a) The Board consults with representatives of the parents, teaching staff and Board of Governors of the School [Article 14(5)(A)].

(b) The Board consults with the trustees and managers of any school which is likely to be affected by the proposal [Article 14(5)(B)].

(c) The Board submits the proposal to the Department [Article 14(1)].

(d) The Board publishes the proposals for public consultation for a period of two months with responses to be submitted to the Department. [Article 14(6)(b)]

(e) Decision by the Department on the proposal, or modification of it [Article 14(7)].

(f) If approved by the Department, the Board must implement it [Article 14(9)(A)].

[12] In the case of a voluntary grammar school the proposal may be prepared by any other person, normally the trustees of the school. The proposal is then submitted to the local board which is responsible for publishing it for consultation.

Summary of the history leading to Minister's decision

[13] The genesis of the impugned decision can be traced back to the publication of the Bain Report "Schools for the Future"; on 4 December 2006. The Independent Review Panel chaired by Sir George Bain involved a fundamental strategic review of education provision in Northern Ireland. Its Terms of Reference as announced by the Secretary of State for Northern Ireland in March 2006 were:

> "To examine funding of the education system, in particular the strategic planning and organisation of the schools' estate taking account of the curriculum changes including the wider provision for 14-19 year olds, and also demographic trends."

The full Terms of Reference for the review were confirmed on 5 June 2006 by the Minister with responsibility for education, Maria Eagle MP. On that occasion the Minister said:

> "This review is a key element in our package of major reforms to deliver a world class education system for Northern Ireland. This government's continuing commitment to investing in the local education system is clear but we must be sure that our investment creates maximum benefit for Northern Ireland's young people. The need to ensure that our planning of schools is more strategic, taking account of demographic trends and further educational needs. Existing and new schools must be sustainable in the long term and Northern Ireland's young people must be given the best environment in which to be educated. We have too many schools in Northern Ireland with resources spread too thinly, impacting directly on teachers and children. We need to see greater co-operation and collaboration between school sectors, achieving higher standards, better facilities and a better use of resources. This review will examine arrangements which would deliver these benefits."

[14] In short form the Bain Report recommended that the challenge facing the education sector was to create a network of strong viable schools, capable of delivering the curriculum and which were sustainable in financial and educational terms. The report recommended that the schools estate should be reformed through a process of area based planning, led by the Education Authority (envisaged to be a new ESA). It recommended that a sustainable school should be one with a minimum enrolment of 500 pupils (ages 11-16) and 100 pupils (sixth form).

[15] On 8 February 2007 the Department of Education wrote to the WELB advising that PRS had applied for capital funding for a new school. The Department indicated that the pupil numbers were below sustainability thresholds. It also noted a similar problem with CGS and it invited the WELB to initiate discussions on the future of non-dominational educational provision in Enniskillen. On 3 April 2007 the Department of Education ("DE") met the Governors of CGS to explore amalgamation. After a meeting with DE and CGS the WELB initiated discussions with all of the schools in the sector and ultimately the Board formed the Fermanagh Controlled Post Primary Schools Working Group (CSWG) to discuss rationalisation options for that sector. The first meeting of the Group took place on 16 May 2007. There were six schools involved in this working group namely, Collegiate, Portora, Devenish College, Lisnaskea High School, Elmbrook School and Erne School. For the purposes of this hearing the key schools were Collegiate, Portora, Devenish College and Lisnaskea High School. Devenish College and Lisnaskea High School were controlled non-selective secondary schools. Devenish College was the product of previous amalgamations of Enniskillen High School and the Duke of Westminster High School. Subsequently, Lisnaskea High School was closed and amalgamated with Devenish in 2013.

[16] At this stage it is appropriate to say something about Devenish College. It is now the only non-selective secondary school in Enniskillen in the non-denominational sector. It caters for children aged 11 to 18. It currently has a total authorised enrolment of 665 with substantial surplus capacity. Between 2004 and 2012 its actual enrolment fell from 727 to 485. Following the closure of Lisnaskea High School in 2013 this increased only to 537. The condition of the school facilities is extremely poor. For many years it has been in chronic need of capital investment for the construction of an entirely new school. Although this was approved in 2004 because of numerous difficulties including the scrapping of the PPF model the construction of the new school on a site at Tempo Road has only recently been approved and is now under way.

[17] After meeting throughout 2007 the CSWG agreed that there were five potential options for rationalising the post-primary controlled sector namely:

(a) Retention of status quo;

(b) Three schools (non-selective; Lisnaskea (ages 4 to 14), Enniskillen (11-14) and Enniskillen (14-19);

(c) Two schools (non-selective); Enniskillen 11-14 and Enniskillen 14-19.

(d) Two schools (selective); grammar school Enniskillen (11-19) – High School in Enniskillen 11-19;

(e) Single campus co-located schools in Enniskillen.

[18] The result of the consultation process was that the overwhelming majority (approximately 90%) of parents who responded wished to retain the status quo, with no change to any school.

[19] Three of the schools, (Devenish, PRS and Erne) did not wish to delay progress in obtaining capital funding and asked the WELB to consider the option of co-locating or amalgamating these schools on either PRS or Tempo Road sites. Whilst the WELB was willing to explore this option the DE made it clear that this was not an appropriate solution to the wider sustainability issues across the sector.

[20] A key development was the publication by the Department of Education of the Sustainable Schools Policy in January 2009. It largely followed the Bain recommendations. In particular, it accepted the recommendations on minimum enrolment thresholds of 500 (ages 11-16) and 100 (sixth form), thereby superseding the WELB's own policy on sustainable schools in November 2007 which had considered the minimum enrolment threshold for a sustainable school to be 400 (ages 11-16) and 100 (sixth form). The Sustainable Schools Policy identified a total of six indicators of schools sustainability:

(a) Quality education experience.

(b) Stable enrolment trends.

(c) Sound financial position.

(d) Strong leadership and management by the Board of Governors.

(e) Accessibility.

(f) Strong links to the community.

[21] The SSP also identified a number of ways in which problems of sustainability might be addressed:

(a) Amalgamation; Two or more schools of a similar size coming together to form a new school.

(b) Confederation; Schools of the same or different management types work in partnership exchanging pupils, teachers, facilities etc. but retaining institutional separation.

(c) Federation; Small schools "merging" to form a single school usually on a split site.

(d) Co-location; Separate schools sharing facilities and resources, based upon their proximity. This may be cross-phased (primary and secondary) or cross-sectoral.

(e) Shared campus; Schools retain institutional autonomy and ethos but share facilities.

[22] A fundamental element of the Sustainable Schools Policy was the requirement for area based planning. This is set out in the policy as follows:

> "**Area Based Planning**
>
> 2.16 Developments at one school may have significant impacts on other schools in its area, including their sustainability. This underlines the importance of examining provision on an area basis as recommended by the Bain Report, taking account of the overall projected need for provision in the area.
>
> 2.17 This will be addressed through the roll out of area based planning in 2008. Area based planning is about anticipating the educational needs in an area and planning to meet those needs in an effective and efficient way through an estate of sustainable facilities. This will ensure that planning is on a whole system basis, taking account of impacts within and across areas on a cross-sectoral basis to develop plans that meet the need for provision in that area. …
>
> 2.18 In developing area based plans, a central consideration must be the need for schools which will be viable. The sustainable schools policy is therefore to help provide a framework to inform the preparation of area plans."

[23] Throughout 2009 the WELB worked through the CSWG to consider the future provision of post-primary education in the controlled sector.

[24] An important part of the work was an agreement between the WELB and the Working Group to commission an independent consultant to carry out an economic appraisal of the possible reform options in order to assist in identifying a preferred option.

[25] On the seventh and final meeting of the sub-committee on 4 November 2009 the representatives of the CGS withdrew and sent a letter to the WELB outlining its opposition to the process. Clearly the representatives of the CGS were unhappy about the direction of travel of the process. Recognising these difficulties and the tensions that existed the Board had appointed an independent facilitator in an attempt to improve relations between the various schools and that report was published in November 2009. The independent facilitator recommended an amalgamation between PRS and CGS and noted in his report, "to any outside observer, with no educational and emotional attachment to either institution, such a solution (i.e. amalgamation) is obvious". The report acknowledged that there were problems of perception about the possibility of the new school and he suggested that the two Boards of Governors should meet "… in a neutral venue, in an atmosphere of mutual respect to discuss their concerns and fears about the amalgamation" and that they should also form an interim Board of Governors with equal representation from each school in order to plan for the new school. In this regard I recognise the genuine concerns of the Collegiate as expressed by Elizabeth Armstrong, the Principal of the Collegiate, that the proposed amalgamation would not be a merger of equals. From the Collegiate perspective there is a concern that the new school will be under the control of the former trustees of Portora Royal School and will ultimately be based on the site of the Portora School. The new school will be co-educational, thus losing a distinctive element of the Collegiate ethos. To use her words the sense of unfairness "runs deep".

[26] Also in November the economic appraisal organised by the Board and the Working Group was completed. The methodology comprised of both a financial assessment and a non-monetary assessment. The result of a financial assessment was that the capital costs for all of the options were quite similar. In the non-monetary assessment there were quite large differences. The first ranked option was the amalgamation of PRS and CGS with a new school on the PRS site and a replacement school for Devenish and Lisnaskea High School on the Tempo Road site. This option was the second ranked in the financial assessment.

[27] In order to identify a preferred option the WELB had further discussions with each of the Board of Governors on the working group. The outcome of this process was that four of the six schools indicated their preference for the creation of two schools, including a new non-denominational voluntary grammar school formed by the amalgamation of PRS and CGS with a new school to be located on the PRS site. This recommendation was therefore included in the final economic appraisal submitted to the WELB.

[28] The WELB accepted the results of the appraisal at a formal meeting of the full Board. In January 2010 it submitted the appraisal to the Department along with a document entitled "Strategic Plan; Controlled/Voluntary Post-Primary Education in County Fermanagh" setting out the nature of the sustainable building problem which it faced, the process followed, the outcome and the preferred option for addressing these problems. At that stage the WELB intended to progress the proposal by publishing development proposals under Article 14 of the 1986 Order. However, this was delayed by the pending introduction of area planning as investment decisions were to be informed by the content of a plan for the entire area.

[29] At this stage it is important to say something about "the entitlement framework". This framework imposes a statutory duty upon the Board of Governors of every grant aided school to provide pupils with access to a minimum number of courses. Between 2006 and 2013, the entitlement framework operated on a non-statutory basis, insofar as curriculum requirements took the form of Departmental Policy, rather than a statutory requirement. Legislative provisions have now commenced. In June 2010 the Department of Education published a key document in relation to the entitlement framework namely – "delivering the entitlement framework by 2013 – a guidance for schools on the next phase of implementation". This was described as a core element of the Department's wider work to improve educational outcomes for all pupils and to address the barriers to learning that result in too many young people not achieving to their full potential. Following on from this the Department set out the minimum number of courses by means of direction to the schools thereby increasing the requirements on schools for curriculum provision.

[30] On 26 September 2011 the Minister made a key statement to the Assembly entitled "Putting Pupils First; Shaping our Future". He directed all Education and Library Boards to prepare school viability audits and thereafter a plan for the entire area. The Terms of Reference for viability audits were announced by the Minister on 30 September 2011 and the Terms of Reference for area planning were announced by the Minister 15 December 2011.

[31] The results of the audits for the relevant schools by the WELB were as follows:

(a) Devenish College; Falling enrolment trends, below sustainability thresholds; level 1 financial stress (i.e. 50% deficit) and progress towards meeting entitlement frameworks targets.

(b) Lisnaskea High School; Falling enrolment, well below sustainability levels; level 1 financial stress and inability to meet entitlement framework targets (albeit academic attainment was not unreasonable).

(c) Collegiate GS; Stable enrolment trends, but below sustainability levels; level 3 financial stress (i.e. 5%-25% deficit) and inability to meet

entitlement framework targets at KS4. It did meet sixth form EF targets for 2011 and had an excellent academic attainment.

(d) Portora RS; Stable enrolment trends, but below sustainability levels, no financial stress, inability to meet KS4 or sixth form entitlement framework targets and evidence of some academic underachievement.

[32] On 14 February 2012 the Department issued area planning guidance.

[33] On 5 July 2012 the WELB announced a consultation on its draft area plan. It used the Department's "needs model" to calculate projected pupil numbers within the non-dominational sector until 2025. It showed a fall in need from 1652 pupils in 2011 until 2016 (1575), with a rise until 2025 (1848). Capacity in 2011 was 1965 places. For the non-dominational sector, the draft plan recommended the same solution as previously i.e. amalgamation of PRS and CGS, with closure of Lisnaskea and a new build for Devenish.

[34] On 22 January 2013 the Minister outlined his plans for controlled/voluntary post primary sectors in Fermanagh and made a statement to the Assembly "Advancing New Schools in Planning". He announced capital funding for a new school to replace Devenish and "to make provision for a new school to facilitate the amalgamation of Enniskillen Collegiate and Portora". These proposals were subject to the availability of funding and all necessary approvals.

[35] The WELB published its final plan in February 2013 with the approval of the Department.

[36] In April 2013 there was an ETI inspection of Collegiate Grammar School in which the quality of education provided in the school was evaluated at satisfactory.

[37] On 16 May 2013 the full Board of the WELB unanimously decided to progress the Article 14 consultation process for the proposal to amalgamate PRS and CGS.

[38] On 26 June 2013 the Minister approves DP's 241, 242 and 243 amalgamating Lisnaskea High School and Devenish College.

[39] On 10 July 2013 there was a submission to the Minister with regard to a meeting with Mr Morton and potential legal objections to the use of the word Royal in the new school. The Minister then met with the principal of Portora on 5 August 2013.

[40] On 12 August 2013 the Department of Education write to the Collegiate Grammar School informing of the requirements of the entitlement framework.

[41] On 19 November 2013 the Department responded to the WELB with regard to clarification on matters relating to DPs. Issues dealt with related to staffing issues

but of particular note in the context of this dispute the Board asked the Department "to provide guarantee, clarity and assurance of a new school build". The response from the Department was as follows:

> "The Minister announced, on 22 January 2013, projects that could be advanced in planning, including that for the proposed amalgamation of Portora Royal School and Enniskillen Collegiate. The intention is that these proposals will be taken through to construction but the Minister was very clear that the authorisation to proceed with construction would be based on the level of capital funding available at the time and all necessary approvals having been obtained.
>
> In the event that a development proposal for the amalgamation of Portora Royal School and Enniskillen Collegiate is approved, an economic appraisal will need to be completed and approved to support any proposed capital investment in a new build."

[42] During March and April the following consultations took place:

FPBE consult with Board of Governors of Royal Portora School - 20 March 2014.

FPBE consult with staff of Portora Royal School – 27 March 2014.

FPBE consult with parents/guardians of pupils attending Portora Royal School – 27 March 2014.

FPBE consult with pupils of Portora Royal School – Thursday 10 April 2014.

WELB consult with Board of Governors, Collegiate Grammar School – 2 April 2014.

WELB consult with staff of Collegiate Grammar School- Wednesday 2 April 2014 and Tuesday 15 April 2015.

WELB consult with parents/guardians of pupils attending Collegiate Grammar School – 9 April 2014.

[43] On 1 May 2014 the FPBE request WELB to publish DP. On 6 May 2014 the WELB consult with the pupils of the Collegiate.

[44] On 8 May 2014 the WELB met to decide whether to proceed to publish the development proposals in relation to CGS. The Board members are provided with

relevant papers and a PowerPoint presentation setting out the history and some up-to-date statistics. The meeting was attended by a delegation from each of the three affected schools (PRS, CGS and Devenish) who made representations. The WELB unanimously decided to proceed and the development proposals were published on 14 May and 15 May 2014 for public consultation.

[45] Having published the DPs under Article 14 of the Order there then follows the two months public consultation with responses to be submitted to the Department. During the two month consultation phase the Minister met with representatives of the Collegiate, Portora and Devenish.

[46] During the two month objection period 507 letters of objection were received and 204 letters of support were received. On 24 June 2014 there was an adjournment debate in the Assembly discussing post primary education in County Fermanagh as a result of which Tom Elliott MLA sought a meeting with the Minister. On 10 September 2014 the Minister met with Mr Elliott MLA and a delegation. On 22 September 2014 the Assembly debated a motion "to reject the development proposals and seek consensus on the future of these schools with broad community support". The motion was carried by 47 votes to 32.

[47] On 12 November 2014 the Minister received a copy of the submission in relation to the development proposals. The submission included a summary of the proposals. It set out the background and history. It set out the rationale underpinning the development and also the consultation process. It provided a summary of the arguments in favour of and against the proposals. There was a full summary of the issues raised and the meetings with the schools and the Assembly debates and motions. He was provided with figures in relation to entitlement framework, attainment, financial implications and was provided with recommendations supporting the approval of the DPs. The submission also included maps of the area, statistical information relating to the proposal, WELB comment, DE comment, ETI comment, an analysis of objection period responses, minutes of the Minister's meetings with Collegiate Grammar School, Portora Royal School, Devenish College and Mr Elliott MLA.

[48] The Minister then approved DPs 260, 261 and 262 on 27 November 2014. It is this decision which has been challenged in these proceedings.

The Relevant Legal Principles

[49] The key provision is Article 14(7) which states:

> "Subject to Article 15(3) the Department after considering any objections to a proposal made to it within the time specified in the notice under paragraph (6)(b), may after making such modification, if any, in the proposal as, after consultation with the Board or person making the

> proposal and, in a case to which paragraph 2(i) applies the Council for Catholic Maintained Schools, it considers necessary or expedient, approve the proposal and inform that Board or person accordingly."

[50] It is clear from this provision that the statute provides a broad and open textured discretion to the Minister. There are no mandatory or prohibited considerations identified by the statute as considerations to which regard must be had or not to be had. The Minister is obliged to make a decision on a specific proposal which comes about after an express scheme setting out requirements in terms of pre and post-consultation. It is clear from the authorities that in such circumstances the court's role is a limited one. It in effect performs a supervisory role and should not engage in a merits assessment of the decision challenged.

[51] As Lord Clyde said in Reid v Secretary of State for Scotland [1999] 2 AC 512:

> "Judicial review involves a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view to forming its own view about the substantive merits of the case."

The exercise of the Article 14 discretion by the Minister has been considered in this jurisdiction in the cases of "XY's Application [2015] NIQB 75" and "Re McDonnell's Application (unreported Gillen J GILF5793)". These cases focused on issues of consultation and delay and I will refer to them in more detail later.

[52] I agree with Mr McGleenan's submission that a helpful analogy can be drawn with planning judicial reviews in respect of the appropriate general principles to be applied in reviewing impugned decision-making of the type made by the Minister in this case. A good recent summary of the principles was given by Lindblom J in Bloor Homes East Midlands Limited v Secretary of State for Communities and Local Government [2014] EWHC 754 (Admin):

> "***Relevant legal principles***
>
> 19. The relevant law is not controversial. It comprises seven familiar principles:
>
> (1) Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission are to be construed in a reasonably flexible way. Decision letters are written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues. An inspector does not need to 'rehearse every argument relating to each matter in

every paragraph' (see the judgment of Forbes J in Seddon Properties v Secretary of State for the Environment (1981) 42 P. & C.R. 26, at p.28).

(2) The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the 'principal important controversial issues'. An inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds. But the reasons need refer only to the main issues in the dispute, not to every material consideration (see the speech of Lord Brown of Eaton-under-Heywood in South Bucks District Council and another v Porter (No. 2) [2004] 1 WL.R. 1953, ntp.1964B-G,).

(3) The weight to be attached to any material consideration and all matters of planning judgment are within the exclusive jurisdiction of the decision-maker. They are not for the court. A local planning authority, determining an application for planning permission is free, 'provided that it does not lapse into Wednesbury irrationality" to give material considerations 'whatever weight [it] thinks fit or no weight at all" (see the speech of Lord Hoffmann in Tesco Stores Limited v Secretary of State for the Environment [1995] 1 W.L.R. 759, at p.780F-H). And, essentially for that reason, an application under section 288 of the 1990 Act does not afford an opportunity for a review of the planning merits of an inspector's decision (see the judgment of Sullivan J., as he then was, in Newsmith v Secretary of State for [2001] EWHC Admin 74, at paragraph 6).

(4) Planning policies are not statutory or contractual provisions and should not be construed as if they were. The proper interpretation of planning policy is ultimately a matter of law for the court. The application of relevant policy is for the decision-maker. But statements of policy are to be interpreted objectively by the court in accordance with the language used and in its proper context. A failure properly to understand and apply relevant

> policy will constitute a failure to have regard to a material consideration, or will amount to having regard to an immaterial consideration (see the judgment of Lord Reed in Tesco Stores v Dundee City Council [2012] P.T.S.R. 983, at paragraphs 17 to 22).
>
> (5) Where it is suggested that an inspector has failed to grasp a relevant policy one must look at what he thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the policy in question (see the judgment of Hoffmann L.J., as he then was, South Somerset District Council v The Secretary of State for the Environment (1993) 66 P. & C.R. 80, at p.83E-H).
>
> (6) Because it is reasonable to assume that national planning policy is familiar to the Secretary of State and his inspectors, the fact that a particular policy is not mentioned in the decision letter does not necessarily mean that it has been ignored (see, for example, the judgment of Lang J in Sea Land Power & Energy Limited v Secretary of State for Communities and Local Government [2012] EWHC 1419 (QB), at paragraph 58).
>
> (7) Consistency in decision-making is important both to developers and local planning authorities, because it serves to maintain public confidence in the operation of the development control system. But it is not a principle of law that like cases must always be decided alike. An inspector must exercise his own judgment on this question, if it arises."

[53] Whilst I will deal specifically with each of the grounds of challenge against the impugned decision, properly analysed they essentially come down to a rationality challenge and in particular to the level of enquiry carried out by the Minister. As Mr Dunlop said in his opening in relation to the general legal principles applicable:

> "The position was put clearly by Lord Diplock in Secretary of State for Education and Science Appellant v Tameside Metropolitan Borough Council Respondents [1977] AC 1014 at 1064:

> ***It was for the Secretary of State to decide that. It is not for any court of law to substitute its own opinion for his; but it is for the court of law to determine whether it has been established that in reaching his decision unfavourable to the Council he had directed himself properly in law and had in consequence taken into consideration the matters which upon the true construction of Act he ought to have considered and excluded from his consideration matters that were irrelevant to what he had to consider; see Associated Provincial Picture House Limited v Wednesbury Corporation [1948] 1 KB 233, per Lord Greene MR at page 229. Or, put more compendiously, the question for the courts is, that the Secretary of State asked himself the right question and took reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?'***
>
> The Minister's decision must be based on him appreciating both those matters, which he ought to have considered and also ignoring those matters which were irrelevant and thus should have been excluded from his consideration. The applicant's position in the present case is that the Minister did not ask himself the right questions and did not have the relevant information to enable him to answer those questions correctly."

[54] Following on from the Tameside case referred to by Mr Dunlop and the relevant legal principles in respect of duty of inquiry the Court of Appeal has held in R (Khatun) v Newham LBC [2004] EWCA Civ. 55 that it is a matter for the decision-maker to decide what information it requires and such decisions are only susceptible to Wednesbury review:

> "But the judge did consider the question of the proper exercise of an administrative discretion in a situation where a statute permits but does not require consideration of set or certain matters. The judge said at paragraph [183]:

> 'What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation that the court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the court itself would have taken into account if they had to make the decision.'

These words certainly do not support Mr Sedley's submission. But … the judge in a later passage at page 183 line 33, did recognise that in certain circumstances, notwithstanding the silence of the statute, 'there will be some measure so obviously material to a decision on a particular project that anything short of a direct consideration of them by the Ministers … would not be in accordance with the intention of the Act.'

These two passages are in my view a correct statement of principle.

In my judgment CREEDNZ (via the decision in Findlay) does not only support the proposition that where a statute conferring discretionary power provides no lexicon of the matters to be treated as relevant by the decision-maker, then it is for the decision-maker and not the court to conclude what is relevant subject only to Wednesbury review. By extension it gives authority also for a different but closely related proposition, namely that it is for the decision-maker and not the court subject again to Wednesbury review, to decide upon the manner and intensity of enquiry to be undertaken into any relevant factor accepted or demonstrated as such. This view is I think supported by the judgment of Schiemann J as he then was in ex p Costello - to which Mr Luba refers. That case concerned the degree of enquiry which an authority was obliged to undertake into issues of priority, need and intentional homelessness. At page 309 Schiemann J said:

> 'In my view the court should establish what material was before the authority and should only strike down a decision by the authority not to make further enquiries if no reasonable council possessed of that material could suppose that the enquiries they had made were sufficient.'

This approach has been lent authoritative support by the decision of this court in R v Royal Borough of Kensington and Chelsea ex p. Bayani which was concerned with the authority's duty of enquiry in a homelessness case. Neil J said at 415:

> 'The courts should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable housing authority could have been satisfied on the basis of the enquiries made.'"

[55] Finally, in relation to the applicable legal principles in this respect I refer to the recent summary provided by the Divisional Court in R (Plantagenet Alliance) v Secretary of State for Justice [2014] EWHC 1662 (QB):

> "[100] The following principles can be gleaned from the authorities:
>
> 1. The obligation upon the decision-maker is only to take such steps to inform himself as are reasonable.
>
> 2. Subject to a Wednesbury challenge, it is for the public body, and not the court to decide upon the manner and intensity of inquiry to be undertaken (R (Khatun) v Newham LBC [2004] EWCA Civ 55, [2005] B 37 at para 35, [2004] LGR 696, per Laws LD.
>
> 3. The court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have

been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision (per Neill U in R (Bayani,) v Kensington and Chelsea Royal LBC (1990) 22 HLR 406).

4. The court should establish what material was before the authority and should only strike down a decision by the authority not to make further inquiries if no reasonable council possessed of that material could suppose that the inquiries they had made were sufficient (per Schiemann J in R (Costello) v Nottingham City council (1989) 21 HLR 301; cited with approval by Laws LJ in R (Khatun) v Newham LBC ('supra) at para 35).

5. The principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the Applicant, but from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion (per Laws LJ in (R (London Borough of Southwark,) v Secretary of State for Education (supra) at p 323D).

6. The wider the discretion conferred on the Secretary of State, the more important it must be that he has all relevant material to enable him properly to exercise it (R (Venables,) v Secretary of State for the House Department [1998] AC 407 at 466G, [1997] 3 All ER 97, [1997] 3 WLR 23)."

GROUNDS FOR CHALLENGE

[56] As I have already indicated the applicant in this case is a Year 10 (Form 3) student at the Collegiate Grammar School. Her affidavit in support of the application does not provide any significant or substantive ground for a legal challenge to the Minister's decision. In essence she points out that she is very happy and content at the Collegiate Grammar School and has very understandable concerns about the proposal to amalgamate with Portora Royal School on a split site

basis. She says that she does not think that she would like to go to a mixed school and is worried about the impact of a split site in terms of the practical arrangements for her education.

[57] Whilst there is no doubt that the applicant has standing to bring these proceedings in reality this challenge is brought by the leadership of the Collegiate Grammar School as part of their determined and ongoing opposition to the proposal to close their school. The substance of the complaints about the process and the Minister's decision is set out in the affidavits from the Principal of the Collegiate Grammar School, Elizabeth Armstrong and Florence Brunt who is one of the Governors of the Collegiate Grammar School and a nominated Governor to the Interim Board of Governors for the proposed new school.

[58] The challenge in these proceedings has been extremely comprehensive involving a forensic analysis of the entire process as set out in the chronology in this judgment. Whilst the background is important for context I must bear in mind that what is actually challenged here is the Minister's decision. In this regard the Northern Ireland decisions in XY's Application ("XY") [2015] NIQB 75 and Re McDonnell's Application (Unreported) Gillen J GILF5793 are relevant. In the latter case the applicant sought judicial review of the Department's decision to approve a development proposal by CCMS to close a High School based on deficiencies in CCMS's consultation process prior to publication of the development's proposal. The applicant argued that time for the challenge started to run from the date of the Minister's decision. The first respondent argued that the challenge should have been brought once CCMS had submitted its proposals.

[59] Dealing with the question of delay Mr Justice Gillen says:

> "[21] Delay
>
> A claimant has a duty to act promptly, not an entitlement to wait for up to three months. The clock starts when the grounds first arise. This usually means the date of the decision or action being challenged. In this case the Order 53 rule 3 relief is couched in terms of a challenge to the decision of the Department of Education `following a proposal by the CCMS and the Board' to discontinue St Joseph's High School Plumbridge. I consider that the appropriate time to have made the challenge in this case was when the proposal was first made by the CCMS. The fact of the matter is that virtually the whole focus of the applicant's claim has been on the alleged defects in the consultation exercise carried out by CCMS. I have carefully reviewed the authorities put before me by the parties and I consider that the Bandtock case is the appropriate authority governing cases of this type. It

> would provide a striking asymmetry if an applicant were able to claim that the first stage process of consultation was fatally flawed but did not have to address that flaw until many months later when the Department had come to a conclusion. I consider that the approach adopted by Collins J in Bandtock to the effect that the decision of the Secretary of State should never have been allowed to come about in the sense that the challenge should have been made at the far earlier stage to the allegedly flawed proposal applies in the instant case. By waiting several months until the later stages had been completed it serves to bring about a wholly undesirable consequence namely that the effect of the remedy being granted would be to require the school to completely reopen a process that has been ongoing for a very substantial period. That is particularly so in this instance where since the date of the proposal it has been known to all the parties that ongoing steps have been taken in relation to redeployment of prospective pupils, existing pupils and teaching staff."

[60] In the more recent case of XY Stephens J also raised the issue of delay. Rejecting the applicant's challenge in that case he held:

> "[69] I also reject those grounds of challenge on the basis of delay. These grounds relate to the consultation carried out by the BELB and the appropriate time to challenge that consultation process was at the latest immediately after the decision by the BELB on 4 December 2014. I consider that there has been delay by the applicant. It is not a sufficient answer to say that the subsequent decision of the Minister was flawed and that it proceeded on the basis that the first consultation was adequate. That is an inappropriate attempt to circumvent the obligation to act promptly."

[61] In similar terms the court later repeated the same admonition against inappropriate attempts to circumvent the obligation to act promptly:

> "[76] It is the applicant's case that the Minister's decision was irrational in that it was based on his mistaken belief that the consultation process carried out by BELB had been fair and proper whilst in reality it was procedurally unfair.
>
> [77] As I have indicated I do not consider that it is a sufficient answer to the issue of delay to say that the

> subsequent decision of the Minister was flawed in that it proceeded on the basis that the first consultation was adequate."

[62] It seems to me the legal principles in relation to delay are relevant to the present application. Thus in my view in so far as the applicant's grounds of challenge challenged matters which were resolved at a previous stage in the process the issue of delay clearly arises. It is not open to the applicant to completely reopen a process that has been going on for a substantial period of time. In my view matters such as the extensive consultation process carried out by the WELB prior to adopting the development proposals, the sustainable schools policy issued by the Department in January 2009, the WELB area plan and the publication of the development proposals in May 2014 are not susceptible to judicial review by reason of delay alone.

[63] Following on from this in so far as it is suggested that the history of the process resulted in the Minister being misinformed or misled in any way this will only avail the applicant if "the matter was presented in a significantly misleading way and not made good" – see Ouseley J in R (Bedford & Clare) v London Borough of Islington & Arsenal Football Club plc [2002] EWHC 2004 Admin. In the XY case Stephens J in dealing with erroneous information said that:

> "[82] The Minister was erroneously informed that the first statutory consultation with BELB included the third option of amalgamation. However this was of no material significance but rather drew the attention of the Minister to the importance some parties placed on amalgamation. The information, whilst erroneous, had no adverse impact given that the Minister was aware of the arguments in favour of amalgamation."

Specific grounds of challenge under Order 53

[64] In the original Order 53 statement there were 36 grounds of challenge. In the amended statement which was considered by the court the applicant abandoned Grounds 4, 8, 10, 11, 12, 13, 29 and 33. Some amendments were made to Grounds 3 and 20 and a new Ground 37 was added. Thus there were 29 grounds of challenge in total. The first section of challenges numbers 1 to 7 (excluding 4 which was abandoned) deal with issues of economic appraisal and financial considerations. The relevant grounds are as follows:

Grounds 1-7

(1) The Department's decision failed to give material weight or due consideration to the need to conduct an economic appraisal in respect of the development proposals.

(2) The Department's decision was irrational and departed from the Department of Finance and Personnel Guidance in respect of development projects and was reached without any consideration, or material consideration, of the costs of undertaking the developments proposals contrasted with retaining the status quo.

(3) The Department's decision did not give any consideration to the standard set out in DFP Guidance for a thorough assessment of the available options addressing sustainability with all relevant costs and benefits examined before a decision was reached.
….

(5) The Department failed to give any consideration to the absence of any commitment or entitlement to conclude that there would be future capital funding available for the construction of a new school in the foreseeable future.

(6) The Department has not undertaken any assessment or calculation of the costs of constructing a new school or the timescale within which any new school might be approved and completed as a capital project.

(7) The Department failed to give any or adequate weight to the concerns of the School Finance Team to include the view that the School Finance Team had 'strong concerns' about these particular proposals in relation to the financial consequences of split-site amalgamation.

Economic Assessment

[65] The "need" to conduct an economic appraisal in respect of the development proposals arises from the Policy for Sustainable Schools ("SSP") which states at 6.15:

> "While the educational needs of the immediate area must be a prime objective, there may also be financial implications for the whole school system. As well as savings, these options may involve additional cost, particularly at the outset. In each case, a thorough assessment of the available options for addressing sustainability should be carried out with all relevant costs and benefits examined before a decision is reached. The appraisal process must comply with the standards set out in the Practical Guide to the Green Book published by the Department of Finance and Personnel. This requires that the principles of economic appraisal should be applied, with appropriate and proportionate effort to all decisions and proposals for spending or saving public money, …"

[66] The up-to-date relevant DFP Guidelines "requires the principles of economic appraisal to be applied, with appropriate and proportionate effort to all decisions

and proposals for spending or saving public money". The applicant's essential argument is that no economic assessment was undertaken in respect of the DPs approved by the Minister. The one economic appraisal which was carried out by the WELB in 2009 is of no assistance, according to the applicant, because it was undertaken to look at a variety of options not just the "two school model" involving the amalgamation of Collegiate and Portora, with one non-selective, non-denominational school at the Devenish site. In any event it is argued that the EA process was superseded by the subsequent introduction of the area planning. By the time the DPs were actually proposed three of the schools who were engaged in the economic appraisal in 2009 no longer existed and therefore the landscape had significantly changed. It is argued that since the DPs actually envisaged a split site campus before the construction of a new build school an economic assessment was required of the financial implications for the split site campus.

[67] In relation to Ground 2 this is in effect a development of the argument that the Minister did not take into account the financial implications of the amalgamation and in particular the Minister's own Amalgamation Guidance which was first prepared in 2003 and was superseded by the 2014 Guidance in September 2014. The applicant focuses on the 2014 Guidelines and in particular the requirement that "consideration should be given to the realistic financial implications of a proposal and these should also be detailed in the case for change. Potential options for delivering the proposed change should be considered prior to the publication of the DP as the DP process does not provide for consideration of options or which option is the best value for money. This is particularly important where there is a need for capital expenditure." It is submitted that the DPs are defective because they do not provide any of the information in relation to the financial implications of the amalgamation proposed. In terms of financial implications for the costs of the amalgamation the only information provided was that from the School Finance Team which formed part of the briefing documentation for the Minister when he made his decision. The applicant also refers to the Amalgamation Policy subsequently published in 2015 at the direction of the Minister which indicates that the Minister when reaching a decision on a DP:

> "Considers all pertinent information, including estimated implementation and arrangements costs and makes a decision to either approve or reject the proposal."

The guidance clearly envisages "thorough assessment of all the options" with "all relevant costs and benefits ……." and provides that "set up costs" and "requirement funding allocation" including "split side costs", supernumerary staff etc should be set out in the "case for change". It is alleged therefore that he simply did not have the proper basis for assessing the costs of the DPs he could not therefore rationally have been satisfied of the case in support of the DPs.

[68] Ground 3 is a development of Ground 2 in that the applicant in effect says that the Minister did not have an adequate financial assessment of the costs of the split site of the amalgamated school and that an economic assessment carried out after approval of the DPs in relation to the construction of the new school is plainly wrong. The Department cannot prejudge the outcome of an economic assessment after the approval of these DPs. The applicant points out that the Minister cannot guarantee that a new school will be constructed. A new school has not yet been the subject matter of an economic assessment. Although the Minister has announced that the new school envisaged has been advanced in planning in January 2013 in relation to the major works protocol, the 2014 protocol envisages a scoring and ranking system for projects. The applicant therefore points out that there is no guarantee that the new school will be built and the release of capital will be subject to the 2014 protocol criteria, the availability of funds and the completion of an economic assessment. What then happens if the new school is not built? It is therefore argued that the Minister failed to take into account a material consideration or that his decision is unlawful because even if he was aware that the availability of funding could not be assured he failed to properly analyse or assess the risks of no funding set against the long term operation of a split site.

[69] Ground 6 clearly focuses on the alleged failure to carry out any economic assessment of the costs of constructing a new school which is what is envisaged in the proposals.

[70] Ground 7 has a particular focus on the failure of the Minister to consider the financial and cost implications of the split site arrangement. In particular he made his decision in the face of "strong concerns about these particular proposals in relation to the financial consequences of a split site amalgamation". In the briefing documents provided for the Minister it was suggested that there would be high level estimate of annual costs to the ASB of approximately £90,000 arising from the split site amalgamation. The School Finance Team in its report indicated that they had "strong concerns about these particular proposals". In particular they pointed out to the fact that the school would result in a net loss of 100 pupils which would affect their combined budget. Whilst the School Finance Team recorded that it generally supported amalgamations it observed that it did have particular concerns in this case. It is argued therefore that the Minister could not have taken the rational decision that the new school was financially viable on a split site operation, even on an interim basis.

[71] In aid of his argument Mr Dunlop has referred me to the case of CPNI's Application [2011] NIQB 132. In that case the applicant was a company which owned a number of community pharmacies in Northern Ireland. The applicant challenged determinations made pursuant to the Pharmaceutical Services Regulations (Northern Ireland) 1997 which set prices and fees to be included in the drug tariff and the decision of the Department made on 24 March 2011 amending the said drug tariff with effect from 1 April 2011. In that case a major issue between the parties centred on the question as to whether or not a Regulatory Impact Assessment

(RIA) should have been conducted prior to the introduction of the revised drug tariff. In Paragraph 43 of his judgment Mr Justice Treacy states:

> "On the basis of the evidence summarised above I consider that the respondents have not taken sufficient steps to inform themselves adequately about the basic economic facts which existed in an area of economic activity and to which they were about to introduce a revised regulatory instrument. In particular, it is agreed by both parties that the respondents never conducted an up-to-date costs survey to establish what it costs to run a pharmacy in Northern Ireland in 2011. It is also agreed that they never conducted a margin survey to establish the levels of retained profits pharmacists here can achieve – as compared to the profits that may be available in England. Without this core information I consider that the Department failed in its basic duty to take reasonable steps to acquaint itself with relevant information and failed in its obligation to equip itself with the information necessary to take an informed decision."

The relevant DETI guidance stated as follows:

> "When should I do an RIA?
>
> 1.7 … You must prepare an RIA for all proposals (legislative and non-legislative) which are likely to have a direct or indirect impact (whether benefit or cost) on businesses, charities, social economy enterprises in the voluntary sector."

As Mr Justice Treacy said:

> "It is hard to see how the guidance could be clearer in relation to the circumstances in which RIAs should be done."

[72] He came to three broad overlapping conclusions one of which was that "the Department erred in failing to carry out a Regulatory Impact Assessment and in disregarding paragraphs 1.6 and 1.7 of the RIA Guidance entitled "Better Policy Making and Regulatory Impact Assessment: A Guide for Northern Ireland". This error constituted a breach of the applicant's legitimate expectation that an RIA would be conducted in the present case and result in the potential loss of relevant information.

[73] He therefore held that the judicial review was successful.

[74] Mr McGleenan counters by saying that the matters under consideration by Mr Justice Treacy were in an entirely different context. In that case a regulatory impact assessment was a mandatory requirement of the DET guidance. They knew they had to do it and they did not. He also informed the court that even though the judge accepted an irrationality challenge on this ground he did not ultimately quash the actual decision. Indeed, none of the counsel involved in the case were able to point to a single case where a decision of this type was refused because of an inadequate or lack of economic assessment. Mr McLaughlin referred me to the case of Re National Trust for places of Historical Interest or Natural Beauty [2013] NIQB 60. That case involved a challenge to an application for planning permission in respect of a hotel and golf resort close to the Giant's Causeway which is a world heritage site. Part of the challenge in that case was based on an allegation that the Department failed to address reservations expressed by the economics branch of the Department of Rural Development which were not addressed in a subsequent economic impact assessment. The relevant passages in the judgment are as follows:

> "[93] On the other hand the Department pointed out what was described as a strategic approach to the assessment. The Department did not intend to carry out a forensic scrutiny of the economics of the project. Rather the Department's approach was to consider whether the project would bring benefits to the wider economy as part of a more strategic policy to have an assessment. Dr Roberts' view was that financial viability of the project was relevant to whether the project and the claimed economic benefits could actually happen.
>
> [94] Thus the applicant contends that it is a relevant consideration that there be completed a proper economic assessment of the project. The respondent contends that what is relevant is a wider consideration as to whether the project advances the strategic government aim for the development of tourism and golf, the perceived benefits of which have been established in general policy analysis. The Department's approach is likely to give effect to proposals considered to further the strategic aim. The proposal was judged to be within the strategic aim. Broadly, if benefits of a proposal can be identified, as is said to arise in the present case from the construction works which would be the position in every development and further the benefits said to arise from tourism and golf, which the Tourist Board considered to be the case, and if the proposal were considered to be sustainable, which the Department concluded would be the position, although based on certain assumptions, then the

Department considered the case for the development to have been made out.

[95] In taking the approach that it did, has the Department left out of account a relevant consideration by failing to complete a proper economic assessment? What are the relevant considerations for the purpose of the Department's decision on planning permission? There are generally said to be three categories of consideration for a decision maker. They are the mandatory considerations that are expressly or impliedly identified by the statute as considerations to which regard must be had. Then there are the prohibited considerations identified by the statute as considerations to which regard must not be had. Finally, there are the discretionary considerations being those considerations that are within the discretion of the decision maker whether or not to take into account subject to the Wednesbury Rule. Further, it is for the decision maker and not the court to decide the manner and intensity of enquiry into the relevant considerations …

[96] A full economic appraisal cannot be shown to be a mandatory consideration. The Department completed what was considered to be a sufficient economic impact assessment. I am not satisfied that any ground has been shown on which to set aside the approach as has been taken by the Department."

(My underlining)

CONSIDERATION OF GROUNDS 1-7

[75] In considering these grounds I obviously have regard to the matters set out above. In looking at issues of economic assessment and financial implications it must be borne in mind as appears from paragraph 6.15 of the SSP that "the educational needs of the immediate area must be a prime objective". In approving these proposals the Department says that a key objective is improved educational outcomes for pupils who are served by a network of educationally sustainable local schools. Whilst it was not possible to reach consensus locally the proposals do have the support of the WELB, the FPBE, Portora School, Devenish College and ETI. The Department's view in accordance with its policy is that the amalgamation proposal, with fewer grammar places and more non-selective places is seen as providing the only solution which is fair and able to provide the quality and breadth of education to which children whether in grammar or non-selective settings are entitled. It was the Department's view that the educational case for amalgamation is clear. Whilst

this is something about which the applicant and the Collegiate School vehemently disagree it is a proposal which does have significant independent support and is clearly within the ambit of the Minister's discretion. On no account could that view be described as irrational or unlawful in the Wednesbury sense.

[76] When considering financial considerations it must be remembered that the policy relied upon by the applicant is qualified in the sense that the principles must be applied "with appropriate and proportional effort". Turning firstly to the question of any economic assessment which led to the DPs by the WELB and the FPBE it cannot be ignored that an economic appraisal was carried out by the WELB in 2009 in relation to all of the identified options at that time including the option which was approved by the Minister. That economic appraisal took full account of the capital construction costs associated with the option approved by the Minister and the life time costs of the project of 25 years. The appraisal was conducted by an independent consultant and followed a methodology which was developed in consultation with all of the schools including the Collegiate. Its representatives participated in the process, attending 6 of the 7 meetings of the sub-group which worked with the consultants before withdrawing at the very end because of "grave concerns about how this review was unfolding". Indeed, following the 2009 economic assessment the WELB intended to implement the proposals by publishing DPs but this was superseded by reason of the subsequent introduction of the process of area planning. By the time the area plan was published – which again supported the current proposals, it is argued that the economic assessment was redundant. This is because circumstances had changed in that some of the schools involved in the original assessment no longer existed. Notwithstanding this it seems to me that clearly the economic assessment carried out in 2009 was a material factor in leading to the ultimate proposals and are part of a consistent strategy pointing in this direction. If there has been any failure to carry out a proper economic assessment prior to the publication of the DPs then such a challenge should have been made at the time they were published. However, it is not necessary to rely on the principle of delay in this regard because I do not consider that there was anything irrational about the decision to publish the DPs by the Board in May 2014 in terms of a failure to carry out any economic assessment. Financial considerations are considered at each stage in the process in a manner which is appropriate to that stage. The position of the Department is set out in the affidavit from Jacqui Durkin dated 11 September 2015 at paragraphs 69 and 70:

> "69. There are three different stages at which financial factors are considered in taking forward a proposal namely:
>
> (a) by the proposers when identifying the proposal to be progressed through the DP process;
>
> (b) by the Department on assessing the DP; and

(c) following approval of the DP through the economic appraisal of options to implement the proposals should a new building be required.

70. Formal economic appraisal (the third stage just set out) itself constitutes only one of the steps in the process following approval of a DP(s) involving provision of a new building. This economic appraisal assesses the options for implementing the proposal and is properly conducted following the decision on the DP. It does not form part of the advice provided to the Minister."

[77] This approach is of course entirely consistent with the letter sent by the Department of Education to the WELB on 19 November 2013 prior to the publication of the DPs in which it was stated that:

> "… in the event that a development proposal for the amalgamation of Portora Royal School in Enniskillen Collegiate is approved, an economic appraisal will need to be completed and approved to support any proposed capital investment in a new build. …"

Furthermore, in the submission made to the Minister re amalgamation on 12 November 2014 it was noted that:

> "… work on the economic appraisal will commence when and if the DP is approved …"
>
> "… the educational case for amalgamation is clear."

[78] Thus the Department say that a full economic appraisal can only be carried out in terms of the new build after the DPs are approved and when it has sufficient information to carry out such an assessment. Obviously a new school cannot simply appear overnight. As Mr McGleenan put it the Department has to know what it is going to build and where. The approval of these DPs is an essential step towards the ultimate policy objective. It is clear from the history of this case that the Department and the Minister are well aware of the policies and procedures with respect to capital funding for the construction of a new school. Thus the project was announced to be advanced in planning in January 2013. In 2014 the Minister announced the "criteria for capital" in the Major Works Protocol for Selection of Projects to proceed in planning on 20 June 2014. The purpose of the revised process was to ensure that projects were progressed more quickly and indeed provided that where schools were the product of an amalgamation they would be allocated additional marks which significantly increases the likelihood of that school being announced on the resultant major capital list. In the course of the hearing Mr Dunlop quite properly pressed the Department on their assertion that the Department and the Minister

were and remain satisfied that capital funding issues and duration of the split site arrangement will not prevent the successful implementation of the DPs – ie the building of a new school on a single site. By open letter from the Department dated 7 October 2015 on behalf of the Minister it was confirmed that a typical timeline for the process of delivering a major product of this size (following creation of the Project Board) is as follows:

> "(i) Technical feasibility, business case preparation and approval – one year.
>
> (ii) Procurement of the design team – 6 months.
>
> (iii) Design and design/costs approval – 12 months (can be slightly longer if a site with a listed building is referred).
>
> (iv) Construction and procurement – 6 months.
>
> (v) Construction – 2 years."

[79] He pointed out that the Project Board was created during the summer of 2015 and the project is currently 2-3 months into the first stage. Thus it appears that a new school is unlikely to be completed for 5 years. Obviously, nothing in life is certain and the Minister and the Department have repeatedly made it clear that the availability of funds in terms of building the new school will always be subject to "the budget and all necessary approval". However, the course is clearly set for the construction of a new school and as a matter of law the Minister is entitled on the basis of the available information to conclude that capital funding will be available when the "appropriate economic appraisal is carried out at the "appropriate time". A failure to build the school would be contrary to all the policy decisions made to date and certainly would constitute a serious breach of faith. The applicant points to the huge delay in the construction of the new school for Devenish College as a poor augury for the construction of the new school anticipated under these DPs. Indeed, it was this very delay which fuelled much of the strong opposition to the current proposals as is evident from the minutes of WELB's consultation with staff and parents of Collegiate pupils in April 2014 and in the subsequent Assembly debates to which I have referred. However, the delay in the construction of that site can partly be attributed to issues that arose in relation to public private partnership funding arrangements which were dismantled by the UK Treasury in April 2007. Happily, the construction of the new school has been approved and is now underway.

[80] The fact that the new school will not be built for at least 5 years does give rise for significant concern. The applicant in this case will have completed her second level education before the new school is constructed and the "interim" split site arrangement will be the reality for a very significant number of pupils for the foreseeable future. A particular focus of the applicant's case centres on whether or

not the Minister has properly considered the issues that arise in relation to the amalgamation on a split site basis. In terms of the financial considerations they particularly rely on the report of the school's finance team which was provided to the Minister at the time of his consideration of the DPs.

[81] In looking at this issue it is important to consider what actual information was provided to the Minister in relation to financial and economic issues. In the summary of the briefing papers prepared for the Minister the following is set out:

> "A capital project for Portora and Collegiate was announced to be advanced in planning in January 2013 but a DP was required. Work on the economic appraisal will commence when and if the DP is approved.
>
> There will be costs associated with the proposed amalgamation but, given the uncertainties involved, it is very difficult to estimate these. A high level estimate of annual costs to the aggregated schools budget "ASB" is approximately £90k but there will be other "up-front" costs which cannot be estimated at present."

[82] The substantive submissions to the Minister also deals with financial implications as follows:

> "40. School Finance Team (SFT) points out (at Appendix E) that the unknowns and uncertainties involved render it very difficult to predict the financial implications of the proposed amalgamation. However, comparing net costs of the formula funding allocation before and after amalgamation provides a high level estimate of an annual cost to the ASB of approximately £90k. SFT also points out that there will be other "up-front" costs involved in the transition from two schools to a single school where these cannot be estimated at present."

This point was reinforced in paragraph 50 of the submission to the Minister.

[83] Appendix E sets out the full report of the school finance team. Whilst the report indicates that the school finance team generally supports amalgamation as a delivery of education in fewer, larger schools is usually a more cost effective use of resources it does refer to the fact that it "has strong concerns about these particular proposals in relation to the financial consequences of split site amalgamation".

[84] One of the factors of concern to the SFT was the fact that overall reduction from 1,000 pupils (ie 500 in each school) to 900 pupils in the new school would result

in a reduction in capital funding. It has been pointed out on behalf of the Department that this represents a misunderstanding of the proposal and indeed this was also relevant in relation to subsequent grounds of challenge. It has been explained that the operation of a split site is intended to be a temporary arrangement and numbers in the new school will be reduced over time through reducing admissions rather than immediately. No child attending either Collegiate or Portora would be expected to leave because these DPs have been approved. Whilst it is accepted this means funding will reduce over time and costs will also reduce with the fall in pupil numbers, the new school will be funded in accordance with the pupils attending the school.

[85] In any event what is clear is that all of this information was made available to the Minister. This is a classic example of challenging the weight which the Minister pays to the information he was provided with and the extent and intensity of the enquiry to be undertaken by him. He clearly was apprised of the SFT reservations, he was fully briefed on the matter and made a decision fully sighted. There can be little doubt that the interim split site schools will be properly funded given that the responsibility for any costs associated with the school are matters for the EA, the Department and FPBE, all of whom support the proposal on the grounds of educational sustainability.

[86] The actual costs of the split site school will depend on the precise arrangements settled upon by the new Interim Board of Governor's to manage the split site. In my view it was perfectly permissible for the Department in the circumstances to leave the very detailed practical arrangements to the Interim Board.

[87] At the end of the day it was for the Minister to decide (subject only to Wednesbury unreasonableness) whether he had enough information to make his decision. He had to weigh the evidence before him on financial issues against all other issues including the educational needs of the area. Of course the applicant says that his conduct in this regard was unreasonable given that there can be no guarantee that a new school will be built. In those circumstances it was incumbent upon him in accordance with his own policy to carry out a much more detailed economic assessment of the costs of a split site. In this regard the applicant also relies heavily on a Ministerial quarterly update of 4 December 2013. That update which arose from a meeting chaired by the Minister refers to the critical requirement of establishing the real costs of individual reorganisations which should form part of the economic appraisal. However, it is clear that this document is in fact a position paper, prepared for a consultation with a view to providing a bespoke amalgamation policy. The document itself states quite clearly that "the Department is currently reviewing the DP process, so that will not be addressed in this paper". The Minister was entitled rationally to form the view that capital funding issues and duration of the split site arrangement will not prevent the successful implementation of the DPs.

[88] However, I form this view on the basis that the Department will proceed to implement the DP proposals in terms of the building of a new school. It would be nothing short of a scandal if this does not occur. If there was a realistic prospect of the split site arrangement being a permanent feature I would have serious concerns about the lack of a more detailed economic assessment and my decision on this point might well have been different.

[89] Accordingly, I reject any grounds of challenge insofar as they are set out in Grounds 1-7 which relate to economical appraisal and financial considerations.

Ground 8

[90] This has been abandoned.

CONSIDERATION OF GROUND 9

Ground 9

The Department failed to give any, or give manifestly inappropriate weight to the transport implications of the development proposals and did not have access to any evidential basis or other material, in which a proper decision could be taken that the transport difficulties inherent in the development proposals were not unique and would be capable of being managed.

[91] It has been a consistent feature of those opposing the proposals that there would be very significant transport difficulties arising from the operation of the split site. The Collegiate and Portora are situated on separate sides of the island town of Enniskillen which already suffers from very significant traffic problems. The applicant argues that despite the fact this matter has been repeatedly raised the Minister has decided to approve the proposals without carrying out any enquiry as to how this issue could be managed and without seeking any evidential basis for dealing with the problem.

[92] This is part of an overall attack on the proposals which relates to a failure to consider how they will be implemented in practice, in particular having regard to the split site arrangement. Thus this theme comes up again in some of the later grounds of objection. There is ample support for the suggestion that there are significant traffic problems in the Enniskillen area – see the acknowledgement from WELB at the pre-consultation stage to the effect that:

> "The roads infrastructure within the town of Enniskillen is at capacity level. In the agreement of an option for the future provision of controlled post-primary education in the Fermanagh area, discussion will take place at a strategic level with other government departments to ensure the infrastructure is appropriate to address the needs of the preferred option."

[93] It does not appear that any such strategic discussion took place. So the applicant makes two points. Firstly, having regard to the argument that there is no guarantee that a new school will be built, it is erroneous to state that any transport problems will be "temporary" and secondly, that it was irrational of the Minister to come to the view that this was something which would be "managed" by the Interim Board of Governors. In considering this matter it is important to bear in mind that the issue of travel arrangements was repeatedly brought to the attention of the Minister. These are referred to throughout the submission to the Minister at paragraphs 14, 15, 18, 21, 22, 43, 44 and also in the appendices.

[94] The Minister contends that it is clear that the split site arrangement will be temporary and in this regard I refer to the arguments above in relation to economic assessment. In terms of the management of the split site the Department's view is set out in Ms Durkin's affidavit at paragraph 110 as follows:

> "Depending on the size of the schools involved, amalgamated schools will usually, but not always (if one of the schools can accommodate the pupils of the other) operate from a split site initially. The challenges of operating effectively on a split site are therefore not unique to the new amalgamated school and the decision was taken in the knowledge of where the pupils of both schools live and Enniskillen's traffic problems as considered within the submission … .
>
> The IBOG with knowledge of current local traffic issues and with the best interests of the new school in mind, will determine how the new school will operate effectively and efficiently on split sites so as to minimise disruption to pupils and meet required educational standards."

[95] Ways in which this could be dealt with are set out in paragraph 112 of Ms Durkin's affidavit as follows:

> "Pupils currently travel from home to both schools and will continue until such times as a new school is built. The IBOG will determine how the curriculum is delivered, eg, they may decide that Key Stage KS3 and KS4 will be delivered on one site and post 16 on the other. To set this in context, in a recent amalgamation to establish a new voluntary grammar school in Coleraine the IBOG determined that KS3 and KS4 will remain in the smaller school site with all others in the larger of the school sites and staffing will be allocated in a manner that best delivers the curriculum and requires minimum

> movement of teachers between sites. In other split site arrangements in busy market towns across Northern Ireland there is an example of an amalgamation in a 3-way split where KS3 pupils attend on one site, KS4 pupils attend another site and post 16 pupils attend on the third site, namely St Ronan's College, Lurgan. At Knockbreda HS and Newtownbreda HS a split site amalgamation pertains until the new build. It is clear from these examples and others a split site is workable."

[96] Again this part of the challenge is based on the weight the Minister paid to the material provided to him and the sufficiency of information relied upon by him. In short this is a rationality challenge. The Minister as set out in Ms Durkin's affidavit clearly took the view that this is a matter which could be left to the IBOG to manage in the best interests of the school. It seems to me that it was lawful for the Minister to form the view that the problems which can arise are capable of being managed. Accordingly, I reject this as a ground justifying quashing the Minister's decision.

Grounds 10, 11, 12 and 13

[97] These grounds have been abandoned.

Grounds 14, 15, 16, 17, 18 and 19

[98] These grounds can conveniently be dealt with together. The applicant argues that these grounds support the argument that the Department's decision was grounded upon errors as a result of a misunderstanding of facts and inappropriate briefing provided to the Minister which was infected by manifest error. The grounds are as follows:

Ground 14

The WELB comments at Appendix D to the Ministerial briefing paper which were relied upon by the Department wrongly advised the Minister, inter alia, that:

(a) there would be access to a broader choice of courses as a result of an amalgamation when there is no evidence or grounds for this conclusion;

(b) the amalgamation would lead to state of the art facilities when there is no proposal or approval or funding for a new school;

(c) that financial sustainability and economies of scale would be improved when in fact the split site is likely to prove more expensive.

Ground 15

The WELB comments at Appendix D to the Ministerial briefing which was relied upon by the Department failed to advise the Minister, inter alia:

(a) the collaboration between the Collegiate Grammar School on a cross-sectoral basis could not be assured to continue.

Ground 16

The Department was wrongfully informed by the WELB that Devenish College numbers were being depleted by the existence of Portora RS and Collegiate GS when in fact, the enrolment in Devenish was reduced by reason of parental choice to send their children to alternative schools.

Ground 17

The Department failed to give appropriate consideration to demographic trends within County Fermanagh and misdirected itself in relation to the demographics of pupil numbers and concluded that the new school would provide 1,700 places in the controlled/non-denominational VG sector where the WELB figures show that by 2025 there will be a need for 1,848 places.

Ground 18

The Department misdirected itself by accepting the views of the WELB that the projected census figures for pupil numbers would be less than anticipated without any rational evidence or proper explanations for this view.

Ground 19

The statistics relied upon by the WELB and by the Department only considered the controlled schools and non-denominational voluntary grammar schools and failed to give consideration to pupils who transfer across sectors or into or outside the WELB area. No cross-sector considerations were applied to the statistical tables prepared by the WELB.

CONSIDERATION OF GROUNDS 14-19

[99] Ground 14 is predicated on the basis that "the new school" will operate on a split site. Thus the specific criticism set out in 14(a), (b) and (c) (and especially (b) and (c)) address the split site arrangement. The applicant avers that the assertions at (a), (b) and (c) are "simply wrong".

[100] In considering Ground 14 it is important to bear in mind the comments of Ouseley J that arguments in relation to mis-information provided to the Minister will only avail an applicant if "the matter was presented in a significantly

misleading way and not made good". The difficulty I have with the arguments supporting Ground 14 is that they focus on the interim arrangement and mis-characterise the true purport of the proposals. It is clear that the objective of the proposals is to achieve the construction of a new build school. In dealing with the financial/economic arguments above I have set out my finding that there is clear intention to build the school and that the appropriate steps have been taken to initiate the implementation of this objective. The operation of the split site is clearly an interim arrangement whilst the appropriate steps are taken to implement the construction of the new build school. The Department and the Minister have recognised that there will be potential difficulties during the interim phase but have come to the view that these can be properly managed by the IBOG and I have indicated that there is nothing irrational or unlawful about such a conclusion. Set against the construction of a new school there is nothing irrational about the suggestion that this would provide a broader choice of courses for pupils attending the new school or that it will lead to state of the art facilities. Prior to the DPs being presented to the Minister curriculum surveys and an ETI inspection confirmed that neither the Collegiate nor the Portora was meeting the statutory requirements of the entitlement framework. This was not withstanding the fact that there was collaboration with other schools and colleges within the Fermanagh learning community. The creation of a new build school on a single site with 900 pupils is entirely consistent with the relevant educational policy going back to the Bain Report and right through the SSP. The entire purpose of the policies which have developed in this area was for the express purpose of delivering rationalisations which would lead to improved economic and educational sustainability. The proposal was approved by the Minister. I therefore reject Ground 14 as forming the basis for any valid challenge to the Minister decision.

[101] The applicant points out that both the Bain Review and the SSP refer to the importance of cross-sectoral collaboration when considering proposals for new schools or re-organisation or rationalisation of schools. Along with all the other post primary schools in the Fermanagh area the Collegiate Grammar School participates in the Fermanagh Learning Community (FLC). The FLC is the means by which schools in the Fermanagh area work with others to provide teaching in subjects which are not available at the school they are attending. The applicant says that the closing of the Collegiate will inevitably impact on the schools with which it works under these arrangements and that the Minister should have been advised of the cross-sectoral implications of this discontinuance.

[102] Whilst it is true that the FLC does provide some cross-sectoral collaboration between schools in the Fermanagh area it is clear that the purpose of the scheme is to assist schools in complying with their statutory obligation under the entitlement framework. Thus it is not surprising that the Department does consider the FLC in its submission to the Minister in the context of the entitlement framework. Whilst participation in the FLC does have some cross-sectoral benefits it is somewhat disingenuous to suggest that these proposals will have a significant cross-sectoral impact. Firstly, it is clear from the analysis of the extent of collaboration that this is

very limited, particularly with the maintained sector. Secondly, it is self-evident that if a school is closed then that collaboration with other schools will not continue. Thirdly, there is no reason why the new school could not enter into similar collaborative arrangements in the post amalgamation era.

[103] Ground 15 overlaps with **Grounds 25 and 32** which really focus on the Department's alleged failure to give any consideration to the impact of the development proposals upon the other post primary schools in Enniskillen. For that reason I propose to deal with those grounds at this stage. Again, the applicant refers back to the fundamental landmark policy of the Department namely the SSP. In particular she refers to Section 2.16 and 2.17 of SSP which state:

> "**Area Based Planning**
>
> 2.16 Developments at one school may have significant impacts on other schools in its area, including their sustainability. This underlines the importance of examining provision on an area basis as recommended by the Bain Report, taking account of the overall projected need for provision in the area.
>
> 2.17 This will be addressed through the roll-out of area based planning in 2008. Area based planning is about anticipating the educational needs in an area and planning to meet those needs in an effective and efficient way through an estate of sustainable facilities. This will ensure that planning is on a whole system basis, taking account of impacts within and across areas on a cross-sectoral basis to develop plans that meet the need for provision in that area."

[104] The applicant argues that the intake to the Collegiate is not solely from the controlled/voluntary primary sector and argues that there is the potential for greater numbers of transfers from the maintained sector because of planned rationalisation in that sector. It is argued that the Minister's decision is therefore flawed because in reaching his conclusion he failed to have regard to his own policy which he thought he was implementing by approving the DPs. Alternatively, it was a relevant consideration for the Minister that the SSP proposed cross-sectoral analysis and if he considered that enrolment in the maintained sectors was truly irrelevant to the DPs then it was plainly relevant to take into account that he was departing from the SSP and the intention that planning be undertaken on a "whole system basis". As was clear from the SSP the overall projected need for provision in a specific area is to be addressed through the "roll out of area based planning". It is therefore important to understand that the DPs are the out workings of the WELB

strategic area plan for post primary schools. That area plan expressly takes account of need across the entire County Fermanagh area and all schools within it, including denominational and integrated schools. Thus the plan does address all post primary schools across all sectors in the Fermanagh area. In preparing the plan the WELB clearly takes account of the enrolment trends within every grant aided school in all sectors. As has been pointed out earlier the area plan has not been the subject of any legal challenge and the subsequent DPs which were approved can be traced back to the plan. The rationale underpinning the proposals is set out in detail in a submission made to the Minister in a document "WELB Background and Comment". The clear objective was to meet the needs of pupils in the controlled/voluntary sectors in Fermanagh into the future. In my view there was nothing irrational or unlawful in coming to the conclusion that the DPs approved will achieve exactly that, even if others may disagree. I agree with Mr McLaughlin's submission on behalf of the Board that even if the possibility of cross-sectoral movements of pupils was not expressly considered, it was well within the margin of discretion for the board and the Department not to do so. In terms of cross-sectoral movements of pupils this also touched upon in relation to alleged concerns about the role of the FPBE in any new school. The reality is that the continuation of planning of education on a sectoral basis continues and indeed the Assembly rejected the Bain proposal to establish an ESA which would have created a single management authority for all schools. I do not consider that the possibility of significant cross-sectoral movements arises from this proposal so as to materially affect the decision taken by the Minister. Accordingly, I reject Grounds 15, 25 and 32.

Ground 16

[105] The issue of enrolment trends at Devenish College has been controversial throughout this process. To a large extent the applicant's complaint under this ground relates back to the WELB's rejection of an alternative put forward by the Collegiate that it be allowed to increase its numbers to meet the sustainability requirements under Bain. Because the WELB took the view that this would have an inevitable detrimental effect on the viability of Devenish College this option was rejected. It is argued that the Minister was misled by the WELB so that he wrongfully concluded that the two school model was the only viable option since other options and in particular the one put forward by the Collegiate would either result in an overall supply of places or would have a detrimental impact on numbers at Devenish. It was suggested that the enrolment at Devenish was falling for a number of years and for a multiple of reasons. Thus it is suggested that the entire basis of the DPs was therefore predicated on the impact it would have on the new school at Devenish. The applicant therefore submits that the decision making process was influenced by a lack of a proper understanding of the reasons for the decline in enrolment at Devenish. In her affidavit on this point Ms Armstrong points out that since the numbers for the Collegiate and Portora remain constant the decline in enrolment in Devenish over the years 2009-2014 is explained by parents opting for non-selective options such as Erne Integrated, Castlederg High School,

Omagh High School and Fivemiletown College, or indeed a grammar school option such as Omagh Academy and Dungannon Royal with a cut-off score maybe lower than that in the Collegiate. She suggests that the trend of pupils going elsewhere is well established and will not be changed by the closure of the Collegiate. The factual basis for this is well set out in the affidavit from Ms Armstrong. She refers to a table setting out the actual number of admissions for the years 2009-2014 for each of the schools in the controlled voluntary sector. She then goes on to state:

> "[101] These numbers clearly show that the decline in the enrolment in Devenish College is not due to the grammar schools taking more and more pupils. This decline in enrolment is due to parents of children in controlled primary schools in Fermanagh opting for other schools. Parents are opting for non-selective options such as Erne Integrated, Castlederg High School, Omagh High School and Fivemiletown College, or indeed a grammar option such as Omagh Academy and Dungannon Royal with a cut-off score maybe lower than in the Collegiate. The area plan is based on the false assumption that if fewer pupils gain access to a grammar school in the controlled voluntary sector they will go to Devenish College. However, as these figures show the trend of pupils going elsewhere is already well established and closing the Collegiate will not change this trend. These figures have come from the WELB statistics which are in the public domain; the WELB should be well aware of these trends as evidenced by their own statistics and by the choices of parents on the transfer forms.
>
> [102] It has also been stated that there are too many empty desks in our system. The above figures show that in 2013 each of the three schools in the controlled/voluntary sector in Fermanagh would have been over-subscribed had all the transferring pupils from controlled primary schools remained within the controlled sector in County Fermanagh. It is also noteworthy that the enrolment number for Devenish College is 665; yet their current enrolment number is stated in the WELB Transfer 2015 Guide for Parents as 520."

[106] It is therefore argued that the Minister was misled in that the Board had made a link between the failure of Devenish to meet its anticipated quota of students and the continuation of the provision for 1,000 grammar school pupils provided by the Collegiate and Portora. Indeed, the applicant goes further to suggest that this misunderstanding or misrepresentation of the enrolment trends at Devenish was the

basis for rejecting a proposal put forward by the Collegiate to the effect that its cap should be lifted to permit 600 students because they would have had a detrimental impact on enrolment at Devenish. As Mrs Brunt says in her affidavit in support of the applicant:

> "This significant misunderstanding and failure to properly analyse the relevant evidence has meant that the Minister was not properly informed when he was advised by the Western Board 'the sustainability of Devenish College is inextricably linked with the attached development proposals'."

[107] In considering this argument I am mindful that the Minister can only decide to approve the option that is actually before him. He is not being asked to decide on any of the alternative options that were put forward by various parties during the consultation process and in particular the one supported by the Collegiate. As I had made plain earlier in the judgment the applicant cannot use these proceedings to reopen a matter that has been decided and as has been made clear already neither the area plan nor the initial publishing of the DPs has been the subject matter of a judicial review challenge. Thus, the applicant is driven to say that in reaching his decision to approve the DPs he was misled in a material way in respect of the enrolment trends at Devenish.

[108] Bearing that in mind it is important firstly to analyse what the Minister was actually advised. The briefing document which was provided to the Minister contained a comprehensive review of the background process and reasoning behind the WELB's decision to publish the DPs. In relation to the Devenish issue as Mrs Brunt has pointed out, the commentary states that:

> "In order to provide two schools to meet the needs of the pupils of the area, the sustainability of Devenish College is inextricably linked with the attached development proposals which if implemented will result in the establishment of a new co-educational 11-18 non-denominational voluntary grammar school in Enniskillen."

[109] In looking specifically at the removal of the cap on admissions to the Collegiate Grammar School the briefing document points out that:

> "An enrolment increase would however necessitate the provision of additional accommodation at the Collegiate Grammar School and consequently have an inevitable detrimental effect on the viability of Devenish College, in particular."

[110] During the course of the hearing I heard significant argument and was referred to material on the reason for the reduction in the enrolment trends through enrolment at Devenish College. It seems pretty clear that the reasons for that decline are multi-factorial. Self-evidently a major contributing factor must be the failure to build the new school in accordance with what was anticipated. Thus the condition of the current school facilities is extremely poor with a chronic need of capital investment. Indeed, this point was made by a delegation from Devenish College when it met the Minister as part of the consultation process for these DPs where they spoke about the negative impact on their school that excellent facilities in other schools had on transfer choices. Happily the construction of a new school on a site at the Tempo Road at Enniskillen has been approved and is now underway. This will inevitably improve the enrolment figures for the school.

[111] Turning to the overall policy, the Board is obliged to consider education provision on a whole system basis having regard to the needs of all pupils in the area. Thus it is perfectly entitled and indeed obliged to consider the sustainability of the school in Devenish which is the only non-selective controlled secondary school in the Enniskillen area. The area plan which led to the development proposals anticipates a two school system on two new sites which will meet the needs of students in terms of sustainable schools and the provision of a curriculum in accordance with the entitlement framework. That proposal is entirely consistent with the applicable policy. In considering the DPs under challenge the Board in my view was perfectly entitled to point out the potential implications on Devenish College. Whilst as I have pointed out the reason for the decline in enrolment at Devenish College is multi-factorial the Board is entitled and it is a perfectly reasonable submission that the level of grammar school provision is a contributing factor in this equation.

[112] It is unsurprising and to be expected that grammar school places will fill first. There are two sides to this coin. On the one hand if grammar school places are increased at the Collegiate or Portora this will inevitably result in a further reduction in enrolment at Devenish. On the other hand if the overall number of grammar places is reduced as anticipated by the DPs this should result in an increase in enrolment at Devenish even if all of the reduced numbers do not go there. In my view therefore the approach taken by the Board was an entirely lawful and legitimate approach to adopt and more importantly for the purposes of this judicial review I do not accept that the Minister was misled in any way on this issue.

[113] In short no illegality arises on this ground.

Grounds 17, 18 and 19

Statistics

17. The Department failed to give appropriate consideration to demographic trends within County Fermanagh and misdirected itself in relation to the demographics of pupil numbers and concluded that the new school would provide 1,700 places in the

controlled/non-denominational DG sector when the WELF figures show that by 2025 there will be need for 1,848 places.

18. The Department misdirected itself by accepting the views of the WELB that the projected census figures of pupil numbers would be less than anticipated without any rational evidence or proper explanation for this view.

19. The statistics relied upon by the WELB and by the Department only considered the controlled schools and non-denominational voluntary grammar schools and failed to give consideration to pupils who transferred across sectors or into or outside the WELB area. No cross-sector considerations were applied to the statistical tables prepared by the WELB.

CONSIDERATION OF GROUNDS 17, 18 AND 19

[114] In relation to these grounds I have already dealt with Ground 15 above in terms of cross-sectoral considerations. As part of the area planning process the Board prepared projections of need for places within its area. Applying the "Needs Model" statistical analysis it was estimated that there would be a need for 1,848 pupils in 2025 but as I have already pointed out the needs model does take account of cross-sectoral transfers and the number of pupils living in one area but attending school in another as it bases projections of post primary pupils across sectors and proportions already attending schools, regardless of what sector they had previously attended at primary level. However, the applicant points out that the Board has based its proposals on a projected need of 1,700 places which in accordance with the DPs would provide 900 places for pupils in the non-denominational voluntary grammar school and 800 pupils in the non-selective all ability school.

[115] The thrust of the applicant's argument under this ground is that the Minister's decision was therefore based on inadequate data which was incorrectly interpreted and thus the logic and basis of the decision was flawed and in consequence unlawful. In her affidavit Ms Durkin points out that the data to which the applicant refers provided projections for each of the years up to 2025. The projected need for 2015 was only 1,590 pupils. When the projections were prepared it was understood that population projections change and as more information becomes available over the yearly cycles the projections are updated. So it is argued on behalf of the Department that what has been done is a proposal has been made to create two schools with a total capacity of 1,700 students. This meets current needs for 2015 and on the basis of the figures then presented would be sufficient to meet need until approximately 2021. In the event of these numbers increasing as was originally anticipated the new schools would be capable of expansion. In any event to make Ms Durkin's point good the most recent predictions point to a projected need of 1,659 pupils. Most importantly all of the current figures up to 2027 are less than 1,700 with in fact the figure of 1,659 being the highest for 2025. I do not consider that there are any valid grounds whatsoever in 17, 18 and 19.

[116] I deal with Grounds 20, 21, 22, 23, 24 and 34 in a separate section dealing with the FPBE. Grounds 25, 26, 27, 28 and 30 relate to the impact of the implementation of the decision and are as follows:

Impact of the Decision

25. The Department irrationally failed to follow its own policy and give any, or due consideration to the impact of the development proposals on area planning or upon the other post primary schools in Enniskillen.

26. The Department failed to take account of any and/or give any consideration to the implementation of the decision to include –

(a) the reduction of 100 places in the "new" school and the measures for those pupils already attending Collegiate and/or Portora in the new school.

(b) the operation of a split site in Enniskillen and the impact on children and staff;

(c) the traffic impact of operating a split site in Enniskillen.

27. The Department has given no consideration as to the relocation of the 100 pupils currently at the Collegiate Grammar School or Portora Royal School who would no longer have a place after amalgamation.

28. The Department wrongfully approved the decision with no proper impact assessment on the operation of a split site and how it could be operated in practice.

30. The Department wrongfully failed to give any consideration to the fact that the roads infrastructure within Enniskillen is at capacity level and failed to give consideration to any discussion at a strategic level with other government departments as envisaged in the pre-consultation document on the future of controlled/voluntary post primary education in County Fermanagh.

CONSIDERATION OF GROUNDS 25, 26, 27, 28 AND 30

[117] In relation to the reduction of 100 places in the "new" school Mr Dunlop points out that the new school will be the amalgamated school on a split site basis. He points out that this was not considered by the Minister in his deliberations and that as a result there would be 100 pupils currently in either the Collegiate and/or Portora who will be compelled to relocate to a "non-voluntary grammar setting" if the proposals are implemented. He refers the court to the report from the schools finance team which addresses the issue of the impact this might have on the finances available to the new school on the basis of 900 as opposed to 1,000 pupils. In the course of the hearing the Department has unequivocally averred that "no child attending either Collegiate GS or Portora RS would be expected to leave their school because these DPs had been approved. Numbers at the new school will be reduced over time to reduce admission numbers". I must confess that this is not immediately

obviously from reading the proposals as presented to the Minister. Nonetheless, I take the view that there is a clear and unequivocal undertaking in court that the position is as stated by Ms Durkin and that therefore no material issue arises in relation to students currently attending Collegiate and Portora being disadvantaged as a result of these proposals. In terms of the eventual outcome clearly the Minister was aware of the fact that ultimately there would be a reduction to 900 places. This of course is a matter entirely within the remit of the Minister and not one for the court to comment on. The important point is that he took the decision in the full knowledge that this would be the eventual outcome which is neither unlawful or irrational.

[118] The remainder of the issues raised under these grounds relate to the practical implications which will inevitably arise as a result of the split site. This obviously will have particular implications for the applicant as it is inevitable that she will spend the remainder of her education under these arrangements. Some of this area has been covered in my discussion in relation to whether or not it was necessary to carry out an economic assessment of the financial implications of the split site. Mr Dunlop points out that the Minister was aware that significant difficulties will arise in relation to a split site arrangement. Despite this he reached the conclusion that these issues could be managed despite the absence of any assessment of the practical implications being undertaken. He appears to have come to the view that the issues "can and will be managed". The applicant points to the unique geographical issues facing Enniskillen in terms of transport issues. She refers to the potential impact on how the Fermanagh Learning Partnership will be affected. It is argued therefore that the Minister could not rationally have reached the conclusion that the split site issues could be managed in the absence of any consideration or assessment of these issues.

[119] That the Minister was aware of the potential difficulties is abundantly clear. Thus, for example the submission from the Department refers to the following points being raised in the consultation process:

- The negative impact that operating over split sites could have on pupils' education.

- The lack of clarity at how pupils' learning and teaching could be facilitated where different examination boards and pathways have been followed by pupils in the Collegiate GS and Portora RS.

- The benefits of single sex education.

- The guarantee of a new build.

[120] This was repeated when referring to the issues raised by the Collegiate GS delegation when they met the Minister. The logistical difficulties of a split site were also recognised by the Portora RS delegation who met the Minister but it was their

view that these could be addressed and that they "could and would be managed". This argument was again repeated in the summary and in the more detailed submission provided by WELB.

[121] I bear in mind that this is another classic example of an issue that goes to the manner and intensity of the enquiries to be undertaken by the Minister. This is an area which may very well have benefited from more analysis. It is also clear that at this time the Minister was aware of ongoing issues in relation to the amalgamation of schools on a split site basis and was actively involved in developing a guide in relation to this matter – see the reference to the Minister's quarterly update above. Both the Board and the Department have significant experience of school amalgamations and of operating schools on split sites pending a new build. Dealing specifically with the issue of transport as is the case with the other matters I have discussed transport implications were brought before the Minister and were considered. Is the Minister's view that these matters can be managed irrational? At the end of the day it seems to me that this is something which can be properly left to the IBOG. It does not necessarily follow that a large number of pupils will be moving between sites on a daily basis. This issue can be managed in a range of ways through timetabling arrangements or by keeping pupils on one or other campus but moving teachers. Whilst I understand these issues will only arise on an interim basis pending the construction of a new school which I am satisfied will take place they are nonetheless significant matters which have a direct bearing on this applicant and many other students. However, I am satisfied that these are matters which the Minister considered and that he is entitled to come to the view that they can be dealt with by the Interim Board of Governors. In short perhaps more enquiry would have been desirable but certainly the decision in this regard falls short of irrationality.

Grounds 31 and 32

Other errors in the Department's Decision

31. The Department gave manifestly insufficient weight to the statutory requirement to have regard to parental choice in accordance with Article 44 of the Education (NI) Order 1986.

32. The Department failed to give consideration to the WELB strategic area plan and failed to give any consideration to the impact of the development proposals of area planning to include the impact on the controlled and maintained educational sectors including the Fermanagh Partnership and for shared schooling on a cross-sectoral basis.

CONSIDERATION OF GROUNDS 31 AND 32

[122] Ground 32 has already been dealt with. Article 44 of the 1986 Order provides as follows:

> "On the exercise and performance of all powers and duties conferred or imposed on them by the Education Orders, the Department and Board shall have regard to the general principle that, so far as is compatible with the provisions of efficient instruction and training and the avoidance of unreasonable public expenditure, pupils shall be educated in accordance with the wishes of their parents."

[123] It is clear from the evidence that the overwhelming majority of parents of students at the Collegiate wish to maintain a single sex grammar school. Mr Dunlop argues that whilst Article 44 is subject to significant restrictions the obligation in question was not drawn to the Minister's attention and finds no expression within the briefing papers or recommendations provided to him. It is argued that the absence of reference to this express statutory obligation and the absence of any evidence that was specifically considered supports the argument that insufficient regard was given to the Department's duty.

[124] If there is one thing that cannot be in dispute in this matter it is that the Minister was fully aware of the very strong wishes of the parents of the students at the Collegiate in particular. They are referenced repeatedly throughout the submissions made to him and he was made fully aware of them at his own meeting with a delegation from the Collegiate. Parental preference is not the ultimate arbiter on this issue but rather "the provision of efficient instruction and training and the avoidance of unreasonable public expenditure". The absence of any specific reference to Article 44 in the Minister's briefing papers, in my view, could not justify a successful challenge to the Minister's decision. In no way can it be established that he was unaware of the requirement to have regard to Article 44 or of the factual position in relation to the wishes of the parents at Collegiate Grammar School. Wednesbury challenge cannot in my view be made out under this ground.

[125] Ground 32 has been dealt with above. Ground 34 has also been considered above and the general ground under Ground 35 that the Department's decision "was unreasonable in the Wednesbury sense" has been dealt with in respect of the analysis of each of the individual grounds for complaint. Grounds 36 and 37 will be dealt with under the FPBE section.

THE FERMANAGH PROTESTANT BOARD OF EDUCATION ("FPBE") – GROUNDS 20, 21, 22, 23, 24, 34, 36 AND 37

[126] In view of the matters that arose in the course of this hearing I propose to deal with the FPBE in a separate section. Obviously there is a degree of overlap having regard to its role in the process. It will be recalled that the FPBE made proposals 261 and 262 which were ultimately approved by the Minister. Again as will be recalled the proposals were made pursuant to Article 14 of the Education and Libraries (Northern Ireland) Order 1986 ("The 1986 Order"). Clearly the FPBE was not

regarded as problematic by the Department in the course of their considerations. The Department has confirmed that it has had a summary of the scheme under which the FPBE was established since 2009 and the Minister was advised prior to meeting Mr Morton (the Principal of Portora) that "based on legal advice from DSO the Department confirmed it would have no legal objections to raise in respect of the scheme" on 10 July 2013. In the course of the hearing the relevant scheme has been subject to considerable analysis and the applicant makes a number of points which it is said support the grounds for judicial review of the Minister's decision.

What is the FPBE?

[127] In essence the FPBE is the trustee body of the Portora Estate. It is a public body which was established by, and operates pursuit to, statutory provisions found in "Scheme 34" ("the Scheme"). The Scheme is dedicated legislation which was made by the Lord Lieutenant of Ireland by way of Order in Council, pursuant to powers conferred upon him by section 24 of the Educational Endowments (Ireland) Act 1885. I will return to the specific clauses of the Scheme and how the FPBE in fact operates in practice below.

Challenges insofar as they relate to the FPBE

[128] In my view the issues concerning the FPBE in this judicial review can be broken down into four issues as follows:

(1) Did the FPBE have the power to make a DP under the Order?

(2) Were the DPs legally deficient in that they did not contain sufficient information?

(3) Was the Minister's approval of the DPs ultra vires on the grounds that no agreement was in place between the FPBE and the Department in compliance with paragraph 1(1) of Schedule 6 to the Order?

(4) Did the Department give sufficient consideration to concerns about the role of FPBE in the future running of the new school?

[129] I propose to deal with each of the questions in turn.

Question 1

Did the FPBE have the power to make DP under the Order?

[130] The applicant suggests that development proposals 261 and 262 should not have been proposed by the FPBE, since it is not a trustee of the school as required by the Department's 2014 Guidance on Development Proposals. Whilst obviously the Minister was aware of this guidance when he made his decision it was not published at the time the proposal was made by the FPBE and obviously it could not have been

aware of it. In any event neither of the provisions of Article 14(2) of the 1986 Order or the Departmental Guidelines require that a proposal be brought by either the trustees of the school or the Board of Governors. Article 14(2) which governs who may make a development proposal to discontinue a voluntary school or establish a new voluntary school provides that such a proposal can be made by a "person other than a Board". Thus the proposal need not be made by a trustee. Similarly, the guidelines do not indicate that only trustees or its Board of Governors may make a proposal. In any event it seems to me that this was of no legal consequence as the FPBE is to be treated as being an owner of the lands. It is not in dispute that the FPBE is the legal owner of part of the Portora site, comprising the school pitches. Under Clause 66 of the Scheme it is correct to say that it is the Commissioners of Education in Ireland who "hold the said premises upon trust" for the FPBE who "take" the lands. However, the Scheme makes it clear that the FPBE is to be treated as having acquired and holding the lands. This is apparent from Clause 66 itself and also from Clause 62 which provides that the school building and premises "shall be treated as belonging" to the Board. Accordingly, I have formed the view that the FPBE was entitled to make the relevant DPs.

Question 2

Were the DPs legally deficient in that they did not contain sufficient information?

[131] Mr Dunlop argues on behalf of the applicant that a proposer of a DP is under an obligation to "make the case for change" in support of a DP. In this regard he relies on what were then draft 2014 guidelines. The guidelines continue that the proposer should "seek to provide robust and verifiable evidence which clearly demonstrates how the proposal is aligned to the relevant area plan …". The guidance also states that "consideration should be given to the realistic financial implications of a proposal and these should also be detailed in the case for change. Potential options for delivering the proposed change should be considered prior to the publication of the DP as the DP process does not provide for consideration of options or which option is the best value for money. This is particularly important where there is a need for capital expenditure." The guidance also sets out the requirement for a detailed "implementation plan" which will be a "key consideration" for the Minister. Furthermore a proposer should set out "the related costs" of establishing a new school or the "costs of amalgamation".

[132] Mr Dunlop points out that the FPBE in its proposals does not provide any of this information. It is correct that the DPs themselves proposed by the FPBE do not contain details of any "case for change".

[133] The nature of the <u>legal</u> obligation on the FPBE, as proposer pursuant to Article 14(2) of the 1986 Order, was to identify the proposal, so that representations may be sought in relation to it. There are no specified statutory requirements for the DP save that pursuant to Article 14(4), "a proposal under paragraph (1), (2) or (3)

shall be in such form and contain such particulars as may be required by the Department".

[134] As stated earlier the 2014 guidelines were not published at the time the relevant DPs were prepared and the extant i.e. 2003 guidance at the time was non-prescriptive about the contents of the DP. There has been no breach of the standards set by the 2003 guidance.

[135] In any event it is clear that it is for the Department to determine whether the information provided is sufficient and whether further enquiry is required. I have dealt with the issue of sufficiency of enquiry in relation to financial and implementation matters above but insofar as this issue relates to the legality or adequacy of the proposals I do not believe that there has been any breach by the FPBE in this process.

[136] In any event I do not think that it can be argued that the case for change was not well known to all the relevant parties when the decision under challenge was made. In McDonnell's Application Gillen J summarised the role of the proposer as follows:

> "The proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response."

[137] In considering whether there were sufficient reasons for the proposal Gillen J held that it was relevant that "this was not an instance where … the proposal came out of the blue. Not only had the possibility of closure been canvassed for some years with manifest evidence of falling of numbers evident for all to see, but the Board of Governors had clearly looked at the problem with at the very least amalgamation in mind in an attempt to solve the issue."

[138] In this case the proposal under consideration had been the subject of debate for years as is clear from the chronology set out earlier. Indeed as a result of the relevant consultations up to that time the Board's area plan makes it clear that Portora and the Collegiate should be discontinued and a new voluntary grammar school should be formed. Indeed the 2014 guidance relates the necessity for the case for change to "clearly demonstrate how the proposal is aligned to the relevant area plan". Thus I do not believe that there is any deficiency in the DPs proposed by the FPBE which would justify overturning the Minister's decision.

Question 3

Was the Minister's approval of the DPs ultra vires on the grounds that no agreement was in place between the FPBE and the Department in compliance with paragraph 1(1) of Schedule 6 to the Order?

[139] The relevant parts of the Order are as follows:

> "*Establishment and recognition of grant-aided schools*
>
> 15.-(1) ..
>
> (3) The Department shall not approve under Article 14(7) a proposal for the establishment of a new voluntary school or the recognition of an existing school as a voluntary school unless the school is to become a maintained school or unless it is to become a grammar school, in relation to which an agreement with the Department under paragraph 1(1) of Schedule 6 is in force."

[140] Schedule 6 provides for the membership of the Board of Governors of a Voluntary Grammar School which has entered into an agreement with the Department. Article 11(4) states:

> "(4) Each voluntary grammar school in relation to which an agreement under paragraph 1 of Schedule 6 is in force shall be under the control and management of a Board of Governors constituted in accordance with the provisions of Schedule 6."

[141] Schedule 6 sets out as follows:

> "SCHEDULE 6
>
> Article 11(4)
>
> MEMBERSHIP OF BOARD OF GOVERNORS OF VOLUNTARY GRAMMAR SCHOOL ENTERING INTO AGREEMENT WITH DEPARTMENT
>
> 1. - (1) The trustees of a voluntary grammar school shall, notwithstanding anything in any instrument of government of the school, have power to enter into-
>
> (a) an agreement with the Department that paragraph 4 shall apply in relation to the membership of the Board of Governors of the school; or
>
> (b) an agreement with the Department that paragraph 5 shall apply in relation to the

membership of the Board of Governors of the school.

(2) An agreement under sub-paragraph (1) (a) or (b) shall provide that the Head of the Department, before making an appointment to the Board of Governors of the school under paragraph 4 or 5 (as the case may he), shall consult the Board of Governors of the school and the board for the area in which the school is situated and may consult any other board which he considers appropriate.

(3) An agreement under sub-paragraph (1) shall have effect to terminate any prior agreement in force under that sub-paragraph."

[142] Paragraphs 4 and 5 of Schedule 6 dictate inter alia the membership of, and appointment to the Board of Governors. In practical terms Schedule 6 gives the trustees of a voluntary grammar school the power to enter into an agreement with the Department either for 100% capital funding (paragraph 4) or 85% capital funding (paragraph 5). The type of agreement reached has a bearing on the composition of the Board of Governors - where a VGS gets 100% capital funding DE appoints one third of governors rather than two ninths if it is in receipt of 85% capital funding.

[143] The new voluntary grammar school will have an agreement with the Department under paragraph 1(1) of Schedule 6, in compliance with Article 15(3).

[144] As appears from Article 15(3) 'The Department shall not approve under Article 14(7) a proposal for the establishment of a new voluntary school ... unless it is to become a grammar school, in relation to which an agreement with the Department under paragraph 1(1) of Schedule 6 is in force.'

[145] The Applicant contends that this should be construed so as to mean that an agreement must be in place at the time of approval of the DP. I agree with Mr McGleenan's submission that the approval of the DP for the school's establishment is looking forward to that time, at which point the required agreement pursuant to Schedule 6 must be in place.

[146] This is the only logical and coherent way to read the provision. That this is correct is clear from the fact that the new school does not exist until the Minister makes his the decision on the DP. Until the school exists there can be no trustees of that school to enter into any such agreement.

[147] The new school in this instance will be a grammar school in which such an agreement is in place. An agreement will be entered into in due course.

[148] The new school was therefore, at the time of approval of the DPs, one which was 'to become a grammar school, in relation to which an agreement with the Department under paragraph 1(1) of Schedule 6 is in force'. Article 15(3) provided no bar to approving the DP's and the respondent did not act ultra vires in making the impugned decisions.

Question 4

Did the Department give sufficient consideration to concerns about the role of FPBE in the future running of the new school?

[149] The applicant makes a series of criticisms of the FPBE. The thrust of the criticisms are that because of its "Protestant" ethos and the terms of the Scheme under which it exists it will have an inappropriate influence over and role in the new school, something which the Minister should have taken into account in reaching his decision. To use Mr Scoffield QC's colourful phrase the FPBE has been presented as some sort of "Protestant Taliban" intent on exercising a sinister role over the proposed new school. Having considered the terms of Scheme 34, the history of the FPBE's role in Portora, its current role in relation to Portora and its potential future role in any new school, I have come to the view that there are no valid concerns.

[150] Historically it is clear that any connection between the FPBE and Portora Royal School has had no adverse impact on the way in which the school has been managed. As a matter of fact the FPBE does not manage Portora. That is the responsibility of its Board of Governors. Under Article 11(1) of the 1986 Order "each voluntary school shall be under the control and management of a Board of Governors". The FPBE has minority representation on the Portora Board of Governors. There are currently ten members of the Portora Board of Governors nominated by the FPBE which at its full complement could consist of 27 members. I have received two affidavits from Mr Morrow. He is a member of the Fermanagh Protestant Board of Education and a member of the Board of Governors for Portora Royal School. He avers that the FPBE does not exercise powers of management over Portora and it appears that in practice the role of the FPBE in relation to Portora is very limited. It is clear that to quote Mr Morrow the right to nominate Governors to the Board "has not presented any management or legal issues in relation to the administration of the school".

[151] What then are the specific criticisms of the FPBE called in aid of the application? Grounds 20 and 21 focus on the use of the word "Royal" in the name of the new school. Whilst there was some debate about whether or not this would be a requirement of the proposals I am now told that the interim Board of Governors have confirmed that the word "Royal" will be incorporated in the name of the new school. It is suggested that this will have an adverse impact on a non-denominational cohort of pupils from the Collegiate and potential future non-denominational students eligible to attend the new school. In short it is suggested that this name will deter Nationalist or Catholic children from being

enrolled at the school and this is something that the Minister failed to take into account. This is not supported by the evidence available to the court. Firstly, I note that currently 10.1% of Portora pupils are Catholic as opposed to only 4.4% at the Collegiate, notwithstanding the fact that the Portora name incorporates the word "Royal" whilst the Collegiate name does not. Furthermore of the 506 letters of objection received during the consultation process only one took issue with the use of the word "Royal". Mr Morrow in his second affidavit refers to figures which demonstrate that many schools which bear the word "Royal" in the school name in fact have a good mix of Catholic and Protestant students, with, for example 25.7% of pupils enrolled at Belfast Royal Academy been identified as Catholic. I therefore agree with Mr Scoffield's submission that the Minister was rationally entitled to take the view that, in the event that the new school would have the word "Royal" in the title (as has now been confirmed) this was not an issue which was of sufficient concern to warrant non-approval of the DPs.

[152] Grounds 22 and 23 of the applicant's Order 53 statement are as follows:

> "22. The Department failed to give any consideration to the powers and responsibilities of the FPBE to include the provisions of Scheme 34 and the impact of the FPBE's, influence on a non-denominational cohort of pupils from the Collegiate.
>
> 23. The Department failed to give any consideration or give manifestly inappropriate weight to concerns raised about the accountability of the FPBE."

[153] It is correct to say that in support of these particular grounds in his submissions Mr Dunlop focused on his analysis of Scheme 34 and whether this would constrain the FPBE in its ability to be involved in any new school in accordance with the requirements of the 1986 Order. He is critical of the lack of analysis of the Scheme and the role of the FPBE prior to the Minister making his decision. The Minister did raise a query about what the FPBE actually was on 30 January 2014 and in response he was informed that the FPBE was a name given to the "governing Board of Portora Royal School". The origins of the FPBE were communicated by a senior legal figure on 21 May 2013 and it is clear that the Department was aware of Scheme 34. Concerns were raised about the FPBE with the Minister in his meeting with the Collegiate group on 2 July 2014 and in response to this the FPBE has confirmed that it will not veto any decision taken by the new Board of Governors of the proposed new school provided there is no conflict with Scheme 34.

[154] One of the beneficial effects of this challenge is that this matter has been fully addressed by the notice party and in the written and oral submissions of

Mr Scoffield who appeared with Ms Fee on their behalf. In my view any concerns about the FPBE have been put to bed by this hearing and any inadequacies in information provided to the Minister about Scheme 34 and the FPBE are in my view not material and do not provide the basis for setting aside the Minister's decision.

[155] I have already said something about the role of the FPBE and the background to Scheme 34. In light of the issues raised in this application it is worth saying something more about Scheme 34. The primary function of the Board under Clause 21 of Scheme 34 is "to establish or aid in establishing, and to maintain or aid in maintaining, such school or schools in their several districts as they shall think expedient". Thus their function is educational and not religious. Clause 62 makes it clear that the purpose for which school premises are held is "exclusively for the educational benefit of the district". I have already referred to Article 11(1) of the 1986 Order which sets out the basis upon which any voluntary school shall be governed. The Article is entirely consistent with the scheme and is in compliance with what is required by the Department. Thus Section 60 of the Scheme makes clear that in the new school, since it will benefit from departmental funding (as Portora does), any departmental rules and regulations (including obviously statutory duties but also the provisions of circulars or directions of the Department) override the provisions of the Scheme. Local Boards are authorised to obtain for their schools financial or other aid "from any other public body" and where they do so the local Board "may notwithstanding anything being herein contained, place any or all their schools, classes or pupils in connection with or under the inspection of any such public body as aforesaid, and they may comply with any rules or regulations for the time being in force respecting school classes or pupils receiving such aid". Indeed Section 60 continues that all money so received will be "subject to such rules and regulations".

[156] As for the concern that the FPBE may interfere with the religious ethos of the new school Section 61 is relevant. It notes that local Boards such as the FPBE "may make provisions for religious instruction at a school for which they are responsible, provided always that such religious instruction shall be given with due regard to the religious dominations to which the pupils shall respectively belong, so that no pupil shall be permitted to receive or to be present at any religious instruction to which his parents or guardians shall object, and at the time for giving religious instruction, and the mode of giving it, shall be so regulated that no pupils declining to receive such instruction shall be thereby in effect excluded, directly or indirectly from any of the other advantages afforded by the school".

[157] Whilst the Scheme is drafted in arcane language, as one would expect, in fact it is a very progressive and forward thinking document in terms of education and arguably well ahead of its time. As for the future role of the FPBE in any new school it is clear that Article 11(1) will continue to apply and this is reinforced by Article 11(4) which repeats:

> "Each voluntary grammar school in relation to which an agreement under paragraph 1 of Schedule 6 is in force shall be under the control and management of a Board of Governors constituted in accordance with the provisions of Schedule 6."

Such an agreement currently exists in relation to Portora and as Mr McLaughlin has pointed out on behalf of the WELB/Education Authority the new school will also have one, since that is the requirement of Article 15(3) of the 1986 Order. Paragraph 1(1) of Schedule 6 emphasises again that "the Trustees of the voluntary grammar school shall, notwithstanding anything and any instrument of Government of the school, have power to enter into" an agreement as to the constitution of the Board of Governors.

[158] Finally, should there be any difficulty in relation to the terms of the Scheme this can be remedied simply by the Scheme being amended which can be done by way of legislation or pursuant to the procedures set out in Clause 85 thereof.

[159] Grounds 24 and 36 of the Order 53 statement can be dealt with together. They are as follows:

> "24. The Department failed to give any consideration or gave manifestly inappropriate weight to concerns raised about the legality of the FPBE holding title as trustees to the sale of part of the new school …
>
> 36. The Department failed to give any consideration to the apparent requirement that the Portora Royal School, as a voluntary school, must dispose of its assets in line with the school's Policy on Disposal drawn up in accordance with the Finance and Audit Arrangements Manual, unless otherwise agreed with the Department."

[160] Mr McGleenan argues that these matters are not in fact material to the Minister's decision and are matters which can be dealt with when the time comes and when a decision has been made about the site of any new school. Whilst I think there is force in the submission given what I have outlined above I do not believe there is any valid concern in this regard. Notwithstanding that Clauses 62 and 66 of the Scheme state that the school buildings and premises "shall be treated as belonging" to the FPBE given that the Commissioners of Education in Ireland formerly held the said premises upon trust for the FPBE in effect the land is legally vested in the Department of Education as successors to the Commissioners of Education in Ireland. In any event the FPBE has proceeded on the basis that it will simply pass the relevant lands to the Governors of the new school which is entirely

consistent with the Scheme purposes. There is simply no evidence that this issue will be problematic at all.

[161] I acknowledge that the FPBE may well be influenced by the consideration that the site of the new school will in fact be the current site at Portora. As the Independent Facilitator noted this may also have contributed to a perception by the leadership at Collegiate that the proposal is akin to a form of takeover of the Collegiate by the FPBE. However, everything I have seen and considered in this hearing leads me to the conclusion that the FPBE is motivated by the best interests of the education of students in the Fermanagh area. I agree with Mr Scoffield that they have shown leadership in this matter. I accept that the Board must have had a very strong emotional attachment to the Portora Royal School given its rich history and that the new school will lose the name Portora and will be a different school to the one that currently exists. Their decision has not been easy. I would hope and expect that they will engage in the interim Board of Governors in a spirit of equal partnership with the Governors nominated by the Collegiate school and I note this is the intention averred in the affidavits from Mr Morton and Mr Morrow.

CONCLUSION

[162] For the reasons set out above I therefore refuse the application for judicial review. I appreciate that this decision will come as a great disappointment to all of those associated with the Collegiate Grammar School. Their loyalty to the school is entirely understandable. Apart from losing something which they hold dear there clearly is a perception that the proposed amalgamation will not be one of equals as has been promised. There appears to be an expectation that the site for the new school will be at the current Portora site and in giving up their single sex school it may well be felt that they are sacrificing more than Portora. However, one thing is not in dispute and that is that the status quo in terms of post primary education in Fermanagh is unsustainable. It has not been possible to reach a consensus as to future arrangements but the proposal approved by the Minister has been approved after detailed and lengthy consultations. It is consistent with educational policy and as I have found the decision is neither irrational or unlawful. Indeed, the more I considered the matters raised in the course of the hearing the more it became clear that at its heart this dispute involves a difference of opinion as to how best to provide for post primary education in the Fermanagh area. These differences of opinions are not matters for the courts but clearly matters for the Minister.

[163] It is my earnest hope that the able and determined leadership of the Collegiate will now devote its efforts to ensuring that the new school will indeed fulfil its potential. Equally it is my earnest hope that the representatives of Portora and the FPBE will implement these proposals in the spirit of the affidavits from Mr Morton and Mr Morrow and that in particular they will fulfil the aspirations set out in their response to the applicant's affidavit. Finally, as set out in my judgment I hope that the new school will be built in accordance with the DPs and that there will

be no repeat of the difficulties that arose in relation to the construction of the new school at Devenish.