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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

McDonnell's (Mary) Application [2007] NIQB 125

IN THE MATTER OF AN APPLICATION BY MARY McDONNELL FOR JUDICIAL REVIEW

AND

IN THE MATTER OF A PROPOSAL BY THE COUNCIL FOR CATHOLIC MAINTAINED SCHOOLS AND THE WESTERN EDUCATION AND LIBRARY BOARD

AND

IN THE MATTER OF A DECISION BY THE DEPARTMENT OF EDUCATION

GILLEN J

Introduction

[1] The applicant in this case is a mother of three children who are pupils at St Joseph's High School, Plumbridge, County Tyrone. She seeks judicial review of a decision of the Department of Education ("the Department") following a proposal by the Catholic Council for Maintained Schools ("CCMS") and the Western Education and Library Board ("the Board") to discontinue St Joseph's High School, Plumbridge, County Tyrone. The grounds set out for the relief are that the discontinuance of the school was presented to the parents, staff and Board of Governors of the school as a fait accompli and there was no meaningful consultation with any of them the process having been engineered to ensure a predetermined outcome.

The Statutory framework

[2] The Education and Libraries (NI) Order 1986 ("the 1986 Order") deals, inter alia, with the establishment, recognition and discontinuance of, and affecting of changes to, grant-aided schools. Where relevant, the Order provides as follows:

> "14(2) Where a person other than a Board proposes –
>
> (a) To establish a new voluntary school.
> (b) To have an existing school recognised as a grant-aided school.
> (c) To discontinue a voluntary school.
> (d) To make a significant change in the character or size of a voluntary school . . .
>
> That person shall submit the proposal to the Board for the area in which the school is or is to be situated and that Board shall submit the proposal to the Department together with its views thereon".

Article 14(5) was amended by the Education and Libraries (NI) Order 2003 ("the 2003 Order") and now reads as follows:

> "(5) Before a proposal concerning an existing school is submitted to the board under paragraph (2), the person making the proposal shall consult the following persons (or representatives of them) –
>
> (a) the board of governors of the school concerned;
> (b) the teachers employed at that school; and
> (c) the parents of registered pupils at that school.
>
> (5)(a) Before a proposal concerning an existing school is submitted to the Department by the board under paragraph (1) or (3), the board shall consult the following persons (or representatives of them) –
>
> (a) the board of governors of the school concerned;
> (b) the teachers employed at that school; and
> (c) the parents of registered pupils at that school.
>
> (5)(b) Before a proposal concerning any school is submitted to the Department by the board under paragraph (1), (2) or (3), the board shall consult the trustees and managers (or representatives of them) of any other school which would, in the opinion of the board, be affected by the proposal".

Article 14(6):

"(6) A board after submitting a proposal to the Department under paragraph (1), (2) or (3), shall –

(a) forthwith furnish to the trustees and the managers of every school which would, in the opinion of the board, be affected by the proposal such particulars of the proposal as are sufficient to show the manner in which the school would be affected;
(b) forthwith publish by advertisement in one or more newspapers circulating in the area affected by the proposal a notice stating the nature of the proposal, that the proposal has been submitted to the Department, that a copy of the proposal can be inspected at a specified place and that objections to the proposal can be made to the Department within 2 months of the date specified in the advertisement, being the date on which the advertisement first appears;
(c) furnish to any person, on application, a copy of the proposal on payment of such reasonable sum as the board may determine.

Article 14(7):

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, it considers necessary or expedient, approve the proposal and inform that board or person accordingly.

. . .

Article 14(8):

"A proposal under paragraph (1), (2) or (3) shall not be implemented until it has been approved by the Department."

Departmental Guidance

[3] The Department published guidance to the implementation of the 1986 Order under the heading "development proposals for grant-aided schools" in 2003. Where relevant that document reads as follows:

"Introduction

(1) The main purpose of the development proposal procedure is to ensure that all interested parties are informed about proposed changes to schools and have an opportunity to comment on any proposed development that may affect them before decisions are taken. All objections and comments received are considered in reaching a final decision on a development proposal.

(2) Article 14 of the Education and Libraries (NI) Order 1986 (as amended) details the circumstances leading to the publication of Development Proposals.

. . .

(4) School authorities should bear in mind that decisions on development proposals are subject to the judicial review process and in considering an application, the courts will consider not only whether statutory procedures were followed but also whether all interested parties, such as parents and teachers, were treated fairly during the process and given a chance to air their views.

CONSULTATION

(5) Consultation includes:

1. informing all interested parties about a proposed change to a school; explaining the reasons for it and any implications arising from it;
2. receiving views expressed by concerned parties; and
3. considering the validity of points made.

The relevant Education and Library Board (ELB) publish all Development Proposals. ELBs do not have the discretion to refuse to publish a Development Proposal and must keep a record of all views expressed in the consultation process. ELBs must then pass those views on the Department along with its own views on the proposal.

(6) There should be widespread consultation with local communities about any intention to:

1.
Discontinue schools

. . .

(7) In addition to the statutory requirement for the ELB to consult with all schools affected by the Development Proposal, including the school that is the subject of the proposal, Article 24(5) of the Education and Libraries (NI) Order 2003, introduces a requirement for consultation with Boards of Governors, parents and teachers of existing schools, prior to the publication of a Development Proposal. For maintained schools this function will be carried out by the CCMS, . . . The Department will seek documentary evidence that the statutory consultation has taken place. . . .

JUDICIAL REVIEW

(29) If a Development Proposal becomes the subject of a judicial review, all papers relating to the case may have to be made available to the court. It is therefore essential that all consultation meetings are properly documented and that all the correspondence is retained."

[4] Factual background

In February 2006, Mr O'Doherty, Policy and Planning Officer of the CCMS, drew up a document entitled "Education provision in respect of St Joseph's High School, Plumbridge" which outlined the background to this matter in respect of the situation then obtaining with this school. In the course of this hearing no substantive challenge was brought to the factual background which he depicted in that document and I intend to record it now as the general context in which this case was set:

> "The present situation
>
> The school has been facing a decline in pupil numbers for many years from 309 in 1994 to 151 at present. The dramatic fall in pupil enrolment is further evidenced by examination of the school intake numbers which have also declined dramatically from 71 in 1991 to 25 in 2005. A number of redundancies have reduced the number of teaching staff. Present financial projections estimate a deficit of over 300,000 within 2 years (*this proved to be an over estimate)*. Such a radical reduction in enrolment places intolerable constraints upon the Board of Governors, Principal and senior management team as they seek to effectively manage the school's delegated budget. Over the past few years the school has reduced its teaching complement, through voluntary redundancies, in an attempt to manage its budget deficit. There are now 13 teachers plus the Principal

> on the staff of the school. Current financial projections identify a budget deficit in the region of £ 320,000 by the end of the 07-08 financial year. The Western Education and Library Board propose an immediate further reduction of teaching posts thereby resulting in a staffing complement of 9 teachers plus Principal at the commencement of the incoming academic year i.e. 06-07. Without these redundancies being affected the budget shortfall would be of the magnitude of some – 65% of actual income. However a reduction of teaching staff at this level would not allow the curriculum to be delivered to existing pupils".

That document then indicated three options. First, to maintain the status quo. The disadvantages of that option were recorded as follows:

> "(a) The school would continue to face increased difficulties in terms of managing its pupils' curriculum entitlement.
>
> (b) Financial difficulties will continue for the school and it cannot meet its financial targets.
>
> (c) Current and future pupils' numbers cannot maintain the school.
>
> (d) Reduced teaching complement will continue to have difficulty in delivering the new revised curriculum.
>
> (e) Pupils will have limited opportunities for study post 14".

The second option was to amalgamate with St Joseph's Sacred Heart College, Omagh. Once again the advantages and disadvantages were set out. The third option was closure of the school.

As will appear from the summaries of the cases made by the parties, it was the case of the CCMS that the difficulties facing the school had been canvassed during the course of 2003/2006. A consultation process was set up pursuant to Article 14 of the 1986 Order for a proposal concerning the existing school (which eventually proved to be a proposal to close it) to be submitted to the Board. After meetings in February 2006 with the representatives of the staff, the Board of Governors and the parents, the decision to submit a proposal to the Board recommending closure was made by the CCMS

Education Provision Committee on 15th March 2006. Thereafter the proposal was advertised and the subject of Board and departmental consultation for a period of some months until the Ministerial decision was made to close the school in September 2006.

The Applicant's case

[5] In the course of a well presented skeleton argument augmented fully by oral submissions, Mr McCann on behalf of the applicant made the following points:

(i) The CCMS, as the person making the proposal under Article 14 of the 1986 Order, had failed to comply with the statutory obligations under Article 14(5). He argued there had been little or no consultation and in so far as any consultation had taken place, it was inadequate.

(ii) He relied on the so called "Sedley requirements" adopted in R v London Borough of Brent ex parte Gunning 1985 84 LGR 168:-

(a) Consultation when proposals are still at a formative stage.

(b) Sufficient information and reasoning to allow for an informed response.

(c) Adequate time must be given for consideration and response.

(d) The product of consultation must be given conscientious and open-minded consideration.

These principles he claimed to have been breached.

(iii) The CCMS had failed to be aware of the need to keep any proper records of what their consultation process constituted. He drew my attention to the Departmental guidance at paragraphs 5 and 29 (see paragraph 3 of this judgment)

It was Mr McCann's submission that the CCMS appeared unaware of this necessity and certainly failed to implement the guidance. He submitted that there were little or no records of what took place at meetings and it appeared as if the CCMS were unaware of any obligation to keep such records. Counsel sought to illustrate this by drawing my attention to correspondence which passed between Mr Lundy (the head of School Planning and Development at the CCMS) and the Department during June 2006 when the Department was seeking evidence of consultation that the CCMS had had with teachers, parents of pupils etc. for the development proposal. After pressure for the discovery of such documentation, Mr Lundy

replied to Ms Bowden of the Development Branch of the Department in the following terms by way of e-mail of 15 June 2006:

> "Janet
>
> This is the first time in all my experience that we have been asked to provide minutes of meetings as part of this submission. Please clarify the reason as this could add significantly to the paperwork at this time."

Ms Bowden replied on 16 June 2006:

> "Jerry
>
> Further to your e-mail of 15 June 2006, I have discussed the content with Mr Russell Welsh. Having read through the file Mr Welsh has confirmed the minutes of the consultation meetings with parents and teachers are required. This is normal practice for consideration of Development Proposals and we need them to ensure us to confirm to the Minister that these meetings have taken place."

(iv) Counsel asserted that such records of the consultation process as were produced were flawed and unreliable. In correspondence of 27 June 2006, Ms Bowden again wrote to Mr Lundy in the following terms:

> "Development Proposal No. 186 – Proposed Closure of St Joseph's HS, Plumbridge
>
> We have received correspondence from St Joseph's Parents Action Group (P.A.G.) suggesting proper consultation did not take place for the proposed closure. The P.A.G. believe they have not missed any meetings since 2001 and the first time they heard their school was under threat was at the meeting of 28 February 2006.
>
> The P.A.G. also feel that the unions representing canteen, auxiliary and teaching staff have not received 'proper consultation'.
>
> I would be grateful for your comments on the above issues and clarification that all consultation procedures have taken place with the relevant bodies.

> In relation to the above could I remind you of my e-mails of 14 and 16 June 2006 requesting the minutes of the consultation meetings between parents and teachers."

Ms Bowden again wrote on 4 July 2006 reminding Mr Lundy of the e-mails of 14 and 16 June and her letter of 27 June 2006 requesting the minutes of the consultation meetings between parents and teachers.

Eventually on 7 July 2006, Mr Lundy replied to Ms Bowden in a letter which included the following paragraphs:

> "I also enclose for your information notes of the consultation meetings held with governors, parents and staff in February 2006."

I pause at this stage to record that I consider it necessary to set out in full the notes appended to that letter as they formed a substantial part of the case made on behalf of the applicant:

> **"St Joseph's High School Plumbridge**
>
> **Communication/consultation with the school and its community prepublication of the development proposal in February 2006**
>
> Monday 15 March 2004 CCMS were invited to meet the Governors.
>
> The difficulties facing the school at that time were considered and the Governors raised concerns about viability. As a result they suggested CCMS attend a meeting in the library with the staff. This was arranged for Friday 19 March after school.
>
> Friday 19 March:
>
> Staff were concerned about viability and redundancies. The CCMS procedure in regards to redeployment of teaching staff was explained. The meeting explored ways of reviving the school. It was emphasized that the school would only be viable with the full support of the community. A newsletter was then produced and distributed to parents.

Monday 24 March 2004:

CCMS were invited to attend a meeting with parents on the night of Monday 24 May. 2004. Most issues were discussed by the governors and the principal with the parents. The chair emphasized that if the community did not support the school closure was a possibility. These possibilities were also alluded to in the newsletter distributed to the community at the time. Asked specifically about the closure option CCMS emphasized that they would try to ensure children who had started their GCSEs would face minimal disruption.

26 May 2005:

Survey letters (26 May 2005) were distributed to parents of key stage 2 children from the feeder primary schools about options. Over 300 letters were distributed to parents. The responses indicated that on average, only abut 20 children per year would opt for transfer to St Joseph's at age 11.

As a consequence it was decided the only option other than closure to be explored was linking with Omagh. Significant detailed work on this option was progressed with St Joseph's, Sacred Heart College, Omagh and the WELB by CCMS.

When this route proved not viable formal consultation commenced in February 2006.

Meeting with Governors
St Joseph's High School, Plumbridge

Monday 27 February 2006 @ 7.3O pm

Present: Board of Governors of St Joseph's HS
Diane Christy, CCMS
Paul O'Doherty, CCMS

Presentation: Paul O'Doherty gave a PowerPoint presentation on the analysis of the situation in particular falling enrolment and reducing finances. He explained that since amalgamation seemed impractical Council was recommending closure. He

then explained how the public consultation prior to a Ministerial decision would be held.

Q&A's: The Governors expressed disappointment at the proposed recommendations to close the school. Mr O'Doherty discussed the options that were considered before reaching this recommendation. He referred to a previous meeting where closure was mentioned in the context of continual falling enrolments. The Governors stated that the recommendation to close was based on purely financial reason and took no account of the needs of pupils and the parish.

Meeting with Parents
St Joseph's High School, Plumbridge

Tuesday 28 February 2006 7.3O pm

Present: Parents
Transport Officer (2)
Diane Christy, *CCMS*
Paul O'Doherty, CCMS

Presentation: Paul O'Doherty gave a PowerPoint presentation on the analysis of the situation in particular falling enrolment and reducing finances. He explained that since amalgamation seemed impractical Council was recommending closure. He then explained how the public consultation prior to a Ministerial decision would be held.

Q&A's: The parents raised the following concerns:

- The decision is based purely on finance and no consideration is being given, to the needs of the pupils;
- Parents very unhappy with proposal to close;
- St Joseph's is a small school which caters for the needs of individual pupils;
- Those needs will be lost in larger school such as Holy Cross College, Strabane;
- Emphasis is on numbers not needs;
- Have the WELB issued a letter to non-teaching staff regarding the closure (CCMS has already met with teaching staff);
- What is the position if the Governors oppose the development proposal;

- What are the transport arrangements for Yr 10 pupils.

Mr O'Doherty addressed matters raised and Ms Christy agreed to speak to WELB regarding non-teaching staff.

Meeting with Staff Plumbridge

Tuesday 28 February 2006

Present: Teaching and Non-Teaching Staff
WELB Personnel Staff
Diane Christy, CCMS
Paul O'Doherty, CCMS

Presentation: Paul O'Doherty gave a PowerPoint presentation on the analysis of the situation in particular falling enrolment and reducing finances. He explained that since amalgamation seemed impractical Council was recommending closure. He then explained how the public consultation prior to a Ministerial decision would be held.

Q&A's: Staff were sad but already aware that this was likely having been briefed by the Principal Mr Strong. There were no issues raised about the consultation but rather the mechanisms for implementing the decision. The meeting then broke up with WELB staff talking to non-teaching staff.

Meeting Teaching Staff

D Christy and P Q'Doherty then met with teaching staff in the staff room. D Christy explained the process for redeployment. Most discussions focused on the redundancies for the coming academic year. D Christy asked staff to reflect and let the Principal know if they wished for voluntary redundancy this year. The needs of the school however were paramount. She agreed to a request from staff to return and talk to either groups or individual about their needs."

There was also supplied to Ms Bowden a note put together by Mr Lundy giving an explanation of what had occurred and which he had written in July 2006 to describe the overall process.

(v) Arising out of these documents Mr McCann made the following points founded on the premise that the Sedley principles had been breached.

(a) It is highly significant that Mr Lundy expressed surprise in his e-mail of 15 June 2006 that he was not being asked to provide minutes. Mr McCann submitted that this graphically illustrated how little importance Mr Lundy attached to note-making and illustrated a lack of care generally in the consultation process.

(b) Counsel submitted that it was obvious from the format of the notes made of 2004/2005 meetings that these were far from contemporaneous and were clearly drawn up in 2006. This clearly made allowances for hindsight, made no reference to who had been present at any of the meetings or consultations during this period and was indicative of the perfunctory manner in which this whole process had been approached.

(vi) Counsel asserted that such consultation as did occur had not come at a formative stage in the process and allowed insufficient time for informed response. Moreover the parents had been confronted with a closed mind impervious to their pleas. Mr McCann argued that the decision to close this school had come as a "bombshell to the parents". In a news letter produced and distributed by the CCMS to parents in March 2004, it had indicated that the school would only close if "parents wished it to close". In other words they had been told all along that this was not inevitable. Indeed even at the Board of Governors meeting in January 2006, the CCMS were simply arguing that closure "was not ruled out". He drew attention to the affidavit of Mr O'Doherty, the Policy and Planning Officer of the CCMS sworn on 8 February 2007 at paragraph 24 wherein he refers to the meeting with the parents in February 2006 and to their reaction in the following terms:

> "The majority of the comments were expressions of hurt and disappointment about the prospect of the school closing."

At paragraph 25 he states:

> "The meeting lasted 4½ hours. During this time, however, the parents raised no viable alternative options to closure. The issues raised about the report itself were mostly expressions of anger or disbelief in what I was saying."

Turning to the meeting with the Board of Governors in January 2006, Mr McCann emphasised how three possibilities had been given to the Board of Governors and that even at that late stage closure was simply "not ruled out". He contrasted this with the meeting with the parents in February 2006 when they were, in his submission, simply told that the school was closing. Counsel asserted that the whole process had been hurried and pre-determined. He described it as arrogant and lacking in sensitivity. He drew my attention to Mr O'Doherty's affidavit at paragraph 26 where he had said of the parents' representation:

> "All of the above concerns and representations were taken into account by me and my colleague Diane Christy. As also appears from the minute, I addressed the matters raised and Ms Christy agreed to take forward one of the issues raised which required further action. The representations made at the meeting, however, did not persuade me that there was any viable option other than closure."

Mr McCann submitted that this reflected a predetermined approach. Even the costing exercise carried out at the behest of the Board of Governors had not been put to the parents for their comments.

Mr McCann argued that this was proof positive that the consultation process had been inadequate and lacking in preparation for the decision that was taken.

(vii) Counsel helpfully drew my attention to a number of authorities dealing with school closures in England. These included:

(a) R v London Borough of Brent ex parte Gunning 84 LGR 168, The Times, 30 April 1985 ("Gunning's case").

(b) R v London Borough of Sutton ex parte Hamlet unreported and reference number CO/1657/85, 26 March 1986 ("Hamlet's case").

(c) R v Queen Elizabeth GS ex parte Cumbria CC 1994 ELR 220 ("Cumbria case").

(d) R v Leeds CC ex parte N 1999 ELR 324, 19 April 1999.

(e) R v Blackpool BC ex parte Taylor 1999 ELR 327, 12 November 1998.

(f) R v Northamptonshire County Council and Secretary of State for Education ex parte K (1994) ELR 397, 23 July 1993.

(g) R v Secretary of State for Wales ex parte Williams (1997) ELR 100 ("Williams' case").

The consultation process

(viii) Mr McCann submitted that a cursory glance through these authorities illustrates, even in a non-statutory context, the more sophisticated nature of the consultation process. It often included consultation papers, the placing of such papers into the public domain prior to meetings, public meetings, written submissions, and the involvement of local political parties at a local level. He contrasted that to the desultatory nature of the process which he claimed occurred in this instance.

Legitimate expectation

(ix) Counsel relied on the principles set down in Gunning's case. This was a judicial review of two decisions of a local authority to close two schools. Dealing with the right of the parents in the matter Hodgson J said at page 11:

> "The parents had no statutory right to be consulted, (*in contrast to the present parents*) but that they had a legitimate expectation that they would be consulted seems to be beyond question. The interest of parents in the educational arrangements in the area in which they live is self-evident. It is explicitly recognised in the legislation ….."

Hence Mr McCann submitted that such was the importance of this matter to the parents that they enjoyed a legitimate expectation to be appropriately consulted.

Fairness

(x) Counsel also relied upon Hamlet's case which similarly dealt with a challenge to a proposal to close a school. Dealing with the case made by the respondents that it was inevitable in any event that this school would close irrespective of the consultation process, Webster J said:

> "Even if a proposal appears to those in possession of all the material information to be the only obvious one, in my view fairness requires that those affected by their proposals should be informed at least about the substance of the facts or assumptions which have led to that conclusion, in sufficient detail to enable them to question those facts or assumptions. Fairness

> also requires that that information should be provided in a readily intelligible form and that they should be given sufficient time to consider it before having to respond to it. Even where a proposal seems, to those making it, to be obvious and unavoidable, the process of consultation which fairness requires is not simply an exercise in public relations: it is always possible that one of the facts or assumptions which have led to the making of the proposal can be shown to be false; it is possible, too, that in making the proposal those responsible for it, albeit people of considerable experience and wisdom, had overlooked a relevant consideration, perhaps because they had earlier made a decision of policy the application of which would make the point irrelevant."

It was Mr McCann's submission that the closed mind evidenced by the CCMS prevented this fair procedure occurring. He drew my attention to the allegation made by the headmaster of the school in a letter of 18 August 2006 that the presentation to the Board of Governors had been rushed and given at the last minute without adequate opportunity to consider. He alleged that this echoed the closed mind indicated by a press article of 2 March 2006 (three days after the Board of Governors meeting regarding the CCMS proposal) indicating that the school was to close. Mr McCann also argued that the steps taken by the CCMS in the wake of the recommendation to the Department to close the school eg. running down the school numbers, creating parental and pupil apprehension about the availability of classes in the future, indicating that no one would be accepted from September 2006 onwards, all served to illustrate the unbending determination to close the school.

The subsequent consultation process

(xi) Turning to the suggestion by the respondents that even if there had been defects in the consultation system the subsequent consultation by the second respondents was sufficient to fill any gap, Mr McCann submitted that this was a legally incorrect proposition. It was his submission that the unlawful action of the CCMS in failing to adequately consult could not be subsequently cured. He again contrasted the instant case where there was a statutory duty to consult with the legitimate expectation which operated in the English cases. He faced up to the views of Tucker J in Cumbria's case where the judge had said at page 41:

> "Nevertheless it was held by Hodson J in R v Gwent County Council and The Secretary of State for Wales ex parte Brant .. that 'if the duty to consult is only a

> duty to satisfy a legitimate expectation then, although the decision maker fails to comply with that duty, a later decision making process may rectify the earlier unfairness'. In my view that is the correct view to take in the present, where the proposal met all the statutory requirements. Even if the governors conducted themselves in a way not covered by statute, that would not mean that the published proposals were not lawful."

Mr McCann distinguished that case from the present on the basis that there was a statutory duty to consult here as opposed to a legitimate expectation. In any event it was Mr McCann's case that the Department had remained passive in this matter and had turned a blind eye to the poor consultation processes embarked on by the CCMS.

(xii) The decision-makers had failed to take into account the widespread detrimental impact that closure would have on the pupils and on the local community. They had overlooked the importance of this school as part of the community by ignoring the policy exhortation of the Department for widespread consultation. The second respondent had permitted the proposal to go ahead on the basis of serious inaccuracies.

Delay

(xiii) The CCMS development plan/proposal was submitted to the Board on 22 March 2006. The Board ratified the decision on 12 April 2006. In September 2006 the ministerial decision was taken to close the school. The application was not made until 13 December 2006. Mr McCann made the following points on this topic:

(a) At least part of the delay had been occasioned as a result of negative advice given by the first solicitor from whom the applicant had sought an opinion in May or June of 2006.

(b) In any event he argued that time did not begin to run until the ministerial decision. This was a complicated area and there was an argument to be made that if the application had been made shortly after March 2006, this might have been considered premature given the further consideration that was to be made by the Department. In any event he argued that the focus should be kept on the failures by the CCMS and not on the difficulties facing ordinary people without the benefit of strong legal advice until shortly before the application was made.

(c) Mr McCann relied on three authorities namely:

(i) R v Secretary of State for Wales ex parte Williams (1997) ELR 100 ("Williams case").

(ii) Nichol and Others v Gateshead Metropolitan Borough Council (1998) 87 LGR 435 ("Nichol's case").

(iii) R (Burkett) v Hammersmith and Fulham Council (2002) 1 FLR 1593 ("Burkett's case").

In the Williams case, a local education authority had made a proposal to close schools and thereafter the proposal was adopted by a decision of the Secretary of State. Dealing with a suggestion that the application, which had been made only after the ministerial decision, ought to have been made at the proposal stage, Brooke J accepted that it was desirable to leave an application to quash a decision in circumstances like this until after the Secretary of State had considered the matter. He considered it would be quite wrong on the facts of the Williams case to exercise his discretion against the applicant simply because the application had not been made before the Secretary of State's decision in circumstances where it was made extremely promptly after that. In the context of a planning application in Burkett's case, Lord Slynn said at page 1596 paragraph 5:

> "…. Where there is a challenge to the grant itself, time runs from the date of the grant and not from the date of the resolution. It seems to me clear that because someone fails to challenge in time a resolution conditionally authorising the grant of planning permission, that failure does not prevent a challenge to the grant itself if brought in time i.e. from the date when the planning permission is granted. I realise that this may cause some difficulties in practice, both for local authorities and for developers, but for the grant not be capable of challenge, because the resolution has not been challenged in time, seems to me wrongly to restrict the right of the citizen to protect his interests. The relevant legislative provisions do not compel such a result nor do principles of administrative law prevent a challenge to the grant even if the grounds relied on are broadly the same as those which if brought in time would have been relied on to challenge the resolution."

In the circumstances therefore Mr McCann submitted that there had been no unreasonable delay in this case since the application was brought in or about three months after the ministerial decision. Insofar as there was any element

of delay the court should bear in mind that these were concerned lay people unused to statutory processes.

The exercise of the discretion

(xiv) Meeting the argument that a great deal of difficulty will be caused if the process needed to be revisited in light of a court decision, Mr McCann drew my attention to Fordham 4th Edition (Judicial Review Handbook) at paragraph 4.5 which reads:

> "Judges will not readily accede to the argument that a legal flaw was non-material or non-prejudicial or that a remedy would futile. One objection is that public law standards matter, and public bodies should not be encouraged to proceed in the belief that they will be "let off" by the court. …. Hence there is a heavy onus on a public body to show that the decision 'inevitably' would have been or would now be the same."

He relied on Berkeley v Secretary of State for the Environment (2001) 2 AC 603 – a planning statutory review – where Lord Hoffmann said at page 616F:

> "It is exceptional even in domestic law for a court to exercise its discretion not to quash a decision which has been found to be ultra vires."

In any event Mr McCann argued that the steps taken by the CCMS since the making of their proposal had been deliberately engineered to make this a fait accompli. Steps to reallocate the staff after the meeting of February 2006, and during the consultation by the Board throughout the summer of 2006 were indications that the CCMS was acting as if the decision had already been made and preparing the way for the inevitable. It was counsel's submission that the CCMS should not be allowed to benefit from these precipitative and peremptory steps.

The first respondent's case

[6] Mr Schoffield, who appeared on behalf of the first named respondent CCMS made the following submissions:

1. The consultation conducted by CCMS in advance of submitting the proposal to the Department was sufficient and did not fall foul of any legal obligation to the following reasons:-

(a) Ample notice had been given of the possible closure of the school since in or around late 2003/2004 when Mr O'Doherty, policy and planning officer of the CCMS had met the governors, staff and parents to discuss the issue. The applicant would have received a school news letter circulated in April 2004 which included the following paragraph:

> "It would be foolish to attempt to deny that the long term future of St Joseph's High School (and indeed of all the smaller secondary level schools) is under threat. That this is so is due to the falling birth rate and to the fact that being in a rural area St Joseph's is more dependent on attracting as many of the second level pupils from its community catchment area as it can, pupils for whom the school was built in the first place. If St Joseph's High School is forced to close it will because the parents of the community in question no longer need it and wish it to close. Closure, however is not inevitable. The Board of Governors has no wish to see the school closed and intends to struggle on as long as at all possible to keep it open and function in the effort to deliver as well as has been its practice up to now the curriculum pupils need to progress to a satisfying career.
>
> However the Government cannot keep the school open if the parents of the community do not wish it to survive. Accordingly they wish to draw to your attention and open up for discussion some of the issues involved."

Mr Lundy, in the course of his affidavit, stated at paragraphs 6 and 7 where relevant as follows:

> "6. …. On Monday 15 March 2004 CCMS was invited to meet the Board of Governors. The difficulties facing the school at that time were considered and the Board of Governors raised concerns about viability. As a result it was suggested CCMS attend a meeting in the school library with the staff. This was arranged for Friday 19 March after school. Staff were concerned about viability and redundancies and CCMS explained the procedure in relation to redeployment of teaching staff in the event of redundancies. The meeting explored ways of reviving the school and it was emphasised that the school would only be viable with the full support of

> the community. A newsletter was subsequently produced and distributed to parents …
>
> 7. CCMS was also invited to attend a meeting with parents on the evening of Monday 24 March 2004 at which the issues discussed with the Board of Governors and the staff were discussed with parents. It was emphasised that if the community did not support the school closure was a possibility.
>
> 8. On 26 May 2005 survey letters were distributed to parents of Key Stage II children from the feeder primary schools about educational options in relation to St Joseph's. Over 300 letters were distributed to parents and the response has indicated that on average only about 20 children per year would opt to transfer to St Joseph's at age 11. As a consequence of this exercise it was decided that the only option (other than closure) to be explored was linking the school with a school in Omagh. Significant, detailed work in this option was progressed with St Joseph's Plumbridge, Sacred Heart College, Omagh and the Western Education and Library Board through the offices of CCMS. However this particular route did not prove viable."

Mr Scoffield therefore submitted that prior to the consultation process between January-March 2006, the applicant as a parent of children at the school, the staff and the Board of Governors were well aware that the future of the school was under threat and there was a possibility it may close. The issue was expressly opened up for discussion and views sought.

(b) Mr Scoffield acknowledged that the consultation period was confined between January 2006-March 2006. He submitted that this was the formal consultation process and that proposals were at a formative stage as no decision had been taken to make a submission to the Board. He pointed out at this stage however that the school was in dire straits as evidenced by a document drawn up by Mr O'Doherty entitled "Education Provision in Respect of St Joseph's High School Plumbridge" and set out by me at paragraph 4 page 5 of this judgment:

(c) In January 2006 amalgamation was being explored. A working group, including the principal of St Joseph's was set up to explore this. Thus Mr Strong the principal of the school was on the working party and was entirely kept up to date with developments. He called a meeting of the Board of Governors on 11 January 2006. Mr O'Doherty presented a review of the

developments that had taken place over the previous three months including the possible merger with Sacred Heart College, Omagh as a "Plumbridge site". It was made clear that there were three options. First, to remain as an 11-16 high school. Secondly to merge with Sacred Heart College as an 11-14 site (i.e. at the end of third year) and thirdly to close the school with effect from September 2007. Mr O'Doherty had indicated that option (a) was impossible and that option (b) was possible but could only be decided after full costing but that option (c) "should not be ruled out". Mr Scoffield emphasised that the governors at that stage supported the amalgamation option stating that it had "many pluses" for both schools. Thus even the governors, who had parent members, recognised that the status quo was not the preferred option. It was at this meeting that the working party was formed comprising the two principals augmented by Mr O'Neill from CCMS the financial/employment expert together with an ex-Principal to work together to produce a detailed audit and model. If that option proved viable, it was decided that it should be brought to the community to ascertain viable pupil numbers.

(d) That audit made it clear that amalgamation was not viable. A document was produced to the Board of Governors which outlined again the three options and in relation to the amalgamation the disadvantages were outlined as follows:

> "St Joseph's High School would continue to face increasingly significant difficulties in terms of managing its pupils curriculum entitlement. From the curriculum analysis 2006-2007 (see Appendix 3 – number of teaching periods available = 329; total number of teaching periods required = 333; deficit of – 4 periods), it is clear that a reduction to 8/9 teaching staff would not allow the school to function appropriately even at key stage 3. The existing budget difficulties would be compounded by the loss of key pupils in key stage four. The budget of the other site would be detrimentally affected. This would be by virtue of the fact that the amalgamation would be effected (sic) by those pupils currently moving at transfer, remaining in Plumbridge so as to make it a viable 50 pupils intake 11-14 school. Such a scenario simply shifts the significant finance difficulty currently faced by St Joseph's at best to another site and worse causes two schools to have to struggle with such difficulties."

(e) As to the parents meeting with CCMS of 28 February 2006 Mr Schoffield submitted that this was the foremost opportunity for parents to make representations to CCMS. Notes of the meeting revealed the following:

> "(a) The meeting lasted 4½ hours so there was ample opportunity for argument and submissions to be made.
>
> (b) A PowerPoint presentation was produced, a full copy of which was provided to me over 10 pages in the papers before me. It illustrated, inter alia, the falling admission trends at the school with projections of greater falls in the future. It also embraced the three main options of retention, amalgamation and closure. Each was evaluated with advantages and disadvantages and a recommended option described in the following terms:
>
> > 'A falling enrolment (with no indication that it is likely to rise to a sustainable figure) will lead to inevitable further financial difficulties and constraints on meeting the legal requirements of the statutory curriculum. With this in mind CCMS would recommend that the school should close in 2007'."

Mr Scoffield submitted that there could not have been a clearer indication that the proposals were at a formative stage in terms of pluses and minuses of each option. By this time the audit had been carried out and was factored into the PowerPoint.

(f) The concerns raised and representations made by the parents were noted and recorded as follows:

- That CCMS's recommendation was based purely on financial concerns.
- That no consideration was being given to the needs of the pupils.
- That the decision was unpopular with parents.
- That the school, as a small school, was able to cater for the needs of individual pupils.
- That pupils from the school may get "lost" in a larger school.
- That there was undue emphasis on school numbers rather than needs.

Mr Scoffield drew attention to the fact, as recorded in Mr O'Doherty's affidavit at paragraph 24, that it was explained that no decision had been made but that unless new information came forward Mr O'Doherty

supported the recommendation that the school should close. He also indicated that in the event of CCMS submitting a proposal to the Board, there would be statutory consultation period during which representations could be made to the Department. He went on to record in that affidavit at paragraph 25 that the meeting lasted 4½ hours but that during that time the parents raised no viable options to closure. At paragraph 26 he said:

> "All of the above concerns and representations were taken into account by me and my colleague Diane Christy. As appears from the minute, I addressed the matters raised and Ms Christy agreed to take forward one of the issues raised which required further action. The representations made at the meeting, however, did not persuade me that there was any viable option other than closure."

Mr Scoffield submitted that the notes which were kept of the meetings with the staff, Board of Governors and parents during February, were typed up after the meetings within a number of days recording the salient issues. It was counsel's submission that the parents had been given a full opportunity. Thereafter there was a further period of two weeks for other representations which, according to Mr O'Doherty, at paragraph 28 of his affidavit, a number of parents availed of after the meetings and before CCMS had taken the decision to submit the proposals to the Board.

(g) The actual decision to submit the proposal to the Board recommending closure was made by the CCMS Education Provision Committee on 15 March 2006. A note of that meeting was before me. It referred to a paper produced by Mr O'Doherty to consider the future education and provision for children attending St Joseph's High School. The decline in pupil numbers – from 304 in 1994 to 151 at present – was discussed as affecting the teaching complement and reference made to the fact that teachers had taken voluntary redundancy. A lengthy discussion occurred where members considered the process of change within education and the voluntary/transfer redundancies of teaching staff. It was agreed that the proposed option of closing St Joseph's High School was the best way forward.

(h) Mr Scoffield argued that the CCMS continued to receive views during the departmental consultation period for example from Pat Doherty MP in a letter dated 8 June 2006 and a meeting with Omagh councillors on 15 August 2006 together with letters to various interested parties. He drew attention to a number of discrete issues including:

(i) The assertion that 200 additional houses are to be built in the area has not been confirmed by the Planning Service and in any event the additional

housing would only provide an additional four children per year group which is insufficient to allay concerns about falling enrolment numbers.

(ii) There were only 14 first preferences for St Joseph's in the 2006 intake and only 15 pupils actually went to St Joseph's in September 2006.

(iii) Although the intake of 25 in the year 2005 was greater than the intake of 24 in the year 2004, the general trend is still generally downwards and 30 pupils left in that year leading to significant decrease in numbers.

(iv) The budget deficit predicted by CCMS at £300,000 in fact is currently £250,000 and will rise to £400,000 in another year according to the affidavit from Iris Barker the Head of Property Services for the WELB at paragraph 25 of her affidavit. That affidavit also includes a reference to the teaching staff at St Joseph's. The school currently consists of one Principal together with ten teachers. Ms Barker was advised that four of the teaching staff were interested in being transferred to an alternate school with the remainder taking redundancy. These four staff could be accommodated in other schools, three have provisionally accepted the new posts and no guarantee can be given that the current vacancies will remain available in September 2008. She had been advised by the Principal that if the school remains open, the total pupil numbers will be in the region of 27. It is not clear how many teaching staff will be able to remain and it is highly likely according to Ms Barker that there will have to be redundancies.

Finally Mr Scoffield reminded the court that the under Article 14(5) of the 1986 Order, only representatives of the groups of the Board of Governors, teachers and parents need to be consulted by the person making the proposal. It was his submission that this had been fully and properly done after an adequate consultation period.

2. Turning to the Sedley principles, he made the following submissions:

(a) Consultation when proposals still at a formative stage. – The statutory consultations had taken place. Counsel argued that the Sedley principles cannot strictly speaking be applied here because it is impossible to consult without some proposal already being in mind. Nonetheless despite the fact that a proposal to close was in mind, the advantages and disadvantages had clearly been set out and efforts made to meet all options.

(b) Sufficient information and reasoning to allow for an informed response had been given with the PowerPoint presentation constituting a classic example.

(c) Adequate time was given particularly given the context in which the matter had been under discussion since 2003. He emphasised that the test is

not whether this was the best consultation but simply whether it was sufficient. The parents had formed an action group and were sufficiently organised to be able to put their points forward.

(d) Counsel argued that there had been a conscientious and open minded consideration. Dealing with the record keeping counsel emphasised that the Department of Education guidelines exhorted the Education and Library Boards to keep a record of all views expressed in the consultation process and not the CCMS. Paragraph 7 of that guidance indicated that the Department would seek documentary evidence as to the statutory consultation that had taken place and that notes of the relevant consultation meetings had been kept. Paragraph 29 referred to judicial review and the need to ensure that all consultation meetings were carefully documented and all correspondence retained which counsel submitted had been effected in this instance.

3. Board and departmental consultation

[7](a) It was clear that the Board conducted a process of consultation with the trustees and managers of other schools affected by the proposal inviting views on the proposal itself prior to submission to the Department. Six schools made a written response to the Board which were forwarded to the Department of Education. Moreover the proposal was advertised in the local press and libraries, with an invitation from members of the public within a two month period to report to the Board or the Department.

(b) There was a meeting between Mr Haire the Minister's Permanent Secretary and the Principal, Chair of Governors and the applicant on 14 August 2006. The applicant also sent letters to the Department and to the Board in both her capacity as Chair of the PAG and her personal capacity. Mr Pat Doherty MP MLA also lobbied the Department as did the Board of Governors, local councillors and Lord Laird. The affidavit of Ms Barker purports to set out in full the wide extent of representations which were made to the Department and the agencies and bodies interested who were consulted.

[8] I pause to observe at this stage that Mr McCann did not make any serious challenge to the assertion that the Minister had considered all of the arguments put forward both for and against the proposal before reaching a conclusion and limited his attack to the suggestion that the Department had turned a blind eye to the deficiencies in the CCMS approach.

[9] The real issue Mr Scoffield faced in this area was whether or not the Department consultation process could correct the inadequacies alleged on the part of the CCMS. To that end Mr Scoffield relied on:

(a) Hamlet's case to found an assertion that I should be cautious not to trespass upon the merits of the matter given that the Minister had considered all the issues and has rejected the submissions made. He relied upon the judgment of Webster J in Hamlet's case where he said at page 5:

> "I do not, however, propose to decide on unequivocally where the merits lie, particularly because that is a decision which is yet to be taken by the Secretary of State; and, primarily for that reason, I have avoided, where possible, consideration of the contents of the objections under Section 12 of the Act".

Accordingly Mr Scoffield submitted that I should leave the decision of the Minister untouched and be disinclined to look at the merits.

(b) He relied on the Cumbria case as clear authority that if the first stage i.e. the consultation process of the CCMS was deficient, the second stage with the Department/Board could cure any such deficiencies. Although there was no statutory duty existing in the cases earlier referred to but rather a legitimate expectation, he submitted that there should be no difference in the nature of the approach adopted by the court. If the second process cured the deficiency in the first, then it should not matter whether there was a legitimate expectation or a statutory right to the earlier consultation process. He emphasised that the Cumbria case had been heard in 1994 and that now, 13 years on, the doctrine of legitimate expectation is a more potent weapon and the court should not seek to distinguish between a statutory duty and a legitimate expectation in these circumstances.

Delay

[10] Relying principally on the authority of R v. Secretary of State for Education ex parte Robyn Bandtock (2001) ELR 333 ("Bandtock's case") Mr Schoffield submitted that the application should have been brought once CCMS had submitted its proposals. The delay for over 9 months remained unexplained between March 2006 and December 2006. Moreover he asserted that the applicant had delayed three months even from the Minister's decision. In the interim from the CCMS proposal, he argued that CCMS had been offering appropriate assistance in the transfer of staff and pupils in an attempt to alleviate the situation. However the school had been gearing itself towards closure. The position is well set out according to Mr Scoffield in Mr O'Doherty's paragraphs 37 and 38 where he states:

> "Since March 2006, the Principal was asking to make arrangements to contact other schools in relation to GCSE provision. We facilitated this request by way of

meetings with other schools to ensure that pupils beginning the GCSE programme could transfer. Through the Principal's offices all of the pupils entering the GCSE programme at year 11 in September 2006 transferred to other schools. The result of this is that the school now has no fourth year (year 11) pupils who would transfer into year 12 in September 2007. In addition there is quite a small number of year 10 pupils at the school (around 9-10) who are due to begin their GCSE programme next year. If the school is only likely to stay open for one further year, very few of them are likely to transfer to year 11 in September 2007.

38. Also, on the basis that the school was likely to close, it was not included in the transfer booklet given to parents of primary 7 pupils in the area who have recently received their transfer test results. The school has not set admissions criteria and, because it is not included in the transfer booklet, parents do not know that it is open to them to apply for their children to go to St Joseph's in September 2007. The intake in that year, therefore, if the school was to stay open, is likely to be nil or very very low. All of this adds to the difficulties which the school already faces."

[11] However since the grant of leave for judicial review work has stopped redeploying teachers and placing pupils. It is the submission of the first respondent, as set out in Ms Barker's affidavit of 9 February 2007 at paragraph 28 that:

> "the delay of the applicant between March 2006 and December 2006 in bringing forward her complaint about the consultation which took place in February 2006 has had a very significant impact upon the logistics of implementing the existing decision of the Department. If the applicant had brought this case at an earlier stage, I believe that many of the existing difficulties may have been avoided which would have resulted in a clearer and more certain future for existing pupils, staff, parents and prospective pupils".

The submissions of the second and third named respondents

[12] Mr McLaughlin, who appeared on behalf of these respondents, adopted many of the points made by Mr Scoffield and in essence made the following additional submissions:

(1) He emphasised the limited role of the Board in these matters. The process was initiated by CCMS. Thereafter the Board considered their proposal and opened it to public consultation, received responses to it and thereafter passed it on to the Department. The Department's role was then to consider the views and carry out any further consultations.

(2) The Department had set out guidelines earlier referred to at paragraph 3 of this judgment. Paragraph 7 of those guidelines introduces a requirement for consultation with Boards of Governors, parents and teachers of existing schools prior to the publication of Development Proposal. The Department will seek documentary evidence that the statutory consultation has taken place. Mr McLaughlin firmly asserted that the Department had acted on this and drew my attention to paragraph 12 of the affidavit of Russell Welsh, Head of the Development Branch within the Department of Education. The deponent acknowledged that the applicant in a letter dated 19th June 2006 had raised the issue regarding the adequacy of the consultation which had been conducted by CCMS before requesting the board to publish the proposal. Indeed prior to receiving this letter, Mr Welsh asserts that the Department had already made requests from CCMS for evidence of the consultations which it had concluded with teachers, parents and others. Consequently far from closing its eyes to the defects in the CCMS consultation, the Department had been proactive in considering the matter even before the allegation was made by the applicant. Having received the notes and correspondence from Mr Lundy, the Department was satisfied that the appropriate process had taken place. It had listened to the various representations from the parents' action group for example in correspondence of 19 June 2006 from the applicant and the secretary and had responded on 29 June 2006. That letter acknowledges that under Article 14(5) of the Education and Libraries (Northern Ireland) Order 1996 the Board was obliged to consult the trustees and managers of any schools which may be affected by the development proposal. It referred to the Board carrying out this requirement on 23 March 2006 when Ms Barker had written to the schools enclosing a copy of the proposal and asking for comments thereon. A three week period thereafter was allowed for this procedure and the Development Proposal was published subsequently in the local press.

[13] Counsel drew my attention to the memorandum from Eugene Rooney, Head of Development and Infrastructure Division, 13th September 2006 to the Minister, Maria Eagle MP, which in terms was a document prepared for the Minister by the relevant Department. That document fully set out the background, the objections, the comments from the WELB, the nature of the

consultation process and the recommendation that was made. That note contains thereon certain queries raised by the Minister concerning a meeting with Mr Haire the Permanent Secretary in the Department. That was the subject of a further memorandum from the Department to the Minister of 21st September 2006 which gave additional information. Upon consideration of this, the Minister noted on the document that "we should go ahead and support the closure in view of all the information available".

[14] In essence Mr McLaughlin argued that this was tripartite process under Article 14 of the 1986 Order. Stage one was carried out by the CCMS consulting with representatives of the Board of Governors, the teachers at the school, and the parents of the pupils before any proposal was submitted to the Board. He emphasised that by virtue of the fact that only representatives of these groups need be spoken to, that phase may not result in every view being canvassed. The second phase was where the Board was to consult the trustees and managers of any other school which would be affected by their proposal. The Board after submitting the proposal to the Department must then open up the whole process to the public at large and to everyone who wants to comment on the proposal. This will include publishing by advertisement in one or more newspapers circulating in the area affected by the proposal, a notice stating the nature of the proposal and indicating objections can be made to the Department within two months of that date. Thus the applicant, the families, the parent action group, etc could all participate in this second phase. The third phase involved the decision by the Department after considering any objections to the proposal within the time specified. Under Article 14(9)(a) of the 1986 Order thereafter there is a statutory duty on the proposer to implement the proposal once approval from the Department has been received. Accordingly it was his submission that the board has fully complied with its statutory requirements. The Board itself had no statutory role in preparing the proposal, consulting on the proposal, making a decision on the proposal or making other substantive contribution to the process. The role of the Board pursuant to Article 14 is essentially procedural and administrative in nature. The Board had provided staff to assist during consultation meetings, had consulted on the proposal with other schools likely to be affected by the closure and forwarded to the Department all written responses. Thereafter it had submitted the proposal to the Department with its views. The necessary steps for public display/advertisement and forwarding written responses to the Department had all been complied with. Similarly the Department had taken account of the wide range of representations during the public consultation process and made enquiries of its own from a range of bodies interested in the decision. Not only did the Department make searching enquiries from CCMS regarding the nature of the consultation process, but the Department had met with a delegation from the school, headed by Lord Laird and later received a written submission from the parents' action group. The delegation met with Mr William Haire.

[15] Mr McLaughlin relied upon Nichol's case and the Bandtock case to ground his submission that the court should, in the exercise of its discretion, conclude that delay in this case had been such that relief should not be granted even if a flaw in the process on the part of CCMS was concluded by the court.

CONCLUSIONS

[16] I have come to the conclusion that this application must fail and that the respondents' arguments should prevail for the following reasons:

(1) The consultation process

The essential question in any consultation process is whether the decision maker has acted fairly and in accordance with the procedural proprieties. Such a process should comply with the Sedley requirements. I am satisfied that that standard has been met by the CCMS in this case for the following reasons.

(a) First, the consultation occurred at a time when the proposals were still at a formative stage in my view. Proposals do need to have some specificity. Consultation after formulating and deciding upon specific proposals to put out for consultation is still in my view within the formative stage. (See Nichol's case at page 456.) So long as the CCMS was still free to alter or reject the plans during the consultation process, I consider that that brings it within the formative stage. Accordingly, whilst I am mindful that the CCMS did have the proposal in mind during the consultation period, it had not finalised the proposal until the period had concluded. The process had clearly not reached the implementation stage. Self evidently it needed to be crystallised to the extent that it was capable of consideration but it was not the subject of any final resolution (see R v. North and East Devon Health Authority ex p POW (1998) 1 CCLR 280 at page 290.) The CCMS had worked its way through the process looking at possible alternatives to closure at a number of stages. For example the meeting with the Board of Governors in January 2006 had clearly contemplated amalgamation with another school and not merely closure. Not only did the Board of Governors (with representations from parents thereon) embrace amalgamation as a realistic possibility, but a working party had been set up to carry out an audit as to feasibility. In the event the study indicated that it was not a possibility. The meeting with the parents lasted 4 ½ hours in February 2006 and I am satisfied that whilst the prospects for alternative to closure may have appeared bleak to the CCMS at that stage, ample opportunity was afforded at that meeting for alternatives to surface. A lengthy and detailed PowerPoint presentation was given, all the parents' objections were discussed and recorded. I find nothing in the applicant's affidavits or the recorded notes which persuade me that any rational argument was raised to the closure option at that meeting with the parents.

(b) Secondly, the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. I strongly endorse the views of Webster J in Hamlett's case at page 6 where he said:

> "Even if a proposal appears to those in possession of all the material information to be the only obvious one, in my view fairness requires that those affected by the proposal should be informed at least about the substance of the facts or assumptions which have led to that conclusion, in sufficient detail to enable them to question those facts or assumptions. Fairness also requires that that information should be provided in a readily intelligible form and that they should be given sufficient time to consider it before having to respond to it. Even where a proposal seems, to those making it, to be obvious and unavoidable, the process of consultation which fairness requires is not simply an exercise in public relations: it is always possible that one of the facts or assumptions which have led to the making of the proposal can be shown to be false; it is possible too that in making the proposal those responsible for it, albeit people of considerable experience and wisdom, had overlooked a relevant consideration, perhaps because they had earlier made a decision of policy the application of which would make the point irrelevant".

I find nothing in the evidence before me which suggests that the CCMS had transgressed that wise admonition in Hamlett's case. In my view the purpose of the meetings with the representatives of the Board of governors/staff/parents was to discuss if there were sufficient reasons for the proposal set against the background of debate and discussion that clearly had surfaced in the period 2003-2006. This was not an instance where, as Mr McCann suggested, 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 evidenced 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. I would be very surprised if the parent governors/headmaster had not disclosed that process to a number of parents and put the matter into the public domain prior to the meeting with the parents in February 2006. Moreover the lengthy meeting with the parents gave ample opportunity for a full debate. I have no doubt that the parents were shocked at the state of affairs that had now crystallised but this is often the case where notwithstanding the inevitability of any situation, the moment arrives when final decisions have to be taken.

(c) Thirdly, adequate time must be given for consideration and response. That again ties in with the admonition in the Hamlett case to which I have earlier referred. I cannot ignore the fact that this matter had been discussed in the public domain during the period 2003-2006 before the consultation process finally commenced January-March 2006. That provided a context for the consultation process and served I believe to focus minds and sharpen the debate in the consultation period. After the final consultation with the parents in February 2006, a further two weeks or thereabouts ensued before the proposal was made. I am mindful that two weeks may in retrospect appear to have been the minimum that could have been afforded for sober and considered reflection. However the fact of the matter is that the opportunity for further debate and response to the dire straits of the school had been long in gestation and this additional opportunity for further discussion was availed of by a number of parents in that two week period. I am satisfied therefore that in the context of this case the third Sedley principle was adhered to.

(d) Fourthly, the product of consultation must be conscientiously taken into account in finalising any proposals. The reaction of CCMS to the proposals at the Board of Governors' meeting in January 2006 the setting up of an audit and working party thereafter – in my view is but one illustration that the consultation process was taken into account and was acted on. Moreover at the parents' meeting, the concerns of the parents were carefully noted and in at least one instance were acted on thereafter. I see nothing to suggest that an inadequate period was taken to consider the product of the consultation process given the context.

[17] I pause to make observation on certain discrete points raised about the consultation process by Mr McCann:

(1) **Note taking**. I have no doubt that the note taking in this instance could have been more comprehensive. I did find it disquieting and not a little surprising that Mr Lundy had registered surprise at being asked to provide minutes of meetings as part of his submission. His evident irritation at the fact that this could add significantly to the paper work was a remark that fuelled my initial concern. Note taking needs to be a norm of procedural propriety in such processes. Moreover the Department of Education Guidance at paragraphs 7 and 29 highlighted the need to carefully document all consultation meetings, correspondence and the statutory consultation process. Nonetheless I am satisfied that in the event adequate notes were kept of the consultation process as presented before me. Whilst they might have been more fulsome they did contain in my view the salient issues. I find nothing in the affidavits of the applicant to suggest that any material or substantive issue was left out. To criticise this note taking is not to condemn it. Courts must be wary not to introduce an undue degree of formalism into the decision making process of such matters. In a somewhat different context, namely the alleged breach of Article 9(1) of the European Convention for the Protection of Human

Rights and Fundamental Freedoms of a Muslim child wishing to wear a jilbab in R v. Governors of Denbigh High School (2006) UK HL 15, Lord Hoffmann said at paragraph 31:

> "I consider that the Court of Appeal's approach would introduce "a new formalism" and be "a recipe for judicialisation on an unprecedented scale". The Court of Appeal's decision making prescription would be admirable guidance to a lower court or legal tribunal, but cannot be required of a head teacher and governors, even with a solicitor to help them. If, in such a case, it appears that such a body has conscientiously paid attention to all human rights considerations, no doubt a challenger's task will be the harder. But what matters in any case is the practical outcome, not the quality of the decision making process that lead to it".

In the instant case the guidance from the Department of Education is an important document but it must be subjected to a purposive and not an over formalistic construction when being considered by the courts. I have therefore concluded that whilst CCMS would be well advised to review their note taking functions and the training of their officials in this regard, nonetheless I am satisfied that the notes taken in this instance were sufficient to comply with their statutory obligations and the common law principles of procedural propriety. I have scrutinised the notes carefully in this regard and have come to the conclusion that in so far as their purpose was to reflect the salient issues arising at those relevant consultation meetings, they did so.

(2) For the removal of doubt, I make it clear that I do not consider that the CCMS approached this matter with a closed mind. On the contrary the contextual evidence of the discussions during the earlier years, the attempt to consider the possibility of amalgamation rather than closure in January/February 2006, and the lengthy and detailed discussion with the parents in February 2006, are proof positive that the CCMS did approach this with an open mind. The fact of the matter is that, as Mr Scoffield submitted, people in the community had been voting with their feet for some time and numbers at the school were diminishing at an alarming rate with the passing years. The community did not evince a determination to keep this school open and the CCMS was running against the tide in its attempts to find a solution short of closure.

The subsequent consultation process

[18] Even if I am wrong on my conclusion that the consultation process was adequate, I am satisfied that any flaw was rectified by the subsequent

consultation process embarked on and completed by the Board and the Department. I am of this opinion for the following reasons:

(1) I am attracted by the argument of Mr McLaughlin on behalf of the second and third-named respondents to the effect that the legislation constitutes a tripartite process which is composite in nature. The object of the legislation is to ensure that the views of those most concerned in the outcome are taken into account and the widest possible array of parties are given the opportunity to participate. The first stage under Article 14 of the relevant Order does not require that all individuals within the categories identified in Art.14(5) are canvassed nor does it require that all those parties are offered the opportunity to express a view. It is sufficient that the opportunity to express a view is afforded to "representatives" of that group. Since the overall statutory purpose is to ensure as wide a consultation process as possible, any defect in the first stage is corrected by the mandatory consultation period during the second phase of the process. This enables the statutory purpose to be achieved. I can see no prejudice whatsoever accruing to the applicant through any defect which might have occurred in the first stage and indeed not only were the applicant and her family fully aware of the second phase but they availed of it. Mr McLaughlin carefully took me through the full consultation process of the second and third-named respondents and it was clear to me that the applicant was able to make all of the points that she wished to make to the Department about the alleged inadequacy of the consultation process conducted by CCMS.

(c) There is a danger that the legislative purpose would be diluted and the object of concern of the legislation frustrated if an over formulaic approach was to be adopted to the interpretation of the primary statute. Not only would this prove a potent stimulus for references to this court but, more importantly, would serve, as in this instance, to delay the implementation of properly considered steps for the benefit of the community and school children simply because of a defect which had been in substance properly corrected by a later stage. I do not believe that Parliament intended that to be the situation in circumstances where the future of the education of local children was at issue.

(d) The need for procedural fairness relates to the process by which the ultimate decision-maker, in this case the Minister, makes up her mind. The question is whether the intent of Parliament, namely that the interested parties, including the applicant, had been given a fair opportunity to comment and object during the decision-making process, has been fulfilled. I am satisfied that it has in this instance and would have been so even if I had sustained the frailties alleged by Mr McCann in his argument about the consultation process operated by CCMS in light of the subsequent enquiries by the second and third named respondents .

(e) I consider that this conclusion carries a particular resonance where, as in this instance, not only were all the same points made to the Department/Minister as had been made to the CCMS but the Minister was directly alerted to the allegation of alleged weaknesses in the CCMS consultation process.

[19] I observe however that I recognise entirely that the interests of parents in the educational arrangements in the area where they live is both self-evident and extremely important. The approach that I have adopted in this instance might not be that which would be followed where there had been a flagrant or determined attempt on the part of a body such as the CCMS to deliberately ignore or dilute that first stage of the process. Such conduct might serve to poison the whole process irrespective of what steps were later deployed to rectify it. I do not consider that to be the case in this instance and taken at their height, I do not consider that the criticisms made by Mr McCann would amount to such a flagrant and deliberate abuse of the statutory process.

[20] Whilst Mr McCann is correct to point out that the Cumbria case is set in the context of legitimate expectation rather than a statutory expectation, I consider that the principles adumbrated in that case apply equally in the context of this instant case. I see no reason why, provided the statutory purpose is fulfilled, a defect in the earlier stage of the statutory process cannot be cured by subsequent reconsideration or further acts which effectively cover the ground of the earlier defect. I do not believe that this area of law lends itself to any clear and absolute rule but rather each case must be considered on a case by case basis in the particular context of the statute under consideration. I am satisfied that any defect in the consultation process, which I have rejected, would have been cured by the subsequent stages and that the principles set out in the Cumbria case equally apply to a statute such as the one now under scrutiny. No realistic criticism has been made of the subsequent comprehensive consultation process with the Board and the Department and I am satisfied therefore that any existing defect would have been cured.

[21] **Delay**

(1) 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 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 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. The affidavit of Ms Barker on behalf of the Board made the following assertions which in my view all point towards prejudice having accrued as a result of the delay. These are:

> "Prospective Pupils
>
> 22. In reliance upon the decision that the school would close on 1 September 2007, the Board has not included any entry in respect of St Joseph's within the current information booklet which was published to parents of children completing the transfer test during the current academic year. Accordingly, the public are under the belief that the school will close and very few, if any, pupils are likely to apply for admission into year 8 in September 2007. … I am also advised by the Principal of St Joseph's that in September 2006, 34 pupils were accepted as a preferential choice for St Joseph's. At that stage, he explained to parents and pupils that only one year of education in the school could be guaranteed. Consequently the intake into year 8 was only 15. On the basis of the above I believe that the current and existing uncertainty about the status of the school in September 2007 is likely to have a very detrimental impact upon the numbers of pupils choosing to attend St Joseph's. Even if the school does remain open next year, I believe that it is likely that there will again be a very substantially reduced intake.

…

Existing Pupils

23. I have also been advised by the Principal of St Joseph's that in reliance upon the decision of the Department he has already requested pupils to express a preference for which school they would like to attend next year. He has negotiated arrangements with the Department of Education and other schools regarding the transfer and admission of those pupils, commencing September 2007. I am advised he has been able to guarantee 90% of the current pupils a place in their first choice alternative school. I am advised that this opportunity may not be available for the following academic year, in the event that St Joseph's remains open. …

Teaching Staff

24. The current teaching staff of St Joseph's consists of one principal together with 10 teachers. I am advised that four of the teaching staff are interested in being transferred to an alternative school, with the remainder taking redundancy. I have been advised that these four staff could be accommodated in other schools commencing in September 2007. Three have provisionally accepted the posts and no guarantee can be given that those current vacancies will remain available in September 2008. Some teachers may choose to move at this stage. If the school does remain open for a further year, I am advised by the Principal that he estimates that total pupil numbers will be in the region of 27. It is not clear how many teaching staff will be able to remain and it is highly likely there will have to be redundancies. ....

25. In addition to the above, I also understand that the school's budget deficit stands currently at approximately £250,000. If the school is allowed to remain open for another year, the budget deficit is likely to grow approximately £400,000. This deficit

> will have to be charged to the Board's School Centre Budget.
>
> 26. In light of all the above factors it is the view of the Board that the delay of the applicant between March 2006 and December 2006 in bringing forward her complaint about the consultation which took place in February 2006 has had a very significant impact upon the logistics of implementing the existing decision of the Department. If the applicant had brought this case at an earlier stage, I believe that many of the existing difficulties may have been avoided which would have resulted in a clearer and more certain future for existing pupils, staff, parents and prospective pupils."

I have much sympathy with that point of view. I appreciate only too well that the applicant is not an expert in school affairs or budgetary deficits. Nonetheless, Mr McCann did concede that legal advice was sought in May or June 2006 (still a considerable period after the proposal had been made) and that this had proved to be an unsatisfactory experience for the applicants until the present solicitor, from a new firm, had taken control of the helm in September/October 2006.

[22] In approaching the matter of delay, I regard a good overview of the principles to be applied is found in R v Secretary of State for Trade and Industry, ex parte Greenpeace Limited [2000] Env LR 221 where Kay J posed three criteria:

(1) Is there a reasonable objective excuse for applying late?

(2) What if any, is the damage in terms of hardship or prejudice to the third party rights and detriment to good administration, which would be occasioned if permission were now granted?

(3) In any event, does the public interest require that the application should be permitted to proceed.

[23] Tardiness or incompetence of legal or other advisers is normally not a good ground, the remedy of the client being to sue those advisers (see R v Secretary of State for Health ex parte Furneaux [1994] 2 AER 652). That is particularly so where speed is of the essence in having the matter determined. I remain unconvinced therefore that there is good reason either for misinterpreting the need to bring the application in the wake of the CCMS proposal or for the excuse thereafter rendered that the advice from a solicitor

had been unsatisfactory. Damage and prejudice have potentially accrued to the pupils and staff of the school by this delay and it would be detrimental to the good administration of this school to ignore it. I consider that there is merit in the proposition put forward by Ms Barker that many of the difficulties which have now arisen could have been avoided if the application had been brought in a more timely fashion. There is strength in Mr McLaughlin's submission that the process has now been underway for some time and many arrangements had been made towards closure. The practical effect of granting certiorari would be to require that the school remained open for a further period whilst the whole process was recommenced. I cannot believe that this would have other than a seriously deleterious impact upon the pupils, staff and school.

[24] My conclusion therefore is that I do not consider that there is good reason to extend the time for this late application particularly in view of the prejudice which has accrued with the passage of time. Accordingly, even had I determined that the consultation process was flawed on the part of CCMS, and had I determined that the defects could not be cured by the subsequent consultation process embarked on the second and third named defendants, I would have exercised my discretion to refuse to grant the relief sought of certiorari on the grounds of delay.

[25] In all the circumstances therefore I have come to the conclusion that this applicant's application must be dismissed.