Neutral Citation No. [2016] NICA 12

Ref: **DEE9815**

Judgment: approved by the Court for handing down
(subject to editorial corrections)

Delivered: **14/03/16**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHEN IRELAND

2014 No. 129018/01

BETWEEN:

THE DEPARTMENT OF EDUCATION

Respondent/Appellant;

-And-

MAIGHREAD CUNNINGHAM (A MINOR)
BY HER MOTHER AND NEXT FRIEND BREDA CUNNINGHAM

Applicant/Respondent.

THE COUNCIL FOR CATHOLIC MAINTAINED SCHOOLS

Notice Party.

Before Morgan LCJ, Weatherup LJ, Deeny J

DEENY J (Delivering the judgment of the court)

Introduction

[1] This is an appeal by the Department of Education (the Department) from an order of Treacy J of 27 March 2015 removing into the Queen's Bench Division and quashing two decisions of the Minister for Education, Mr John O'Dowd MLA. These two decisions related to Clintyclay Primary School, 81 Clonmore Road, Dungannon, County Armagh, BT71 (the school). The applicant is a pupil at that school and brought the proceedings by her mother and next friend, Breda Cunningham. The first decision of the Minister was to refuse to approve a transformation of the school into an integrated primary school as sought under Development Proposal 315. The second decision was to approve the closure of the school under Development Proposal 312. The judge quashed both Ministerial decisions.

[2] At the hearing of the appeal Dr Tony McGleenan QC led Mr Philip McAteer for the Department. Mr Ronan Lavery QC led Mr Stephen McQuitty for the

applicant and Mr Paul McLaughlin represented the Notice Party (CCMS). In a proposed amended Order 53 Statement the applicant relied on numerous grounds of challenge. The judge decided the case as set out below. Mr Lavery submits that if, contrary to his submissions, the Court upheld the appeal the case would need to be remitted to the judge to determine these other grounds. The court is grateful to counsel for their helpful oral and written submissions.

[3] The challenge before the lower court proceeded as a rolled up hearing on 24 and 25 March 2015. At the request of the parties and to allow enrolment decisions to be made early in the next month the learned judge delivered judgment with admirable celerity. His judgment of March 27 which quashed the Minister's decision was based on the conclusion, at [17] of his judgment, that "the Minister has misdirected himself on the question of the school's finances by his reliance on the advices given to him which directly or indirectly reference financial matters raised by CCMS (in the Parish Review) or by comments made by the ETI. As the applicant pithily observed the problem for the respondent is that there never was any financial or budget difficulties." In the submissions made to the Minister there was reference to financial difficulties and budget difficulties. But there were also express statements correctly setting out the budget and financial position of the school in the appendices to the submissions, combined with warnings about the long-term sustainability of the school. In assessing whether the judge acted appropriately in quashing the decisions it is important to consider the background to those decisions and the lengthy iteration leading up to them.

Statutory background

[4] Under the heading 'Establishment, recognition and discontinuance of, and effecting of changes to, grant-aided schools' Article 14 of the Education (Northern Ireland) Order 1986 ("the 1986 Order")[1] sets out the process governing the proposal to close a school.

> "***Proposals as to primary and secondary education***
>
> 14. - (1) Where a board proposes-
> (a) to establish a new controlled school, other than a controlled integrated school;
> …
> (c) to discontinue a controlled school;
> …
> the board shall submit the proposal to the Department.
> …
>
> (2) Where a person other than a board proposes-
> (a) to establish a new voluntary school;

[1] (The Education Act (Northern Ireland) 2014 amended these provisions as of 1 April 2015 so that references to a board are now references to the Authority.)

…
(c) to discontinue a voluntary school;
(d) to make a significant change in the character or size of a voluntary school;
…
then-
….
(ii) in any other case, the person making the proposal shall submit the proposal to the board,

and the board shall submit the proposal to the Department together with its views thereon and, in a case to which head (i) applies, the Council's views thereon.

(3) It shall, where the Department so directs, be the duty of a board to submit to the Department a proposal-

(a) to establish a new controlled school, other than a controlled integrated school;
(b) that a controlled or voluntary school should be discontinued;
…

(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.

(5) Before a proposal concerning an existing school is submitted to a 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.

(5A) 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.

(5B) 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.

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

(a) forthwith furnish to the trustees and 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 two 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.

(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 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.

(8) In relation to a proposal made under paragraph (3), paragraph (7) shall have effect with the substitution for the references to the person making the proposal of references to the trustees and managers of the school to which the proposal relates.

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

(9A) Subject to paragraph (9B), where a proposal under paragraph (1), (2) or (3) is approved by the Department after 1st April 1987, it shall be the duty of the board or person making the proposal to implement the proposal.

(9B) The Department may modify any proposal which is required to be implemented under paragraph (9A), but shall not do so except at the request of the board or person making the proposal.
…"

[5] Chapter II of the Education Reform (Northern Ireland) Order 1989 governs grant maintained integrated schools. Article 71 provides for proposals for acquisition of grant-maintained integrated status. Article 74 provides for consideration of proposals and how they should be considered and determined when brought concurrently with a proposal to close a school:

"Proposals for alteration, etc. of schools eligible for grant-maintained integrated status
74. - (1) Before formulating in respect of any controlled school which is eligible for grant-maintained integrated status any proposal under Article 14(1) (c), (d) or (e) of the principal Order, a board shall consult the Board of Governors of the school.

(2) No proposal shall be submitted under Article 14 of the principal Order in respect of any school in respect of which a proposal for acquisition of grant-maintained integrated status has been approved.

(3) Paragraph (4) applies in any case where either-

(a) after a proposal for acquisition of grant-maintained integrated status has been first submitted to the Department under Article 71 in respect of any school which is eligible for grant-maintained integrated status but before that proposal is withdrawn or determined a proposal in respect of the school is submitted to the Department under Article 14 of the principal Order; or

(b) after a proposal in respect of any such school has been submitted to the Department under Article 14 of the

principal Order but before that proposal is withdrawn or determined a proposal for acquisition of grant-maintained integrated status for the school is first submitted to the Department under Article 71.

(4) In any case to which this paragraph applies, the Department shall consider both proposals together but shall not determine the proposal under Article 14 until it has made its determination with respect to the proposal for acquisition of grant-maintained integrated status.

(5) Where-

(a) a proposal under Article 14(1)(d) or (e), (2)(d) or (e) or (3)(c) of the principal Order with respect to any school has been approved under Article 14(7) of that Order; and

(b) the school becomes a grant-maintained integrated school before that proposal has been implemented,

that proposal shall be treated for the purposes of this Part as if it had been published and approved under Article 79."

[6] Article 64(1) of the 1989 Order states as follows:

"PART VI
INTEGRATED EDUCATION [Articles 64 – 99]
CHAPTER I
GENERAL FUNCTIONS OF DEPARTMENT AND BOARDS

General functions of Department and boards in relation to integrated education
64. - (1) It shall be the duty of the Department to encourage and facilitate the development of integrated education, that is to say the education together at school of Protestant and Roman Catholic pupils."

Policy background

[7] In December 2006 the Bain review produced a report entitled *Schools for the Future: Funding, Strategy Sharing – Independent Strategic Review of Education*. Findings included that there was evidence that resources were not being used as effectively as they might be and that, because of falling pupil numbers and the many school sectors, there were too many schools in Northern Ireland. As a result there were too

many schools with small pupil numbers, some to the extent that they soon would be unsustainable. The report recommended that the minimum enrolments for new primary schools in rural areas should be 105 pupils.

[8] In January 2009 the Department's policy response to the Bain Review, *Schools for the Future: Policy for Sustainable Schools* was published. At paragraph 3.2 the Department noted that small primary schools could face particular difficulty where two situations arose: where there were composite classes with more than two age groups within most classes, and where there were only two teachers, one with responsibility for four different age groups, and the other three different age groups. The "Enrolment Trends" section of the policy stated that the position of a primary school should be reviewed when the enrolment falls below 60. The policy adopted the threshold enrolment figure of 105 for a rural primary school as recommended in the Bain report. Paragraph 5.3 noted that small schools required additional financial support in order to make appropriate curriculum provision for their pupils and so the Local Management of Schools (LMS) Common Funding Formula (CFF) included elements designed to target their particular needs, including the Small Schools Support Factor. Paragraph 5.6 recorded that "an inevitable consequence of the support provided to small schools is that the LMS per-pupil allocation for small schools are significantly higher than for larger schools". Paragraph 5.8 stated that the costs associated with providing additional support to smaller schools reduced the funding available for distribution across other schools. Chapter 6 and Annex A then outlined six sustainable school criteria and indicators intended to provide a framework for assessing the range of factors that may affect a school's sustainability. It was noted that the criteria and indicators should not have a mechanistic application, that schools should be considered on a case by case basis, and that the criteria and indicators do not determine whether a school should automatically be considered for closure or amalgamation. Out of the six criteria three are particularly pertinent to the present case:

(i) Quality Education Experience: indicators include no more than two composite year groups in a single classroom and a minimum of four teachers at a primary school;
(ii) Stable Enrolment Trends: indicators include that ideally a school should have at least seven classrooms and minimum enrolment of 105 in rural areas; and
(iii) Sound Financial Position: indicators are that the school's annual finances and financial trends should indicate that it can and will continue to live within its annually delegated budget, and the school's three year financial plans, based on realistic assumptions, indicate that where there is a deficit this can be substantially reduced or recovered.

[9] In 26 September 2011 the Minister announced to the Northern Ireland Assembly a process of school area planning and rationalisation: *Putting Pupils First: Shaping Our Future*. A theme of the announcement was that the pattern of provision was unsustainable and that there were schools that were too small or too empty.

The Department intended to implement the Sustainable Schools Policy and there would be three components of a programme for action. Firstly, managing authorities were being asked to carry out a viability audit to identify all schools evidencing stress. Viability would be measured against the three criteria from the Sustainable Schools Policy noted above. Secondly, the five Education and Library Boards, in close conjunction with CCMS, would be required to produce strategic area plans. Thirdly, there would be a review of the CFF, the mechanism by which funds are allocated to individual schools. (This review, which resulted in the Salisbury report of January 2013, recommended that small school support factors should be removed from the CFF.)

[10] There also is a Departmental Circular entitled Publication of a Development Proposal (2014/21) dated 26 September 2014.[2]

CCMS review

[11] In response to the *Putting Pupils First* policy CCMS conducted the viability audit of all primary schools for which it had responsibility, which included the school attended by the applicant. On 28 June 2012 CCMS provided the school with a draft school statement which would form the basis for further in-depth discussions. The statement recorded 'No' against the primary audit stresses of 'quality of education' and 'finance' and 'Yes' against the primary audit stress of 'enrolment'. It then stated: "Comment: unsustainable as a single school". A letter from CCMS dated 13 August 2012 noted that some school principals had identified discrepancies in the information and that these had been corrected. The statement for the school remained the same.

Review of primary education in the parish of Dungannon (the parish review)

[12] In light of the CCMS audit, CCMS then wrote to the school on 1 October 2012 stating that it had asked Mr Sean Maguire to undertake a review of the school with a view to bringing forward some recommendations for further consideration and consultation. Mr Maguire reported in December 2012. There were surplus places among the four CCMS schools in the parish and, based on projected population figures, neither the school nor Laghey primary school would reach their capacity enrolment figures. Both would fall short of the recommended intake of 105 pupils. Addressing the projected financial position based on the CCMS viability audit, the report noted that the school had a projected surplus by the end of year 3 (2014/2015) of £8,602 or 4.84% and a financial stress indicator at level four. It concluded that: "All four schools have been deemed to be financially stable for the foreseeable future." The report then examined a number of options including amalgamation and closure of various schools. The final proposal recommended the closure of the school for the following reasons:

> “14.1 The continuing very low enrolments at Clintyclay Primary School, with no indication of any significant increase over time, despite growth in the other three primary schools in recent years, will lead to inevitable further financial difficulties and constraints on meeting the legal demands of the statutory curriculum and the new revised curriculum to all children.
>
> 14.2 The three key criteria for viability identified by the Minister in September 2011 … namely standards, future enrolment and financial viability, point to significant pressures on the school. Considering this, together with the holistic education needs of the pupils and the well-being of the staff, CCMS would recommend that the Trustees consider closure, by 31 August 2013 or as soon as possible thereafter, of Clintyclay PS...”

It was noted that Laghey primary school, located 3.7 miles away, could accommodate Clintyclay pupils but should also be kept under review given it was under the recommended enrolment threshold.

Factual Background

SELB’s draft strategic area plan

[13] In September 2012 SELB had published a draft area plan which, in relation to the school, had stated: “*Review future sustainability. Unsustainable as a single school.*” On 18 March 2013 SELB published a draft area plan which included a proposal to consult on closure of the school. SELB conducted a public consultation on the plan from 19 March to 20 June 2013 following which it published a report on 30 August 2013 (later revised on 12 March 2014). The report noted that “the school is financially stable and has a viable 3 year budget.”

Closure recommendation and response

[14] On 29 January 2013 CCMS accepted Mr Maguire’s recommendation and agreed to consult on school closure. On 12 March 2013 CCMS wrote to the school principal, Chairman of the Board of Governors, and the parish priest notifying them that CCMS had concluded that the most appropriate way forward in respect of the school was to consult on its potential closure. The correspondence referenced an extract from SELB’s draft area plan which stated:

> “A number of issues in the school and/or local area have been identified and need to be addressed.
>
> - More than 2 composite year groups in a single classroom.

- 2.2 teachers.
- School's enrolment for 2012/13 (34 pupils) is below the minimum enrolment threshold detailed in the Sustainable Schools Policy.
- 13 unfilled places."

[15] On 21 April 2013 the principal and the Chair of the Board of Governors wrote to CCMS to raise what they considered were misconceptions and assumptions in Mr Maguire's report. They enclosed a response by the Clintyclay Steering Group, dated 20 April 2013, which commented on Mr Maguire's report. In response to the statement in the report that the revised curriculum had placed insurmountable pressure on small schools, the Steering Group said that the figures in the report had indicated the school had a financial surplus. The report had said the school was financially stable for the foreseeable future. The Viability Audit of February 2012 had stated that the school had a stable enrolment trend and a sound financial position. Enrolments had been going up (29 in 2009/10, 32 in 2010/11, and 33 in 2011/12). In considering the various options Mr Maguire had stated under the option of closing the school that "The significant financial difficulties would be removed and the receiving school(s) would have their budget increased." The Steering Group said in response to this that there were no financial difficulties in respect of the school and that the curriculum was currently being delivered to a high standard. The Steering Group also submitted that there were many inaccuracies in Mr Maguire's report, for example to do with catchment areas, distances between schools, maps etc.

[16] CCMS provided a response to Clintyclay Steering Group which stated:

> "6. 2.2 The viability audit for February 2012 indicates that Clintyclay PS had a stable enrolment, however this is stable at a level far short of viability in terms of the government policy on sustainable schools. The sound financial position in 2012 derives from the allocation of £20k underspend accrued in one financial year and then redistributed over the next 3 years to produce a surplus up to 2014. Beyond that point the budgetary position becomes much more uncertain. The review report stated that the school was in sound financial position for the next 3 years.
>
> ..
>
> 13. Financial position see section 6. In addition, the common funding formula allocation for 2013/14, 42% of the allocated finance comes from APWU sources. The remainder includes £41.6k for small school block funding and £12.78K for teacher's salary protection. In addition £16.4K is allocated for Principal release time and £12.3k foundation stage mainstream

> support. While all of these allocations are entitlements under the current funding system they are the subject of much discussion in government and some of the fund sources are liable to change irrespective of the outcomes of the Salisbury report. The review report correctly stated that Clintyclay PS is financially stable for the foreseeable future, however, as pointed out at the start of the report the potential for financial unviability is real and cannot be dismissed for the reasons outlined in section para 6 of this response."

[17] The Steering Group responded to this, providing commentary on each section of the CCMS response. In relation to the above two sections for example, the Steering Group argued that the report had not set out the advantages of small schools. The school's financial surplus was not being used to subsidise the running costs of the school. Under a probable small schools policy proposed as an amendment to the Education Bill the funding for the school could be more secure than as suggested by CCMS. The Steering Group also made representations directly to both the SELB and Department.

Consultation on closure / exploration of other options

[18] CCMS began a pre-consultation process prior to the publication of the closure proposal in accordance with the requirements of Article 14 of the 1986 Order. Meetings to consult on the closure recommendation were scheduled for 22 May 2013. These were postponed by CCMS to September 2013 at the request of the parish priest who reiterated the strength of feeling in the local community and felt that it needed more time to consider the recommendations. In June 2013 the school principal sought and obtained CCMS advice about the consultation process and was advised that CCMS was open to any alternative proposal which would result in a sustainable Catholic maintained school.

[19] On 16 August 2013 CCMS was requested by Archbishop Martin to consider the possibility of an inter-parish solution, by merger of the school with St John's primary school, Eglish. Archbishop Martin is the Chairman of St Patrick's Educational Trust which is the owner and trustee of the school. On 25 September 2013 CCMS responded to Archbishop Martin that neither site would be suitable for a single amalgamated school and that a federated model (split site) would create problems. Further there were available spaces for all children at nearby primary schools. CCMS also looked at the possibility of amalgamation with another school (St Mary's Maghery). On 11 November 2013 the Chair of the school's Board of Governors contacted CCMS to request postponement of consultation meetings to consider the option of merger with St Mary's, Maghery.

[20] On 18 November 2013 CCMS held a consultation meeting with staff, parents and the Board of Governors. Financial viability of the school was discussed at length with parents being concerned that finances were being used as a reason to close the school. Mrs Cunningham avers that the prospect of integration was mentioned at this meeting. CCMS gave a PowerPoint presentation which reported on the audit of the school. Under the criterion "Sound Financial Position" the presentation stated:

> "3 year plan spread underspend from 2011 to ensure budget surplus until 2014. It is unlikely that such levels of underspend can be repeated."

The presentation referred to the enrolment stress and then, in respect of financial stress, referred to the surplus of £8,602 or 4.84%. It then referred to the Salisbury review recommendation small school support factors should be removed from the CFF. It stated that, while the Minister had decided not to implement this for 2013/2014, there was no guarantee that this financial support would remain beyond that year. The presentation outlined the options that had been considered in the parish review and the closure recommendation. It then gave details of the consultation which would run to January 2014.

[21] Consultation responses received included:

- 102 written responses from individuals and groups within the local community;
- a petition with 464 signatures supporting the retention of the school;
- a response from the Board of Governors, promoting potential amalgamations which would retain the school on the Clintyclay site; and
- a response from the parish priest requesting that special consideration be given to the case of the school.

[22] The response from the Board of Governors was critical of the parish review. It notified CCMS that it had received a request from the parents for transformation of the school into a grant-aided integrated primary school. Once the request had been received from a sufficient number of parents, the relevant process involved the conduct of a ballot on the issue.

[23] On 19 March 2014 CCMS prepared a paper summarising the outcome of the consultation process and decided to proceed with the proposal for closure of the school. The Committee was advised of the parallel ballot for transformation to an integrated primary school, that CCMS had given the Board of Governors advice on the relevant procedures, and that that ballot had no bearing on the proposal to close the school as a Catholic maintained school.

Publication of the closure development proposal (DP312)

[24] On 25 March 2014 CCMS submitted the request to SELB to publish the closure proposal. The letter was copied to the parish priest and school principal. During the course of April and May 2014 SELB then carried out a consultation process with local schools that might be affected. Two schools responded.

[25] On 9 May 2014 members of the Clintyclay Steering Group and the Board of Governors met SELB and asked whether publication of the closure proposal could be held back to September 2014 to allow the transformation action plan to be fully worked up. SELB requested CCMS to postpone the closure proposal but CCMS declined to do so.

[26] In May 2014 SELB published the closure development proposal and initiated a two month consultation process which ended on 21 July 2014. The Department received 10 letters of objection and a letter suggesting that a federated model of provision should be further explored.

Publication of the transformation development proposal (DP315)

[27] On 29 January 2014 the Board of Governors advised the Department and SELB of their intention to hold a ballot on transformation to integrated status. The letter was also forwarded to CCMS which replied that it had no role in the management of that process and pointed to the guidance and procedures available through the NICIE and the Department.

[28] The ballot in April 2014 approved the proposal for transformation. On 22 May 2014 the Board of Governors requested SELB to publish the transformation proposal. On 3 June 2014 SELB advised CCMS that the Board of Governors had submitted a development proposal for transformation to integrated status. On 9 June 2014 SELB published DP315 on behalf of the Board of Governors. There was a statutory duty to consult and there was a two month consultation period ending on 11 August 2014. Representations of support were 15 letters received during the consultation period, 6 letters received after the consultation period, and a petition with 157 names. No objection letters were received.

SELB's Strategic Area Plan

[29] On 23 June 2014 SELB's *Strategic Area Plan. Primary Sector* was published. Paragraph 3.5.7 of the Strategic Area Plan contained the "Local Case for Change". The viability audit that informed the plan recorded that the school had an approved enrolment number of 47 but during the years from 2009-2013 had actual enrolments of 29, 32, 33 and 34 pupils. The audit also recorded a modest budgetary surplus for each year. The Strategic Area Plan recorded that pupil enrolment in 24 of the 43 primary schools in the Dungannon and South Tyrone district council area was below the Sustainable Schools Policy threshold of 105 pupils; that 15 primary schools had less than 4 teachers; and that no school showed evidence of financial stress at Level 1. Paragraph 3.5.8 outlined specific proposals for future provision. In relation

to the school SELB noted that the CCMS had proposed a development proposal to close the school and that the Board of Governors had proposed a transformation development proposal. The analysis put forward by SELB stated:

> "A number of issues in the school and/or local area have been identified and need to be addressed.
> - More than 2 composite year groups in a single classroom.
> - 2.2 teachers.
> - School's enrolment for 2013/14 (26 pupils) is below the minimum enrolment threshold detailed in the Sustainable Schools Policy.
> - 21 unfilled places."

The Department's recommendation to the Minister in respect of the transformation proposal (DP315)

[30] In accordance with the statutory process the transformation proposal was considered before the closure proposal. The Department's recommendation to the Minister in respect of DP315 is dated 30 September 2014. It states in the summary section under the heading 'Financial / Resource Implications'*:*

> "Initially the financial implications would relate to the ongoing running costs of the school e.g. high per capita allocation, small schools support and building maintenance…
> However, if the school enrolment also increases further potential financial implications exist particularly if the school is to grow to above the minimum recommended enrolment for a rural school of 105 pupils."

[31] The recommendation outlined the statutory duties to encourage and facilitate integrated education and to manage public money to ensure effective and efficient use of public funds. At paragraph 10 the key criteria for assessing transformation development proposals were listed, one of which was the viability of the school. At paragraph 11 the Sustainable Schools Policy criteria were set out. The Department noted that that the SELB area plan of June 2014 included a proposal for the potential closure of the school.

[32] The Department then summarised the key issues emerging from an analysis of the development proposal. At paragraph 14 the Department commented that enrolments indicated the school is not viable. At paragraph 15 the Department pointed out the high degree of subsidy for a school of this size, detailed in the next paragraph.

The Department stated that there was no evidence of additional demand at this time, that the school had not demonstrated its ability to meet the requirements of the transformation policy, and that the ETI did not support the proposal "as the school is not sustainable and will require unjustifiable expenditure to keep it open, regardless of status".

[33] The more detailed analysis of the proposal was set out at Appendix D of the recommendation. Under the heading *School Budget*, the Department stated:

> "Clintyclay PS has a surplus budget of £33,996, or 18.00% of available delegated resources at March 2014. The SELB Funding Authority has expressed no concerns about the school's financial plans. A budget surplus of £8,467, or 5% of available delegated resources, is forecast at March 2017.
>
> As pupil numbers in the school are low Clintyclay PS receives a per capita allocation of £5,716, substantially higher than the SELB average cost for a primary school of £3,052. In 2014/15 the school received maximum Small School Support funding of £42,008."

[34] In the main body of the recommendation the Department then summarised the ETI report, in which budget difficulties are linked to sustainability.

> "The low enrolment (circa 30) and budget difficulties have been highlighted as areas of stress. … The school is not sustainable and will require unjustifiable expenditure to keep it open, regardless of its status. The proposal is simply an attempt to delay the inevitable."

[35] The Department referred to the CCMS review of December 2012. It was noted that this review had "concluded that no significant increase in the enrolment at Clintyclay PS is forecast over time and that this will inevitably lead to further financial difficulties and constraints on meeting the legal demands of the statutory curriculum". SELB had accepted the case for closure made by CCMS but had not had information or evidence on which to base a view of the viability of the school as a grant maintained integrated school.

[36] The Department then outlined a report by the Northern Ireland Council for Integrated Education (NICIE) on the transformation proposal, which was annexed to

the Department's recommendation. NICIE supported the proposal and noted the evidence of widespread community support for the transformation proposal. However, NICIE also acknowledged the Department's obligation to the public purse to secure viable, sustainable provision, as well as the challenge for the school in regard to the necessity for increased enrolments. Thus, given the interest shown by the public, NICIE requested that should the Minister be unable to approve the transformation proposal he would direct SELB to consider other integrated options that could provide an acceptable community solution.

[37] In setting out its conclusion, the Department noted the strong level of support for the transformation proposal. However the Department considered that there was no indication that transformation would be achieved particularly with regard to the integration and viability criterion. Concerns existed regarding long-term sustainability (in terms of enrolment numbers) and consequently the school's ability to achieve a successful transformation. The Department continued:

> "37. Furthermore, although Clintyclay PS had a budget surplus of £33,996 at March 2014, it should be noted that the school receives a per capita allocation of £5,716, substantially higher than the SELB average cost for a primary school of £3,052. Funding for this school includes maximum Small School Support funding of £42,008 in 2014/15.
>
> 38. CCMS carried out a review … and concluded that no significant increase in the enrolment at Clintyclay PS is forecast over time and this will inevitably lead to <u>further financial difficulties</u> and constraints on meeting the legal demands of the statutory curriculum. On that basis they have proposed the closure of Clintyclay PS … The ETI is also not supportive of the proposal for the school to transform … and note that the school is not sustainable and will require unjustifiable expenditure to keep it open, regardless of its status ….".

[38] The Department concluded that, notwithstanding the statutory duty to encourage and facilitate integrated education, it was clear that the school was not sustainable and therefore not an appropriate setting in which to create integrated provision in the area. It had not demonstrated how it would achieve an integrated mix of pupils in the long term. The Department recommended that the Minister refuse the proposal but also commission NICIE, in conjunction with SELB and CCMS, to carry out a strategic review to consider whether additional places for integrated education were needed and the full range of options available to meet any demand.

The Department's recommendation to the Minister in respect of the closure proposal (DP312)

[39] The Department's recommendation to the Minister in respect of DP312 was also made on 30 September 2014. It states in the summary section under the heading 'Financial / Resource Implications':

> "It is likely that the longer term cost effectiveness of closure will far outweigh the cost of keeping this school open."

[40] The Department's recommendation referred to the six criteria of the Sustainable Schools Policy as well as the proposal for closure in the SELB Strategic Area Plan. Paragraph 6 and Appendix B then set out an analysis of the proposal against the Sustainable Schools Policy criteria. Paragraph 6 stated that enrolments indicated that the school was not viable and were far below the minimum threshold of 105 recommended for rural primary schools. It reiterated:

> "As pupil numbers in the school are low, Clintyclay PS receives a per capita allocation of £5,716, substantially higher than the SELB average cost for a primary school of £3,052. Also in 2014/15 the school received a Small School Support funding of £42,008."

[41] Appendix B stated the following:

> "**<u>C. Sound Financial Budget</u>**
>
> <u>School Budget</u>
>
> <u>Clintyclay PS had a budget surplus of £20,690,</u> or 11.22% of available delegated resources, at March 2013, the most recent set of finalised data available. The SELB's March 2014 MEMR quotes a provisional March 2014 surplus for Clintyclay PS of £33,921. This figure is considered provisional until receipt in the Department of an audited outturn statement. The SELB Funding Authority has expressed no concerns about the school's financial plans.
>
> …
>
> <u>2014/2015 CFF Allocation Data</u>
> Clintyclay PS receives a per capita allocation of £5,716, substantially higher than the SELB average cost for a primary school of £3,052.

> Also, in 2014/15 the school received a Small School Support funding of £42,008."

[42] The main body of the recommendation then referred to the ETI findings which were supportive of closure as well as the SELB/CCMS consultation. It then set out its conclusions which noted the low enrolment numbers and the sufficient capacity at a nearby school to accommodate pupils.

[43] The Minister's decision in respect of the transformation proposal (DP315) was taken on 14 October 2014 and the decision on the closure of the school (DP312) was taken on the next day 15 October 2014. The Minister, as set out above, agreed with the recommendations made by officials to him.

[44] NICIE's responsibility is to support schools interested in using the process of transformation to change to integrated status. On 17 October 2014 the Department informed NICIE of the decision stating that the Minister was not convinced that the school would be able to achieve sufficient and sustainable enrolment necessary to ensure transformation. Substantial concerns existed around the long-term sustainability of the school. Enrolment was substantially below the recommended threshold.

[45] On 5 November 2014 NICIE wrote to the Minister asking that the decision to close the school be deferred and stating that the attempt to transform the status of the school had been impeded by the way planning happens on a sectoral basis. NICIE welcomed the direction to carry out a strategic review of the need for integrated education in the Dungannon area but was concerned that the closure decision had been approved prior to the review being carried out. It was usual that, once a transformation proposal was published, the managing authority would not publish a closure proposal until the demand for integrated education was tested. NICIE argued that under area based planning CCMS had a wider duty to the educational needs of the area as well as its specific responsibilities for Catholic schools.

[46] The Minister replied to this letter on 28 November 2014. He reiterated his consideration that the school was not sustainable and therefore not an appropriate setting for integrated provision in the area; the transformation proposal had not demonstrated how the school would achieve an integrated mix of pupils. As for the closure decision he stated:

> "… the analysis highlighted several areas of concern. These included the low enrolment at the school; the small year group sizes; the need to operate two composite classes and the high level of funding required per pupil."

It can be seen that there is no reference to any supposed existing "financial difficulties" as playing a part in his decision. The Minister concluded that the school was not sustainable and on that basis approved the proposed closure. It was now the responsibility of CCMS to implement the ministerial decision to close the school from 31 August 2015. While NICIE had been asked, in conjunction with SELB and CCMS, to carry out a strategic review, it was not intended that this review would be centred around providing integrated provision at the school but would rather involve a broader examination of the need for integrated provision in the wider area.

[47] In relation to the point about CCMS's responsibilities the Minister said their statutory duty was for Catholic maintained schools while the board had statutory duty to secure provision of sufficient places to meet the needs of all children. Planning for new integrated schools was dependent on collaboration between NICIE and the boards/CCMS. It was the responsibility of the proposer to put forward a robust case.

Pre-action correspondence

[48] A pre-action protocol letter was written on behalf of the applicant to the Minister on 28 November 2014. Twelve grounds of challenge were raised, one of which was that there had been a focus on financial stress and budgeting difficulties that simply were not borne out by the facts and were inconsistent with statements in the Parish Review of December 2012. It was submitted that the way in which budget surplus had been considered was wholly irrational in comparison with other schools; the Department's recommendations had failed to assess the crucial issues around financial viability which could be characterised as irrationality, misdirection of fact, error of fact, failure to properly consider /investigate.

[49] A letter from the Minister on 25 November 2014 to Mr Gerard Cunningham, in his capacity as Chairman of the Board of Governors of the school, explained the basis of the decisions in the same terms as they had been explained in the letters to NICIE. There was no reference to budget difficulties or financial difficulties.

[50] Judicial review proceedings commenced on 19 December 2014.

[51] On 23 December 2014 the Departmental Solicitor's Office (D.S.O.) wrote in respect of DP315, in reply to the letter of 28 November. That letter included the following.

> "The Minister took account of all SSP factors such as the low enrolment numbers; the composite classes; 2.2 teachers; 21 surplus places and the financial difficulties of the school."

Decision at First Instance

[52] Treacy J in his judgment of 27 March 2015 felt able to arrive at a clear decision based on "some of the original grounds pleaded". He adverted to the duty on the Department to "encourage and facilitate the development of integrated education" pursuant to Article 64(1) of the Education Reform (NI) Order 1989. He was told that this was the "very first time a Catholic school had ever made such a proposal."

[53] However, his principal ground for quashing the decision is to be found at paragraph [17] of the judgment:

> "In my view it is clear the Minister has misdirected himself on the question of the school's finances by his reliance on the advices given to him which directly or indirectly reference financial matters raised by CCMS (in the Parish Review) or by comments made by the ETI."

[54] The judge adverted, at [6], to the passage in the Departmental Solicitor's letter of 23 December quoted at paragraph [51] above. He found that this erroneous information about "financial difficulties" echoed elsewhere in the papers "infected" the advice given to the Minister. In fact it was accepted by the respondent at the initial hearing that the school was not in financial difficulties, because the special measures for small schools had enabled it to keep within the budget set for it.

Respondent/Appellant's Case

[55] The Department's appeal is based on 3 interlinked grounds of appeal:

(i) That the judge erred in law in concluding that the Minister clearly and mistakenly made both impugned decisions on the basis that the school was under financial stress.

(ii) That the judge erred in law in concluding that the advice given to the Minister was infected by the CCMS report and by a statement in that report alleging that the school would face "inevitable" further "financial difficulties".

(iii) That the judge erred in law in finding that the Minister had misdirected himself on the question of the school's finances by his reliance on the advices given to him which directly or indirectly referenced financial matters raised by CCMS (in the Parish Review) or by comments in the ETI.

[56] Counsel for the respondent/appellant made a series of submissions which we have taken into account in arriving at our decision, even if not expressly referred to. He submitted that the phrase "financial difficulties" could mean a school deficit, which did not exist but could also be a reference to the dependence of the school on

a much larger subsidy from the Department than larger primary schools. He referred to and set out in his written argument the long iterative process which led to this decision. The appellant pointed out that in the Minister's letter to Noreen Campbell of NICIE dated 28 November 2014 he summarised the grounds for his conclusion as follows:

> "In my subsequent examination of the proposal to close Clintyclay PS, the analysis highlighted several areas of concern. These included the low enrolment at the school; the small year group sizes; the need to operate two composite classes and the high level of funding required per pupil."

[57] It can be seen that financial difficulties did not figure in that summary. The same is true of the decision letters. He submitted that the fine detail of the CCMS Parish Review was not put before the Minister and could not, as a matter of fact, have infected his decision making on this issue.

[58] Counsel submitted that the judge appeared to be attracted by the school offering itself as a pioneering example of transformation from Catholic status to integrated status. But the rationality of the Minister's rejection of this development proposal was underscored by the fact that when expressions of interests, as they merely were, were recorded for the prospective school years 2016 to 2018 only 3 children designated Protestant were proffered as pupils who might seek enrolment in the school. While meeting the initial 10% minimum figure this would fall well below the 30% threshold needed for integrated enrolment in the long term.

Applicant/Respondent's case

[59] Counsel for the applicant, like his opposite number, provided helpful oral and written submissions. With regard to the applicable law he agreed with the submission of counsel for the appellants, perhaps not surprisingly, that the decision of Lindblom J in Bloor Homes East Midlands Limited v Secretary of State for Communities and Local Government [2014] EWHC 754 (Admin) at [19] was of assistance. I shall return to that below.

[60] Counsel submitted that this was not an "inquiry case". The issue was not the sufficiency of information before the decision-maker but the accuracy of some of the information which was provided.

[61] The applicant drew attention to the Sustainable School Policy where one of the six key criteria was "Sound financial position". This supported the submission that an error in describing the financial position of the school was clearly material. In their submission it was misdirection, as the judge found.

[62] Counsel for the applicant also referred to R v Secretary of State for the Home Department ex p Khawaja [1984] AC 74 112E per Lord Scarman, acknowledging that the onus of proof was on the applicant. However it was submitted on behalf of the applicant that on the issue of materiality the burden of proof lay on the Department to establish that the mistake contained in the advice given to the Minister did not play a material part in the impugned decisions: R (Lichfield Securities Limited) v Lichfield District Council [2001] EWCA Civ. 304 at para [26]. The obiter dictum therein might seem a rather slender basis of authority for such a submission but in any event it is clear that the information of which the applicant complains was "material" in the context of the two proposals before the Minister.

[63] Counsel for the applicant argued that where there was ambiguity or lack of clarity in this matter it should be resolved in favour of the applicant where the Minister has declined to file any adequate evidence dealing with that issue. The applicant relied on R v Leicester City Justices, ex p Barrow [1991] 2 QB 260, 290D-E (sic); R v Southwark LBC, ex p Ryder [1996] 28 HLR 56, 57 and the decision of Sales J in Das [2013] EWHC 682 Admin at para [21] citing the dissenting judgment of Lord Walker of Gestingthorpe in Belize Alliance v DOE Belize [2004] UKPC 6.

[64] Counsel in their written and oral submissions elucidated the errors in the material provided to the Minister which "infected" his decision and justified the judge's decision to quash the two decisions of the Minister. It is convenient to deal with those at greater length in the consideration below.

CCMS Submissions

[65] Counsel for the Council for Catholic Maintained Schools, Mr Paul McLaughlin, also provided helpful written and oral submissions. These largely accord with those for the appellant/respondent. Counsel pointed out that the recommendation for closure of the school was first made in December 2012. He pointed out the very lengthy proceedings of consultation and examination set out earlier in this judgment. He pointed out that the Laghey Primary School 3.7 miles away had an enrolment of only 74 but a capacity of 109 pupils and could therefore take all the children from this "unsustainable" school.

[66] Mr McLaughlin pointed out that the concern expressed by the judge about the CCMS view of the school's financial difficulties had to be examined carefully in the light of what the Council's inspector, Mr Maguire, had actually found. At paragraph 2.2(ii) of his review of schools in the parish he said that Clintyclay had been deemed "potentially financially unviable". But he went on to say that all four of the parish schools were "deemed financially stable for the foreseeable future". The Steering Group took issue with these remarks and Mr Maguire clarified his earlier comments as follows:

> "[6] … The sound financial position in 2012 derives from the allocation of £20k underspend accrued in

> one financial year and then redistributed over the next years to produce a surplus up to 2014. Beyond that point the budgetary situation becomes much more uncertain. The review report stated that the school was in sound financial position for the next three years."

But also:

> "[13] In addition, in the common funding formula allocation for 2013/2014, 42% of the allocated finance comes from AWPU sources. The remainder includes £41.6k for small school block funding and £12.78k for teacher's salary protection. In addition, £16.4k is allocation for Principal release time and £12.3k foundation stage mainstream support. While all of these allocations are entitlements under the current funding system they are the subject of much discussion in Government and some of the fund sources are liable to change irrespective of the outcomes of the Salisbury Report. The review report correctly stated that Clintyclay is financial stable for the foreseeable future, however as pointed out at the start of the report the potential for financial unviability is real and cannot be dismissed for the reasons set out in paragraph [6] of this response."

[67] One notes two further matters from his submissions. Firstly that the Steering Group pointed out that a further £2,000 had been saved by good management. Secondly the reference to the Salisbury Report is to a report in 2013 recommending removal of small school support of the sort this school is dependent upon. Counsel for CCMS therefore disputes that there was any error on the part of CCMS in its parish review which would justify the quashing of the Minister's decision.

The law

[68] Both counsel for the appellant and the respondent relied on the summary of relevant legal principles for judicial review set out in the judgment of Lindblom J in <u>Bloor Homes</u> op cit. The most relevant passage in it for the purposes of this appeal is para.19 (2), which is taken from the speech of Lord Brown of Eaton-under-Heywood in <u>South Bucks District Council v Porter</u> [2014] 1 WLR 1953; [2004] UKHL 33. That was, like <u>Bloor Homes</u>, a planning case principally concerned with the reasons given by a planning inspector under the English system. I set out the relevant passages:

"The law summarised

35. It may perhaps help at this point to attempt some broad summary of the authorities governing the proper approach to a reasons challenge in the planning context. Clearly what follows cannot be regarded as definitive or exhaustive nor, I fear, will it avoid all need for future citation of authority. It should, however, serve to focus the reader's attention on the main considerations to have in mind when contemplating a reasons challenge and if generally its tendency is to discourage such challenges I for one would count that a benefit.

The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

[69] It can be seen from the opening words quoted above that this decision relied on by counsel here in fact relates to an entirely different situation i.e. "a reasons challenge in the planning context". The test envisaged by Lord Brown of "a substantial doubt" is, in any event, even if one interprets "some other important matter" as dealing with an issue of fact, qualified by the next sentence in 36:

> "But such adverse inference will not readily be drawn."

[70] In the planning context, where very substantial sums of money may be at stake it is advisable to maintain a precautionary approach. The same might be said of public procurement. The price of probity is eternal vigilance. A test of "substantial doubt", as formulated by Lord Brown on behalf of their Lordships is appropriate. No doubt that might also be appropriate in certain other situations. But this appeal is concerned principally with the allocation of resources: whether a very small school requiring enhanced subsidy be closed or could it be operated as an integrated school, where financial and economic considerations also play an important part.

[71] It is also to be noted that this is a case where the judge quashed the decision on the basis that the decision-maker was "misdirected" on an issue of fact by those advising him. The availability of judicial review based on errors of fact has been a longstanding matter of contention. In Secretary of State for Education and Science v Tameside MBC [1977] AC 1014, Scarman LJ in the Court of Appeal said the following at 1030E:

> "Secondly, I do not accept that the scope of judicial review is limited quite to the extent suggested by Mr [TH] Bingham QC. I would add a further situation to those specified by him: misunderstanding or ignorance of an established and relevant fact."

Although there is no such express statement in the judgments on appeal to the House of Lords, Lord Wilberforce at 1048D said:

> "I must now enquire what were the facts upon which the Secretary of State expressed himself as satisfied that the Council were acting or proposing to act unreasonably. The Secretary of State did not give oral evidence in the courts, and the facts on which he acted must be taken from the Department's letters at the relevant time – i.e. on or about 11 June 1976 – and from affidavits sworn by its officers. These documents are to be read fairly and in bonam partem."

[72] The argument in favour of quashing decisions based on errors of fact was strengthened by the passing of the Human Rights Act 1998. A major decision which followed was that of Regina (Alconbury Developments Limited) v Secretary of State for the Environment [2003] 2 AC 295, [2001] UKHL 23 a planning case. The error of fact issue was addressed by Lord Slynn of Hadley in the first judgment of their Lordship from paragraphs [50] to [54]. I set out paragraph [53] in full:

> "In *R v Criminal Injuries Compensation Board, Ex p A* [1999] 2 AC 330, 344-345 I accepted that the court had jurisdiction to quash for a misunderstanding or ignorance of an established and relevant fact. I remain of that view, which finds support in *Wade & Forsyth, Administrative Law*, 7th Ed (1994), pp 316-318. I said:
>
>> 'Your Lordships have been asked to say that there is jurisdiction to quash the board's decision because that decision was reached on a material error of fact. Reference has been made to *Wade & Forsyth, Administrative Law*, 7th ed (1994), pp 316-318 in which it is said: 'Mere factual mistake has become a ground of judicial review, described as "misunderstanding or ignorance of an established and relevant fact" [*Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, 1030] or acting "upon an incorrect basis of fact" ... This ground of review has long been familiar in French law and it has been adopted by statute in Australia. It is no less needed in this country, since decisions based upon wrong facts are a cause of injustice which the courts should be able to remedy. If a "wrong factual basis" doctrine should become established, it would apparently be a new branch of the ultra vires doctrine, analogous to finding facts based upon no evidence or acting upon a misapprehension of law.' *de Smith, Woolf & Jowell, Judicial Review of Administrative Action*, 5th ed (1995), p 288: 'The taking into account of a mistaken fact can just as easily be

> absorbed into a traditional legal ground of review by referring to the taking into account of an irrelevant consideration, or the failure to provide reasons that are adequate or intelligible, or the failure to base the decision on any evidence. In this limited context material error of fact has always been a recognised ground for judicial intervention'."

[73] These views were not dissented from by his colleagues but a degree of caution was expressed by Lord Hoffman at 117 he said:

> "It is only when one comes to findings of fact, or the evaluation of facts, such as arise on the question of whether there has been a breach of planning control that the safeguards are essential for the acceptance of a limited review of fact by the Appellate Tribunal."

[74] This issue only seems to have been finally put to bed by the decision of the Court of Appeal in England in E v Secretary of State for the Home Department [2004] QB 1044; [2004] EWCA Civ. 49. It is of relevance to note that although the judgment from which I am about to quote was that of a distinguished planning lawyer, Carnwath LJ, as he then was, the case itself related to immigration. In the judgement of the court Carnwath LJ said the following, at [66].

> "In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are apparent from the above analysis of the *Criminal Injuries Compensation Board* case. First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning."

[75] This case has been followed or cited with approval in a number of cases since 2004, including two decisions of the Court of Appeal in England: R (Connolly v Havering LBC [2009] EWCA Civ. 1059; MS (DRC) v Home Secretary [2009] EWCA Civ. 744. See also Re Treacy's Application [2000] NI 330,356-360,364-365, per Kerr J. Although the court in E makes specific reference to 'fairness', quashing a decision caused or contributed to by material error of fact can be looked upon as part of a traditional Wednesbury approach as involving taking into account an 'irrelevant consideration'.

[76] We note the decision of Stephens J in XY 's Application [2015] NIQB 75. This related to another school closure decision by the same minister. The judge found, at [80] to [84], that the only erroneous information provided to the Minister was not of material significance. It is our view that the legal tests to be applied to the instant appeal are those to be found in the judgment of Carnwath LJ in E v The Home Secretary op. cit., bearing in mind that even if errors of fact have been included the court can look at the overall decision in its discretion.

[77] "Must have played" per Carnwath LJ above in his fourth criterion presumably means "has been shown to be on the balance of probabilities". I do not interpret that as meaning that the Lord Justice was postulating a new and higher onus of proof than that on the balance of probabilities usual in civil cases. That is not to gainsay the view that ministerial decisions are not to be cast aside for some immaterial, minimal or tangential error.

Consideration

[78] To assess whether there were mistakes of fact giving rise to unfairness in these two decisions it is essential to carefully examine the material which was actually put before the Minister. Mrs Jacqueline Durkin in her second affidavit of 17 February 2015 exhibits the Departmental submissions which were put before the Minister. I shall deal first with development proposal number 315 (SELB) – proposal for Clintyclay Primary School to acquire grant maintained integrated status. Mrs Durkin avers that in accordance with its statutory duty the Minister addressed this proposal first. She also avers on express instructions that the Minister read everything that was put before him i.e. these submissions and the appendices. There is no evidence that he read the CCMS Parish Review or the underlying ETI document although these submissions of the civil servants who prepared these documents for the Minister were informed by those documents.

[79] DP number 315 is addressed in the minute of Dorina Edgar, Area Planning Policy Team, to Mr O'Dowd MLA to be found at page 1055 of the papers. There is a brief summary on the first page and a recommendation not to approve the proposal for the school to acquire integrated status. The policy context is set out. There is a

summary of key considerations which adverts to the material set out in the long iteration to this process i.e. there were only 26 pupils enrolled in the school in 2013/14, although it is noted that these numbers subsequently rose to 39. The reference to the much higher per capita cost of a small school is set out.

[80] At paragraph 19 and 20 the paper summarises the conclusion of an inspection by the Education and Training Inspectorate of March 2010. The inspection confirmed that the education in the school was very good but, inter alia, referred to issues relating to the sustainability of the school provision and school budget. In paragraph 20 one finds this. "The ETI is not supportive of the proposal for the school to transform to grant maintained integrated status." ETI advised that:

> "The low enrolment (circa 30) and the budget difficulties have been highlighted as areas of stress. Resourcing will need to be found to address the health and safety issues identified in the inspection report if the school is to remain open. The school is not sustainable and will require unjustifiable expenditure to keep it open, regardless of its status. The proposal is simply an attempt to delay the inevitable. ETI supports the proposal to close Clintyclay Primary School."

[81] At paragraph 21 the submission summarises the CCMS input.

> "CCMS carried out a review of the maintained provision in the Parish of Dungannon in December 2012 and concluded that no significant increase in the enrolment at Clintyclay PS is forecast overtime and that this will inevitably lead to further financial difficulties and constraints on meeting the legal demands of the statutory curriculum. On that basis they propose the closure of Clintyclay PS and have published a DP to that effect."

[82] The applicant/respondent criticises both the Department and the CCMS in this regard. It seems to me that its criticisms of the CCMS are misplaced. As set out above at paras [65] to [67] the CCMS took on board the submissions made by the Board of Governors of the school and included them in their document. The difficulty is that this brief summary by the Department does not reflect the full CCMS document. It inevitably gives the impression that the school had been undergoing "financial difficulties" rather than, the undoubtedly valid point, that it was more expensive to maintain than a larger school on a per capita basis. As counsel for the Department conceded "further financial difficulties" was an ill-judged phrase.

[83] Unfortunately for the Department it was repeated again in the submissions to the Minister. If one turns to paragraph 38, under the heading Conclusions and Recommendations one finds this sentence. "CCMS carried out a review of the maintained provision in the Parish of Dungannon in December 2012 and concluded that no significant increase in the enrolment at Clintyclay PS is forecast over time and that this will inevitably lead to further financial difficulties and constraints on meeting the legal demands on the statutory curriculum". Thus the ill-judged phrase is repeated and it is not counterbalanced by referring to the material to be found in the appendix to the very same document that the school in fact enjoyed a budget surplus and was likely to continue doing so unless there was an alteration at a level across the board to reduce the support for smaller schools.

[84] At a lower level of significance is paragraph 41 which I set out in full:

> "If additional places are required a new proposal should be brought forward that will create sustainable integrated primary in the right location (sic), which is educationally strong and viable, financially sound, and works to the benefit for the pupils (sic)."

Mr Lavery QC suggested that implies that the existing proposal is not financially sound.

[85] The Minister accepted the recommendation of his officials on 14 October and decided to reject the proposal, the first apparently made by a Catholic maintained school, to become an integrated school.

[86] The Minister proceeded on the following day to decide on the closure of the school. He did so in relation to DP 312 to that effect. That had been provided to him by the same official on 30 September 2014. It recommended that he do close the school if he rejected DP 315 which in fact he did. There is only one criticism of substance of this document. That is to be found at paragraph 7 where the paper repeats the assertion attributed to the Education and Training Inspectorate in this summary form:

> "The low enrolment (circa 30) and the budget difficulties have been highlighted as areas of stress."

It is to be noted that again, in this paper at Appendix B a correct statement of the healthy budget surplus of the school is to be found at paragraph C: "Sound Financial Budget".

After the decisions

[87] After the decision letters were written to the relevant parties and a press release was announced. It must be noted in favour of the Department that none of these documents, including a personal letter from the Minister to the Chairman of the Board of Governors, relies on "financial difficulties" at the school as a reason for refusing integration and closing the school; see, for example, [46] above. Given that these expressed the reasons for the decision this is a strong point in favour of concluding that the misleading references to financial difficulties set out in the submission to the Minister had not played a material factor in his decision.

[88] However, there was a further letter written on behalf of the Minister. The pre-action protocol letter on behalf of the applicant was replied to by the Departmental Solicitor's Office on 23 December 2014. It responded, with apparent care, to the twelve grounds advanced on behalf of the applicant for attacking the decision of the Minister. Two errors are identified by the applicant's counsel in this letter. The important one of these is at paragraph 4. One finds the following sentence. "The Minister took account of all SSP factors such as the low enrolment numbers; the composite classes; 2.2 teachers; 21 surplus places and the financial difficulties of the school".

[89] A number of things might be said in defence of this. The addition of the adjective 'potential' before "financial difficulties" would render the sentence quite innocuous. Furthermore, one must bear in mind that even conscientious solicitors may not always exactly replicate the instructions of their clients. For example, in the KRW pre action letter of 28 November 2014 the applicant's solicitors misspell her Christian name. With regard to the DSO letter of 23 December counsel for the applicant appears to be right in saying that the statement at paragraph 6 of the letter that no reference was made to the statements within the (CCMS) Parish Review of 12 December is in fact incorrect. This letter of course is written after the event like the other letters of the Minister but the judge relied on it as evidence that, in truth, the Minister did take into account, erroneously, "financial difficulties of the school" and those did not in fact exist.

[90] It is also right to say that there was no express averment from or on behalf of the Minister to say that he had noticed this reference but had discounted it because of the other material confirming the budget surplus of the school. The applicant was critical of the Minister's failure to swear an affidavit himself. We are not persuaded that there is a positive duty in law at the present time on a Minister to personally swear an affidavit in proceedings where his decision has been challenged. It is true that there is a duty on a decision maker of this sort to provide reasons for the decision but that was done in the original decision letters. One is strengthened in this view by the dictum of Lord Wilberforce in Tameside set out at [71] above. Furthermore the Department has produced affidavit evidence from a senior civil servant addressing the issues raised in the application. That evidence is to the effect that the Minister read all the submissions.

Conclusions

[91] The courts should not interfere lightly with ministerial decisions taken, principally, with regard to the allocation of resources, especially against the context of a long iterative process of consultation and advice. Nor should a ministerial decision be quashed because it took into account an error of fact that is immaterial, minimal or tangential.

[92] We have set out above the potentially misleading matters that were included in the two development proposals to the Minister. These are adverted to in the judgment of Treacy J. However there are some matters weighing significantly in favour of the Minister's decision which do not appear in the judgment. As set out at paragraph [33] above Appendix D of Development Proposal 315 for a conversion into an integrated school set out the correct budget position of Clintyclay Primary School but also records the very high level of subsidy from the Department required to maintain that position. There is no reference to Appendix D in the judgment.

[93] Furthermore, as set out at paragraph [41] above Appendix B of the Department Proposal 312 for closure also set out the correct position with regard to the school's budget. It is expressly headed: "Sound Financial Budget". It records the budget surplus and the fact that the SELB funding authority had expressed no concerns about the school's financial plans. Again it referred to the per capita allocation for this school as being £5,716 against an average of £3,052. Again there is no reference to that in the judgment.

[94] That reference is of significance as Mrs Jacqueline Durkin in her affidavit of 17 February has averred on instructions from the Minister that he read everything contained within the submissions when considering his decisions, as one would expect. That clearly includes the appendices. Having read them the Minister would have seen that the school did not have budget difficulties or financial difficulties at that time, although clearly that would change if the generous small school subsidy was reduced, or removed.

[95] It is also right to observe that while the judgment refers to the passage previously cited from the pre-action correspondence from the Departmental Solicitor's Office it does not address the fact that the actual decision letters, and contemporaneous correspondence of the Minister, do not reflect the error which the judge found sufficient to quash the two decisions regarding DP 315 and DP 312.

[96] Was the material drawn to the attention of the learned trial judge? If so why did he not think it relevant to making his decision and exercising his discretion? Given the degree of ambiguity that exists in speaking of budget difficulties and financial difficulties in the context of a school which could have serious potential financial difficulties, dependent as it was on a high level of subsidy, it is surprising that these factors were not addressed. They needed to be put in the balance with the material relied on by the applicant.

[97] The leading authority on the adequacy of reasons for judicial decisions is English v Emery Reimbold & Strick Limited [2002] EWCA Civ. 605. Lord Phillips MR stated that justice will not be done if it is not apparent to the parties why one is won and the other is lost and gave the following guidance:

> "[I]f the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which was vital to the judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision."

[98] It is, therefore, appropriate in these circumstances to remit this matter to the judge to reconsider his decision in the light of the presence of the submissions of Appendix D of DP 315 and Appendix B of DP 312, and the correspondence announcing the decisions on those two proposals. In doing so he should apply the test set out in E v The Home Secretary, cited above at [74]. In this case that will involve deciding, on the balance of probabilities, whether the erroneous phrases in the development proposals played a material (although not necessarily decisive) part in the reasoning which led to the Minister's decision. As the matter is being remitted to the court below the other grounds relied on by the applicant should also be addressed.