Neutral citation number: [2014] EWHC 4335 (Admin)

IN THE HIGH COURT OF JUSTICE Claim No: CO/3519/2014

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

Cardiff Civil Justice Centre
2 Park Street
Cardiff, CF10 1ET

Date: 19 December 2014

Before:

His Honour Judge Keyser QC
sitting as a Judge of the High Court

- -

Between:

THE QUEEN
on the application of CERI MCCANN

Claimant

- and –

BRIDGEND COUNTY BOROUGH COUNCIL

Defendant

- -

David Wolfe QC (instructed by **Public Law Solicitors**) for the **Claimant**

Wayne Beglan (instructed by **Legal & Regulatory Services, Bridgend County Borough Council**) for the **Defendant**

Hearing dates: 8 and 9 December 2014

- -

Judgment

I direct that pursuant to CPR PD 39A, para 6.1, no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

H.H. Judge Keyser Q.C.:

Introduction

1. This is the rolled-up hearing of the application of the claimant, Ceri McCann, for permission to apply for judicial review, and if permission is granted her claim for judicial review, of a decision of the defendant, Bridgend County Borough Council, to close Tyn yr Heol School in the village of Llangeinor ("the School") and merge it with another school, Betws Primary School, on a single site to be shared also with a Welsh-medium school, YGG Cwm Garw.

2. The decision was taken on 29 April 2014 as part of the defendant's School Modernisation Programme ("SMP"), which is intended to ensure that schools in Bridgend and its environs are fit for the twenty-first century.

3. The claimant is a member of the Tyn yr Heol Action Group, which is a campaign group set up to oppose the closure of the School. She lives in Llangeinor and she and her parents and siblings and children have all attended the school, which she describes as the heart of the village. She challenges the decision on the ground that the defendant failed in material respects to comply with the requirements of the statutory decision-making process that has applied to such decisions in Wales since October 2013.

4. At the hearing the claimant was represented by Mr David Wolfe QC and the defendant was represented by Mr Wayne Beglan. I am grateful to them both for their helpful written and oral submissions, which I shall only briefly summarise.

5. The remainder of this judgment will be structured as follows. First, I shall explain the relevant statutory procedure; in the course of doing so I shall set out significant extracts from the relevant provisions. Second, I shall mention some relevant law concerning, in particular, the requirements of consultation under statute and at common-law and the provision of information to the public. Third, I shall summarise the main facts of the present case. Fourth, I shall summarise in turn each of the grounds of this claim, in the light of the facts and the applicable law. Finally, I shall state my conclusions.

The statutory framework

6. The decision to close the School was taken under the provisions of Part 3 of the School Standards and Organisation (Wales) Act 2013, which for relevant purposes came into force on 1 October 2013. I shall refer only to such provisions and such parts of the provisions as are directly material.

7. Section 40(3) provides: "A maintained school may be discontinued only in accordance with this Part." The School is a maintained school (it is also a "mainstream" school and a "community" school; I need not go through the definitions), and the decision in question was a decision to discontinue it. Part 3 sets out a procedure for decision-making to which it applies. Section 43(1)

provides in part: "A local authority may make proposals to discontinue—(a) a community … school." Section 48 provides in part:

> "(1) A proposer must publish proposals made under this Chapter in accordance with the Code.
>
> (2) Before publishing proposals made under this Chapter, a proposer must consult on its proposals in accordance with the Code.
>
> (5) The proposer must publish a report on the consultation it has carried out in accordance with the Code."

Section 49 provides in part:

> "(1) Any person may object to proposals published under section 48.
>
> (2) Objections must be sent in writing to the proposer before the end of 28 days beginning with the day on which the proposals were published ('the objection period').
>
> (3) The proposer must publish a summary of all objections made in accordance with subsection (2) (and not withdrawn) and its response to those objections—
>
> > (a) in the case of a local authority that is required to determine its own proposals under section 53, before the end of 7 days beginning with the day of its determination under section 53(1) …"

The defendant as local authority was indeed in the position of being required to determine its own proposals. Section 53(1) provides: "Where any proposals published under section 48 do not require approval under section 50 [i.e. by Welsh Ministers] or 51 [i.e. by the local authority, where it is not itself the proposer], the proposer must determine whether the proposals should be implemented."

8. Section 38 of the 2013 Act makes provision for "the Code", as follows:

> "(1) The Welsh Ministers must issue, and may from time to time revise, a code on school organisation ('the Code').
>
> (2) The Code is to contain provision about the exercise of the functions of the following persons under this Part—
>
> …
>
> (b) local authorities;
>
> …

(3) The Code may impose requirements, and may include guidelines setting out aims, objectives and other matters.

(4) The persons referred to in subsection (2) must, when exercising functions under this Part—

(a) act in accordance with any relevant requirements contained in the Code, and

(b) have regard to any relevant guidelines contained in it."

9. In summary, therefore, the position is as follows. If a local authority proposes to close a school, it must first—that is, before publishing a formal proposal to that effect—consult on that proposal. Upon the conclusion of the consultation, the local authority must then (a) formally publish the proposal in accordance with the Code, and (b) publish a report on the consultation it has carried out. When the proposal is formally published, there will be a 28-day objection period. At the conclusion of that period, the local authority must determine whether its proposal is to be implemented, and within seven days after the determination publish a summary of the objections received and of its response to the objections. In exercising its functions—whether at the pre-publication consultation stage, or at the stage of publication of proposals and reporting on the consultation, or at the stage of determining the proposals and reporting on the objections—the local authority is required to act in accordance with mandatory requirements of the Code and to have regard to relevant guidelines contained in the Code.

10. The School Organisation Code ("the Code") was issued in July 2013 and came into force on 1 October 2013 with application in respect of all school organisation proposals in Wales published by way of statutory notice on or after that date. The summary section at the front of the Code includes the following text:

"The Code contains the following elements:

1. It imposes requirements in accordance with which relevant bodies … must act. Failure by a relevant body to comply with the requirements set out in this Code may result in a complaint to the Welsh Ministers or to the Public Services Ombudsman for Wales. Where mandatory requirements are imposed by the Code or by the 2013 Act or another statute or statutory instrument, it is stated that the relevant bodies **must** comply with the particular provision. Where practices are prohibited, it is stated that the relevant bodies **must not** use this practice.

2. It includes statutory guidance to which relevant bodies **must** have regard ... Where guidance is given by the Code, it is stated that relevant bodies **should** follow this guidance unless they can demonstrate that they are justified in not doing so."

The emphasis is in the original. Accordingly the distinction in section 38(4) of the Act between requirements and guidelines is reflected by the use in the Code of "must" (or "must not") and "should"; but it should be noted that the statute and the Code require that local authorities "must" have regard to guidelines that are not themselves mandatory.

11. Section 1 of the Code deals with "Development and consideration of proposals". The following passages may be noted.

> "1.2 *Factors to be taken into account in preparing, publishing, approving or determining school organisation proposals*
>
> The following paragraphs set out the factors which **should** be taken into account by relevant bodies when exercising their functions of preparing and publishing school organisation proposals, or approving/determining them. Paragraphs 1.3 to 1.6 are applicable in the case of all proposals."
>
> "1.3 *Quality and standards in education*
>
> Relevant bodies **should** place the interests of learners above all others. With reference to the key questions of the Office of Her Majesty's Chief Inspector of Education and Training in Wales (Estyn), they **should** give paramount importance to the likely impact of the proposals on the quality of:
>
> - outcomes (standards and wellbeing);
> - provision (learning experiences, teaching, care support and guidance, and learning environment); and
> - leadership and management (leadership, improving quality, partnership working and resource management)
>
> at the school or schools which are the subject of the proposals and at any other school or educational institution which is likely to be affected. …
>
> Where proposals involve the transfer of learners to alternative provision there **should** normally be evidence that the alternative would deliver outcomes and offer provision at least equivalent to that which is currently available to those learners (including learners with SEN). Proposers **should** ensure that the disruption to learners is minimised.
>
> In assessing the impact of proposals on quality and standards in education and how effectively the curriculum is being delivered, relevant bodies **should** consider any relevant advice from Estyn, refer to the most recent Estyn reports or other evidence derived from performance monitoring, and take into consideration any other generally available information available on a school's effectiveness."

"1.7 *Specific factors in the consideration of school closures*

There is no presumption in favour or against the closure of any type of school. The prime purpose of schools is the provision of education and any case for closure **should** be robust and in the best interests of educational provision in the area. Nevertheless, in some areas, a school may also be the main focal point for community activity, and its closure could have implications beyond the issue of the provision of education. This may be a particular feature in rural areas if school buildings are used as a place to provide services to the local community.

The case prepared by those bringing forward proposals **should** show that the impact of closure on the community has been assessed through the production of a Community Impact Assessment, and how any community facilities currently provided by the school could be maintained.

When considering whether a closure is appropriate, special attention **should** be given to the following:

- whether the establishment of multi-site schools might be considered as a means of retaining buildings, or the reasons for not pursuing this option;

- whether alternatives to closure, such as clustering, collaboration or federation with other schools, might be considered (taking account of the scope for use of ICT links between school sites) or the reasons for not pursuing these as an alternative;

- whether the possibilities of making fuller use of the existing buildings as a community or an educational resource could be explored;

  (Local authorities **should** consider whether it would be feasible and economical to co-locate local services within the school to offset the costs of maintaining the school);

- the overall effect of a closure on the local community (including the loss of school based facilities which are used by the local community), particularly in rural areas or those receiving funding as part of regeneration activity; and

- how parents' and pupils' engagement with the alternative school and any facilities it may offer could be supported (e.g. how pupils; particularly any less advantaged pupils) will be helped to participate in after school activities). …"

"1.14 *Factors to be taken into account in approving/determining school organisation proposals*

When approving or determining proposals, relevant bodies:

- **must** consider whether there are any other related proposals;
- **must** ensure that the statutory consultation has been conducted in accordance with this Code …;
- **must** ensure that the proposal has been published in accordance with this Code and the notice contains all the required information;
- **must** consider the consultation document and consultation report;
- **must** consider the objections and the objection report and any responses to the notice supporting the proposals; …"

12. Section 3 of the Code deals with "Consultation". I refer to the following extracted passages.

"3.1 *Principles*

…

Case law has established that the consultation process **should**:

- be undertaken when proposals are still at a formative stage;
- include sufficient reasons and information for particular proposals to enable intelligent consideration and response;
- provide adequate time for consideration and response; and
- ensure that the product of consultation is conscientiously taken into account when the ultimate decision is taken.

The process and guidance which follow have been developed with due regard to the principles listed above. Those considering bringing forward proposals will need to be fully aware of this process and guidance. However, proposers **must** be mindful of the four underlying principles and take any necessary additional steps to ensure that those principles are fully upheld.

From time to time proposers will have conducted 'informal' consultation with particular stakeholders at an earlier stage in the development of proposals. Such consultation **must not** be seen as a substitute for any part of the formal consultation processes set out below."

"3.2 *Consultation document*

Those bringing forward statutory proposals **must** publish a consultation document in hard copy and electronically on their website or that of the relevant local authority. Hard copies **must** be available on request. Consideration **should** be given to publishing in other formats where accessibility might otherwise be an issue.

The following **must** receive either a hard copy of the consultation document or be emailed a link to the relevant website …:

- Assembly Members (AMs) and Members of Parliament (MPs) representing the area served by/intended to be served by any school which is the subject of the proposals; …

In the case of all proposals, the consultation document **must** contain the following information:

Description and Benefits

- a detailed description of the status quo setting out its strengths and weaknesses and the reasons why change is considered necessary;

- a detailed description of the proposal or proposals …;

- the expected benefits of the proposals and disadvantages when compared with the status quo;

- any risks associated with the proposals and any measures required to manage these;

- a description of any alternatives considered and the reasons why these have been discounted;

…

Where proposals involve the closure of a school the following information **must** be included in the consultation document:

- details of any alternatives to closure that have been considered and the reasons why these have not been taken forward;

- the impact of proposals on the local community …"

"3.5 *Consultation reports*

Within 13 weeks of the end of the period allowed for responses (and in any event prior to publication of the proposals), the proposer **must** publish a consultation report:

- summarising each of the issues raised by consultees;

- responding to these by means of clarification, amendment to the proposal or rejection of the concerns, with supporting reasons; and

- setting out Estyn's view (as provided in its consultation response) of the overall merits of the proposal.

…

The following **must** be advised of the availability of the consultation report:

- Pupils, parents (and where possible prospective parents) carers and guardians, and staff members of schools which are subject to the proposals …

The following **must** receive either a hard copy of the consultation report or be emailed a link to the relevant website:

…

- Assembly Members (AMs) and Members of Parliament (MPs) representing the area served by/intended to be served by any school which is the subject of the proposals …"

13. Section 4 of the Code deals with "Publication of statutory proposals". Section 4.1, headed "Manner of publication", contains the following provisions that are material to this case:

"Once the proposer decides to proceed with a proposal they **must** publish the proposal by way of statutory notice. …

Furthermore, on the day that they are published, the following **must** receive either a hard copy of the proposals or be emailed a link to the relevant website:

…

- Assembly Members (AMs) and Members of Parliament (MPs) representing the area served by/intended to be served by any school which is the subject of the proposals; …"

14. Section 5 of the Code deals with "Determining proposals (other than proposals made by the Welsh Ministers". The following provisions are relevant.

"5.1 *Objection reports*

Under section 49 of the 2013 Act proposers **must** publish a summary of the statutory objections and the proposer's response to those objections ('the Objection Report').

…

The following **must** be advised of the availability of the Objection Report:

- Parents (and where possible prospective parents) careers and guardians, and staff members of schools which are the subject of the proposals; …

The following **must** receive either a hard copy of the objection report or be emailed a link to the relevant website:

- Assembly Members (AMs) and Members of Parliament (MPs) representing the area served by/intended to be served by any school which is the subject of the proposals; …"

"5.4 *Determination by proposers*

…

Where a local authority's proposals have received objections, and require determination under section 53 of the 2013 Act, the local authority **must** not approach the determination of these proposals with a closed mind. Objections **must** be conscientiously considered alongside the arguments in respect of the proposals and in the light of the factors set out in section 1.3 – 1.14 of this Code. In these cases the objection report **must** be published at the same time as the decision is issued rather than within 28 days beginning with the end of the objection period."

15. Annex D to the Code deals with Community Impact Assessments and Welsh-medium Impact Assessments; only the former is relevant in this case. The following passages are material:

> "The Welsh Government takes the view that the requirement for assessments should not be overly burdensome and does not consider that it is necessary to commission such work from external consultants. Local authorities are already under a duty to carry out equality impact assessments which could provide the basis for the impact assessments specified in this guidance.
>
> *Community Impact*
>
> Impact assessments **should** ideally be included in consultation documents."

16. In my judgment, Part 3 of the 2013 Act and the provisions of the Code represent a careful and deliberate scheme of what may be called participative decision-making at a local level in a particular area of social life. As mention of some of the case-law will make clear, the Code largely reflects existing standards and principles of public law. It brings them, however, into a systematic structure that is designed to involve affected parties in a very real way in decisions that are likely to have significant effects on their

communities. The Code in no way divests the appointed decision-making bodies—in this case, the defendant—of their ultimate role in the process. It does, however, go a long way to ensuring that the decision-making bodies must give to the public a full and meaningful opportunity to engage in the process. Concrete examples of the process in the present case will illustrate what this means in practice.

Some general law

Guidelines

17. Section 38(4) of the 2013 Act creates two broad obligations: first, to comply with the requirements (the "must" provisions) of the Code; second, to have regard to the guidelines (the "should" provisions) in the Code. The question arises as to the circumstances in which a local authority, though having regard to the guidelines in the Code, may depart from them.

18. In *R(Munjaz) v Mersey Care NHS Trust* [2006] 2 AC 148, the House of Lords had to consider the Code of Practice to the Mental Health Act 1983. The Act did not impose a legal duty to comply with the Code of Practice, and the Code of Practice described itself as "guidance". However, section 118(1) of the Mental Health Act 1983 required the Secretary of State to prepare, and from time to time revise, a code of practice for the guidance of mental health professionals in relation to the admission to hospital and the treatment of mental health patients; and section 118(2) stipulated that the code of practice should identify certain forms of treatment that were regarded as giving rise to special concerns and the administration of which was to be subject to particular controls. At [20] Lord Bingham of Cornhill said that there was a "categorical difference" between guidance and instruction. However, having identified features of the Code of Practice and statutory framework in that case (which are not material here), he continued at [21]:

> "It is in my view plain that the Code does not have the binding effect which a statutory provision or a statutory instrument would have. It is what it purports to be, guidance and not instruction. But the matters relied on by Mr Munjaz show that the guidance should be given great weight. It is not instruction, but it is much more than mere advice which an addressee is free to follow or not as it chooses. It is guidance which any hospital should consider with great care, and from which it should depart only if it has cogent reasons for doing so. Where, which is not this case, the guidance addresses a matter covered by section 118(2), any departure would call for even stronger reasons. In reviewing any challenge to a departure from the Code, the court should scrutinise the reasons given by the hospital for departure with the intensity which the importance and sensitivity of the subject matter requires."

At [69] Lord Hope of Craighead agreed that those to whom the Code of Practice was addressed "must give cogent reasons if in any respect they decide not to follow it." He continued:

> "These reasons must be spelled out clearly, logically and convincingly. I would emphatically reject any suggestion that they have a discretion to depart from the Code as they see fit."

19. In *R (Khatun) v Newham London Borough Council* [2005] QB 37 the Court of Appeal was considering a local authority's departure from guidance given by the Secretary of State in respect of Part VII of the Housing Act 1996 (homelessness). Laws LJ, with whom Auld LJ and Wilson J agreed, said at [47]:

> "Although the guidance is provided for by statute and housing authorities are obliged by s.182 of the 1996 Act to have regard to it, it is not a source of law. However Mr Luba cited in his skeleton (paragraph 22) the decision of Dyson J as he then was in *R v North Derbyshire Health Authority ex p. Fisher* (1997) 10 Admin LR 27 to support the proposition that an authority is not entitled to depart from guidance given in a circular issued by central government, to which it is obliged by statute to have regard, merely because it disagrees with it. But this case, I think, goes no further than to underline what is conventional law, namely that respondents to such a circular must (a) take it into account and (b) if they decide to depart from it, give clear reasons for doing so. If the decision is thought to support a proposition which would bind public bodies more tightly to a duty of obedience to guidance to which by statute they are obliged (no more, no less) to have regard, then I would respectfully question its correctness."

20. In my judgment, these dicta are apposite in the present case. A person to whom the Code is addressed is under a duty to have regard to the guidelines it contains but is not under a duty to follow them. However, unless the careful interrelationship of instructions and guidelines and the significant role given in the Code to the latter are to be undermined, it is necessary that a decision-maker who departs from the guidelines in a material way should have a proper reason for doing so and should state that reason.

Consultation

21. In *R (Moseley) v Haringey London Borough Council* [2014] 1 WLR 3947, the local authority was under a statutory duty to consult. Lord Wilson JSC, with whom Lord Kerr JSC agreed without qualification and with whom Lady Hale JSC, Lord Clarke JSC and Lord Reed JSC expressed nuanced agreement, said that the manner in which any consultation pursuant to a statutory or common law duty to consult would be carried out was to be informed by the common law duty of procedural fairness. He continued at [24]:

> "Fairness is a protean concept, not susceptible of much generalised enlargement. But its requirements in this context must be linked to the purposes of consultation. … First, the requirement 'is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested' …. Second, it avoids 'the sense of injustice which the person who is the subject of the decision will otherwise feel' …. Such are two valuable practical consequences of fair consultation. But underlying it is also a third purpose, reflective of the democratic principle at the heart of our society. This third purpose is particularly relevant in a case like the present, in which the question was not 'Yes or no, should we close this particular care home, this particular school etc?' It was 'Required, as we are, to make a taxation-related scheme for application to all the inhabitants of our Borough, should we make one in the terms which we here propose?'"

Lord Wilson's judgment also contains, at [25], endorsement at the highest level of the basic requirements of a proper and meaningful consultation, as set out by Hodgson J in *R v Brent London Borough Council, ex p. Gunning* (1985) 84 LGR 168 at 169:

> "First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third … that adequate time must be given for consideration and response and, finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals."

22. At [27] and [28] Lord Wilson addressed the question of possible alternative course of action; that is a matter of particular relevance to the present case.

> "27. Sometimes, particularly when statute does not limit the subject of the requisite consultation to the preferred option, fairness will require that interested persons be consulted not only upon the preferred option but also upon arguable yet discarded alternative options. …
>
> 28. But, even when the subject of the requisite consultation is limited to the preferred option, fairness may nevertheless require passing reference to be made to arguable yet discarded alternative options. …"

23. Lord Reed expressed general agreement with Lord Wilson but preferred to emphasize the statutory context and purpose of the particular consultation rather than the common law duty to act fairly. His analysis was approved by Lady Hale and Lord Clarke, who saw it as not standing in contradiction to Lord Wilson's approach. Having referred to the common-law duty to consult that can arise where there is a legitimate expectation of such consultation, Lord Reed continued:

> "36. This case is not concerned with a situation of that kind. It is concerned with a statutory duty of consultation. Such duties vary greatly depending on the particular provision in question, the particular context, and the purpose for which the consultation is to be carried out. The duty may, for example, arise before or after a proposal has been decided upon; it may be obligatory or may be at the discretion of the public authority; it may be restricted to particular consultees or may involve the general public; the identity of the consultees may be prescribed or may be left to the discretion of the public authority; the consultation may take the form of seeking views in writing, or holding public meetings; and so on and so forth. The content of a duty to consult can therefore vary greatly from one statutory context to another: "the nature and the object of consultation must be related to the circumstances which call for it" (*Port Louis Corporation v Attorney-General of Mauritius* [1965] AC 1111, 1124). A mechanistic approach to the requirements of consultation should therefore be avoided."

At [37] and [38] Lord Reed noted that the consultation in that case related to the local authority's discharge of an important function in relation to local government finance, which affected its residents generally, and concluded that the purpose of the particular statutory duty was "to ensure public participation in the local authority's decision-making process". In that context, he considered the scope of the options that should be put before the public:

> "39. In order for the consultation to achieve that objective, it must fulfil certain minimum requirements. Meaningful public participation in this particular decision-making process, in a context with which the general public cannot be expected to be familiar, requires that the consultees should be provided not only with information about the draft scheme, but also with an outline of the realistic alternatives, and an indication of the main reasons for the authority's adoption of the draft scheme. That follows, in this context, from the general obligation to let consultees know "what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response": *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213, para 112, per Lord Woolf MR.
>
> 40. That is not to say that a duty to consult invariably requires the provision of information about options which have been rejected. The matter may be made clear, one way or the other, by the terms of the relevant statutory provisions … To the extent that the issue is left open by the relevant statutory provisions, the question will generally be whether, in the particular context, the provision of such information is necessary in order for the consultees to express meaningful views on the proposal. The case of *Vale of Glamorgan Council v Lord Chancellor and Secretary of State for Justice* [2011] EWHC 1532 (Admin) is an example of a case where such

> information was not considered necessary, having regard to the nature and purpose of that particular consultation exercise, which concerned the proposed closure of a specific court. In the present case, on the other hand, it is difficult to see how ordinary members of the public could express an intelligent view on the proposed scheme, so as to participate in a meaningful way in the decision-making process, unless they had an idea of how the loss of income by the local authority might otherwise be replaced or absorbed.
>
> 41. Nor does a requirement to provide information about other options mean that there must be a detailed discussion of the alternatives or of the reasons for their rejection. The consultation required in the present context is in respect of the draft scheme, not the rejected alternatives; and it is important, not least in the context of a public consultation exercise, that the consultation documents should be clear and understandable, and therefore should not be unduly complex or lengthy. Nevertheless, enough must be said about realistic alternatives, and the reasons for the local authority's preferred choice, to enable the consultees to make an intelligent response in respect of the scheme on which their views are sought."

24. At this stage I make the following brief comments on *Moseley* in the context of the present case.

    1) It follows from what I have already said that, in my view, the primary purpose of the statutory procedure set out in the 2013 Act and in the Code is the purpose identified by Lord Reed in the case before him, namely "to ensure public participation in the local authority's decision-making process". However, I would not for that reason discount the importance of the two other, related purposes mentioned by Lord Wilson, namely the achievement of better decisions and an avoidance of a sense of injustice on the part of those who are likely to be significantly affected by the ultimate decision.

    2) The four principles approved by Lord Wilson at [25] are those identified at section 3.1 of the Code.

    3) In the present case, the extent of the obligation to identify alternatives to the proposal is to be judged, in the first place, by reference to the express provisions in that regard in the Code. It is not primarily a matter of assessment by reference to principles of fairness or the inferred purpose of the statutory procedure, although such matters may be relevant to the interpretation of the Code. I shall discuss these matters further when considering the grounds on which the present claim is brought.

25. In *R (Smith) v North Eastern Derbyshire Primary Care Trust* [2006] 1 WLR 3315, the Court of Appeal considered and rejected the argument that, even if the defendant had complied with its duty to consult, it would probably have reached the same decision. May LJ, with whom Keene LJ agreed, said at [10]:

> "Probability is not enough. The defendant would have to show that the decision would inevitably have been the same and the court must not unconsciously stray from its proper province of reviewing the propriety of the decision-making process into the forbidden territory of evaluating the substantial merits of the decision."

Provision of information

26. In *R (Joicey) v Northumberland County Council* [2014] EWHC 3657 (Admin) Cranston J at [51] approved May LJ's criterion of inevitability as the applicable test in "the analogous situation of a breach of right to know legislation". The case involved a claim to quash the grant of planning permission for the erection of a wind turbine. A relevant noise assessment report had not been made available to the public as required by sections 100B and 100D of the Local Government Act 1972. Those sections are relied on by the claimant in the present case. So far as material (and in the case of section 100B as it applies to Wales) they provide as follows:

> "100B *Access to agenda and connected reports*
>
> (1) Copies of the agenda for a meeting of a principal council and … copies of any report for the meeting shall be open to inspection by members of the public at the offices of the council in accordance with subsection (3) below.
>
> (3) Any document which is required by subsection (1) above to be open to inspection shall be so open at least three clear days before the meeting …"
>
> "100D *Inspection of background papers*
>
> (1) … if and so long as copies of the whole or part of a report for a meeting of a principal council are required by section 100B(1) … above to be open to inspection by members of the public—
>
> (a) those copies shall each include a copy of a list, compiled by the proper officer, of the background papers for the report or the part of the report, and
>
> (b) at least one copy of each of the documents included in that list shall also be open to inspection at the offices of the council.
>
> (3) Where a copy of any of the background papers for a report is required by subsection (1) above to be open to inspection by members of the public, the copy shall be taken for the purposes of this Part to be so open if arrangements exist for its production to

members of the public as soon as is reasonably practicable after the making of a request to inspect the copy.

(5) For the purposes of this section the background papers for a report are those documents relating to the subject matter of the report which—

(a) disclose any facts or matters on which, in the opinion of the proper officer, the report or an important part of the report is based, and

(b) have, in his opinion, been relied on to a material extent in preparing the report,

but do not include any published works."

27. In *Joicey*, the claimant did have access to the noise assessment report some thirty-six hours before the meeting of the planning committee and was able to make a five-minute presentation to the committee. Cranston J did not consider that to be timely disclosure and was satisfied that, given more time, the claimant could have done more to make his case. At [47] he made observations of general relevance.

> "Right to know provisions relevant to the taking of a decision such as those in the 1972 Act and the Council's Statement of Community Involvement require timely publication. Information must be published by the public authority in good time for members of the public to be able to digest it and make intelligent representations: cf. *R v North and East Devon Health Authority Ex p. Coughlan* [2001] Q.B. 213, [108]; *R (on the application of Moseley) (in substitution of Stirling Deceased) v Haringey LBC* [2014] UKSC 56, [25]. The very purpose of a legal obligation conferring a right to know is to put members of the public in a position where they can make sensible contributions to democratic decision-making. In practice whether the publication of the information is timely will turn on factors such as its character (easily digested/technical), the audience (sophisticated/ ordinary members of the public) and its bearing on the decision (tangential/ central)."

It is clear from these remarks that the mere fact of a failure to disclose information strictly in accordance with the duties under sections 100B and 100D will not by itself necessarily require the quashing of any decision made at a relevant meeting. It is necessary to consider the significance of the failure, having regard to the purpose of the duty, namely "to put members of the public in a position where they can make sensible contributions to democratic decision-making". However, the importance of that purpose is all the more apparent when the decision was itself part of a statutory process that had the design mentioned in paragraph 16 above. Further, when considering whether that purpose has been frustrated one must apply the "inevitability" test in *Smith*, not some lesser test.

The background facts

28. I do not consider it necessary or appropriate for the purposes of this judgment to recite the background of this matter in such a way as risks venturing into a consideration of the merits of the proposal that gave rise to this litigation. However, some background will serve to explain what the proposal and subsequent decision were about.

29. In 2006 the Welsh Assembly Government published a report called *The Learning Country: Vision into Action*, which set out plans and priorities for the education system in Wales. Under the heading "Schools and Learning", the report set out a number of conclusions drawn from analysis and research, among them the following:

> "Schools with a good learning environment, including high standards of buildings, make a positive impact on learning."

Under the same heading, there were listed a number of goals or "outcomes", including this:

> "All school buildings to be fit for purpose on the basis of target dates agreed with individual local authorities."

30. Also in 2006, Her Majesty's Inspectorate for Education and Training in Wales (Estyn) produced a report called *Small Primary Schools in Wales.* The expression "small primary school" was taken to mean a school with ninety or fewer pupils. On that definition, the School, which currently has sixty-nine full-time pupils aged between four and eleven years and a further twelve children of nursery age who attend on a part-time basis, is a small primary school. The report identified six broad ways in which small primary schools were organised. The first and most straightforward was the single school operating independently. Another model was "clusters", whereby neighbouring schools engaged in collaboration and exchange of staff and ideas; this could be either a formal or an informal arrangement. "Federation" involved closure of one or more schools to form a split-site school with a single head teacher and a single governing body; an informal variant would involve the head teacher of a large school taking temporary responsibility for the management of a smaller neighbouring school. Finally, there were "area schools". As paragraph 50 explained:

> "In this type of organisation, two or more schools may be closed and replaced by a single larger school. This may be located on a new site, or on one of the old sites with refurbished buildings. Such developments require statutory reorganisation proposals."

The report said that inspection evidence indicated that, overall, pupils in small schools achieved similar standards to pupils in other schools, with variations for different areas of learning, although some issues were identified in respect of quality of education and of leadership. Two of the recommendations of the

report focused on the need to assess whether small schools were providing value for money. Appendix A to the report identified advantages and disadvantages of the various models of organisation. Several advantages of federated schools were identified; among the disadvantages were: "Deficiencies in the buildings remain—no additional investment is possible because there has been little saving." Area schools were said to have all of the benefits of federated schools; three disadvantages were mentioned, among them: "There may be opposition to the formation of the Area school from parents and the local communities." Paragraph 60 of the report said that, when area schools had replaced small rural schools, they had generally been successful in terms of facilities, organisation and the quality of educational provision.

31. In the spring of 2006 the defendant carried out a broad-based public consultation on "Schools of the Future" with stakeholders in the education system, such as parents, teachers and school governors. The defendant's thinking after that consultation is shown in a document entitled *Strategy, Principles, Policy and Planning Framework* that was an appendix to a report to cabinet, and was approved by cabinet, on 25 July 2006. The document began: "To achieve our vision of 21st century schools and achieve the best use of our resources, we need to modernise our school accommodation …" The document said that the policy and planning framework, by which certain general and unsurprising principles were to be given effect, should include among its areas "ensuring that pupils experience a physical learning environment which is of high quality, safe and secure and which has an appropriate range of facilities and resources."

32. This theme was developed in a report by the Executive Director—Learning to cabinet on 12 December 2006. The purpose of the report was to make proposals for "a phased approach to the school modernisation programme". The context was explained in section 2 of the report:

> "It has already been recognised by the Council that there is an urgent need to continue to modernise our school buildings and to take some important decisions about their future and the role they play in our local communities. To enable this to happen, there is a need to secure the necessary funding to ensure school buildings and grounds are safe, in good condition and fit for purpose in the 21st century.
>
> A failure to address the serious need to modernise our school buildings, remove surplus places and improve the general level of funding of our schools has been identified as one of the five major areas of risk facing the Council."

The report proposed a three-phase modernisation programme. For present purposes, Phase 3 is the significant phase because it concerned Llangeinor and the School:

> "A full and detailed review of the remaining schools and catchment areas in the county borough, that have not been party to

> recent modernisation … will be required to complete the modernisation programme. An assessment will be carried out to establish priorities based on greatest need. This will include options for:
>
> - addressing the requirements of schools where the current site and/or buildings have significant shortcomings …"

The outline timescale for Phase 3 involved determination of priorities in 2008, a detailed review and consultation in 2009/2010, and an implementation period of 2012-20. Cabinet approved the three-phase modernisation programme.

33. Phases 1 and 2 of the modernisation programme proceeded during 2007, 2008 and 2009. In 2010 the focus shifted to Phase 3. On 2 November 2010 Cabinet approved recommendations for the inclusion of certain projects as priorities in its Strategic Outline Programme, which was to be submitted for funding to the Welsh Assembly Government. The criteria for determining priorities were set out, and the recommendations were explained, in a report by the Corporate Director—Children. Among the criteria was "condition and suitability of premises". Priorities were identified by banding, with Band A including those projects considered most urgent. At paragraph 4.33 the report mentioned primary school provision in the Garw Valley; the School, Betws Primary School, and YGG Cwm Garw (a Welsh-medium school) are the primary schools situated in the southern part of the Garw Valley.

> "An initial options review has been completed on 3 – 11 provision in the Garw Valley with a view to providing all-through schools in the valley that are suitable for the delivery of 21st century learning. It is recommended that the southern part of the Garw Valley and Welsh medium provision be included in the authority's 21st Century School Strategic Outline Programme submission as band A projects and the northern part as Band B projects."

In December 2011 the Welsh Assembly Government gave approval in principle for 50% match-funding for the Band A projects, subject to approval of business cases, with a projected timing for the programme of 2014/2015.

34. I shall say a little more about the reasons why the defendant decided that the schools in the southern part of the Garw Valley should be included within Band A and what its thinking was in respect of them.

35. There are five primary schools serving the Garw Valley area, the three I have mentioned in the southern part of the valley and two in the northern part of the valley. In her witness statement, Ms McMillan states:

> "The Garw Valley was in 2006, and still is in 2014, considered to be a priority project and a number of issues were noted in 2006 that still exist today, namely overall conditions of the schools were considered poor with major defects and a large estimated spend was and still is required to address suitability and 'fit for purpose'

considerations. Schools in the Garw Valley were considered to be priority status due to their age, condition, lack of DDA compliance, access to outdoor space and community use of the buildings, and the urgent need to move forward with school modernisation proposals for the Garw valley was driven by the Strategy, Principles, Policy and Planning Framework, identifying these as urgent, priority projects."

36. For the purpose of background explanation only, and not with a view to addressing matters of substantive merit, which are not my concern, I may note four specific issues that have, among others, been raised by the defendant with respect to the School in particular.

1) A Building Condition Assessment carried out in 2007 identified outstanding maintenance issues with an estimated total cost of £390,635. Of those costs, £4,275 related to Priority 1 matters ("urgent to prevent immediate closure"); £242,700 related to Priority 2 matters ("essential, i.e. within 2 years"); and £116,160 related to Priority 3 matters ("desirable, i.e. within 3 to 5 years"). Ms McMillan states: "Further condition surveys in subsequent years place the current backlog at the value of £393,000 despite the council spending in the region of £71,801 on urgent repairs to the school."

2) A Fire Risk Assessment in 2011 noted that risk reduction measures were considered essential. Ms McMillan states that a fire safety check the following year put the cost of risk reduction measures at £10,834.

3) A disability access audit was carried out by council officers in 2012. It gave the School the lowest grading, Grade D, indicating that it was totally inaccessible to disabled pupils and visitors and could not be rendered compliant with the requirements of the Disability Discrimination Act 1996 without major expenditure, which was assessed at £54,500.

4) The evidence of Ms McMillan is that the School currently has 69 pupils as against a capacity of 73 pupils; this represents a "surplus capacity" of 5.48%. She states: "Whilst on its own this is not a significant issue, there was nevertheless a target to reduce surplus places across the county borough. Surplus places in a school are in effect a tax on the other pupils within the education system and is (sic) not value for money. … [T]he Government's expectation was to reduce excess capacity, and address the issue of small schools, to produce educational benefits and efficiency savings." I note that the consultation document eventually published by the defendant focused on the lack of capacity of the existing site to meet the anticipated demand for places by 2021.

To put the matter very shortly: the defendant's view is that the School's premises are beyond economic repair and that the continued independent existence of the school does not represent value for money and does not

provide for its students a learning environment that is suitable for educational requirements in the present century.

37. As to the development of the defendant's plans for the schools in the southern part of the Garw Valley, in 2010, as part of Phase 3, council officers conducted a preliminary review of the primary school provision in the Garw Valley and reported on "options for the rationalisation of places". On page 2 of the report there was the following text:

> "Having regard to the available sites for the location of a new build primary school, a number of school sites were immediately discounted as being unsuitable due to the size of the site or significant access issues. These sites were [all of the existing schools, except for Betws Primary School]."

The report then identified two "potentially suitable sites available for development of a new build primary school"; these were the Betws Primary School site and a site in Blaengarw, referred to as "the David Street site". Eight different options, involving the alternative sites and different combinations of the schools, were considered in the report. Option 8 was a new-build school at the Betws Primary School site, to incorporate not only Betws Primary School but the School and YGG Cwm Garw, which is a Welsh-medium school. This is the option that eventually became the defendant's proposal, giving rise to these proceedings.

38. On 21 February 2012 the defendant's cabinet met. There was before it a report of the Corporate Director—Children, which explained clearly how matters had developed.

> "In July 2011, the Minister for Education and Skills announced that, as a result of the current economic environment and reduction in capital funding imposed on the Welsh Government, the decision had been taken to give local authorities the opportunity to review the timing and content of their planned investments.
>
> Consequently, in October 2011, local authorities were asked to review those programmes/project(s) provided in the first band of investment (i.e. Band A) of their SOP against specific criteria and a Welsh Government match-funding rate of 50% rather than the previous 70%. The key criteria to be used were surplus places, building condition and resource efficiencies. With regards to the nature of the work, only new build and remodelling of existing buildings were to be considered. Renovation and refurbishment schemes were excluded so as to reduce the risk of a return to a 'patch and mend' type programme.
>
> In addition, it was made clear that funding from Welsh Government for band A schemes will not be available until 2014/15 and will run for 6 years, rather than 3 years from 2011/12 as envisaged at the time of our SOP submission in December 2010.
> …

> On 5th December 2011 the Minister for Education and Skills announced the programme for capital investment in school buildings across Wales and Bridgend received approval in principle for schemes in relation to: … Primary provision in Garw Valley South …
>
> It is important to note that these schemes are at Outline Stage, which means the detail may be subject to further change as the proposals are further developed, go through the school statutory consultation process (where required) and are assessed through further business case submissions to Welsh Government.
>
> The proposals now need to be worked up in more detail and the required business cases developed. This will include wide consultation, as is the practice with school modernisation projects, options appraisals and detailed feasibility studies to develop business case submissions."

39. In 2012 officers of the defendant's Children's Directorate produced a "Feasibility Study" in respect of school provision in the Garw Valley. The express purpose of the study was to determine "the implications, opportunities and costs involved in: (1) creating a replacement school (3-11) for [the three schools in the southern part of the Garw Valley] on the existing Bettws (sic) Primary school site [i.e. Option 8; cf. paragraph 37 above]; (2) creating a replacement school for [the primary schools in the northern part of the Garw Valley] on council owned land just south of David Street in Blaengarw." The study stated that the envisaged development at the Betws Primary School site offered many possibilities for developing a campus that was accessible to both young and older learners and that would operate as a "multi-agency 'hub'" offering a range of services and facilities to the local community. The implementation of the proposals would enable a viable school to be established that could offer "a far better range of opportunities" and "generate [a] modern learning environment … that would serve the needs of the area". Section 2.1 contained the following text:

> "As part of Phase 3 of the programme, a high level 'options appraisal' exercise was undertaken in 2010, which reviewed the primary school provision in the Garw Valley Local Forum Area and explored options for the rationalisation of places.
>
> …
>
> The exercise, having investigated and subsequently discounted a number of unsuitable sites (due to size or significant access issues), identified <u>two potentially suitable sites</u> available for development of a new build primary school: land owned by [the defendant] at David Street, Blaengarw; Betws Primary School site.
>
> The exercise also identified a number of options in respect of Primary provision organisation in the Garw Valley worthy of further detailed investigation."

Section 2.2 went on to describe the condition of each of the schools under consideration. Betws Primary School was "considered to be poor, graded C, (exhibiting major defects and/or not operating as intended), with an estimated £759k spend identified" and to have "reached the end of its financial economic lifespan". Tyn yr Heol Primary School was also graded C, with "an estimated spend [of] £391k". Both schools were graded B for suitability. Section 2.3 considered the existing uses of the current school sites. The comment in respect of the School was:

> "The school site is accessed out of hours only on an occasional basis, by Teachers/Parents/Friends of the school. The school provides a number of 'Out of School Hours' clubs for it's (sic) pupils such as Computer Club, Environmental club and Music club."

Section 3 contained a feasibility study in respect of each of the favoured sites for the new-build schools.

40. The matter went back to cabinet on 15 October 2013, when it was resolved to put to a public consultation the proposal to close the School and Betws Primary School at the end of the summer term in 2014 and open a new school in September 2014 to operate across the two sites; the new school would relocate to a single site in Betws upon completion of a new-build, anticipated to be in September 2016.

<u>The facts concerning the statutory procedure</u>

41. The defendant's proposal to close the school was submitted for public consultation on 12 November 2013, pursuant to section 48(2) of the Act and section 4.1 of the Code. Responses were required by 24 December 2013.

42. The consultation document explained what was entailed by the proposal and the reasons why it had been made. The five key principles behind the modernisation programme were stated: commitment to high standards; equality of opportunity; inclusivity; "community focused schools"; and "value for money". The document said:

> "Those [principles] which are particularly relevant in the context of this proposal concern the size of primary schools (to ensure that 'all Bridgend's primary schools are large enough to make the full range of necessary provision') and value for money, efficiency and effectiveness ('narrowing the gap between the most and the least expensive provision currently')."

(This might be thought a loaded way of putting the matter. The two principles identified were those specifically thought to justify the proposal. That does not make them any more "relevant in the context of" the proposal than, for example, the value of "community focused schools"; it is simply that the latter principle did not clearly support the proposal.) Problems regarding the

suitability, size, condition and accessibility of the School site were then summarised. The passage relating specifically to the School said:

> "[The School] has a capacity of 74 and the number on roll in September 2013 is 69 (4-11), which is projected to rise to 85 by 2021. The school cannot be expanded on the current site to meet the demand for school places in the area, as the site is not large enough. Also, the school is not suitable for delivery of today's curriculum, has no playing fields, limited outdoor space, and is totally inaccessible to disabled pupils and visitors. The condition of the school is graded 'Poor' (exhibiting major defects and/or not operating as intended) with an estimated £390,000 backlog of repair and maintenance."

The document said:

> "As an alternative to the proposal, the Council could elect to 'do nothing' and not amalgamate the two provisions. However, the advantages detailed in the 'What are the advantages if the proposal goes ahead?' section below would then clearly not be realised. Also, the issues with the current accommodation could not be addressed."

The document set out a number of perceived advantages if the proposal were to go ahead. As regards educational standards and outcomes, it said:

> "When Betws Primary School was last inspected in July 2011, standards were judged as good; relative to other schools, standards in many areas remain below the average for the local authority (LA), consortium and Wales. The school predicts that outcomes for pupils will fall this year and the school describes its performance in a number of key areas as adequate. Tynyrheol Primary School was judged to be good overall in its last inspection in November 2010. Standards have improved and compare well with outcomes in similar schools. The reliability of performance data across a larger setting would be strengthened overall as a result of the new school. The key areas for improvement for both schools are similar as the socio-economic context is the same. Both schools have a similar focus on improving various aspects of literacy, numeracy and well-being, including attendance, which should be strengthened in a larger community setting."

As regards finance, it was noted that the salary of one headteacher would be saved and that other savings might follow. General advantages flowing from the modernisation of the accommodation were noted. Under the heading, "What are the potential disadvantages if the proposal goes ahead?" the document said this:

> "Some parents may prefer to have their children educated at the existing school sites for various reasons. Children from Llangeinor would need to travel to the Betws site using the transport provided

> and this may increase their travel to school time. Children from Llangeinor would also not have the opportunity to walk or cycle to school. Some believe that a small school is better to meet the particular needs of their children and that a larger school will not offer the same level of personal attention. Parents have been used to dealing with two headteachers and this would obviously change if the proposal went ahead. A primary school is often viewed as being at the heart of the local community, especially where there are no other public buildings. The change to the social side of school life in Llangeinor could be seen as being detrimental to the community."

Under the heading, "Impact Assessment: Community" the document said this:

> "The school would continue to operate on its current sites until such time as the new premises become ready for occupation on the Betws site in September 2016, so no immediate effect on the community is anticipated. Upon occupation of the new build school on the current Betws site in September 2016, the provision of modern and accessible community facilities will enhance provision in Betws. While the Richard Price Centre opposite Tynyrheol Primary School provides community facilities, there may be those in Llangeinor who believe that not having a school in the village will be a significant loss to the community. The consultation will allow interested parties to state what they see as the likely effects on the respective communities."

43. The Action Group responded to the consultation by email on 10 December 2013; the email contained the following comments:

> "A critical factor in our campaign is for the discovery and publication of the facts. The consultation document presented to both Cabinet and stakeholders lacks accuracy, lacks transparency and does not provide the reader with the information that is required for true and considered consultation.
>
> … Subsequently it is impossible to understand why only the single option proposed for Tyn yr Heol Primary School (closing, merging and relocating in Bettws (sic)) has been presented and why refurbishment of the current site is not being considered.
>
> … No information has been provided to indicate that the child's education or health will be improved. … Deliberate high cost of refurbishment, making it un-competitive with cost of new build."

44. Estyn was a mandatory consultee and provided a detailed response. The response made clear: "Estyn will provide their opinion only on the overall merits of school organisation proposals." It contained further relevant passages as follows:

"*Is the proposal likely to maintain or improve the standard of education provision in the area?*
The standard of education in both existing schools was identified as good in their last inspections. These inspections were in 2010 and 2011. However, the proposal does not have sufficient detail about current outcomes in either school and so Estyn is unable to come to a considered view as to whether the proposal is likely to maintain or improve the standard of provision in the proposed new school."

"*Has the proposer ... Managed any risks associated with the proposals?*
… The proposer believes that the Price Centre opposite Tynyrheol Primary School provides appropriate community facilities. The consultation will allow interested parties to state what they see as the likely effects of the school closure on the community. There is no evidence relating to this aspect in the current proposal that can be commented upon."

"*[Has the proposer ...] Considered suitable alternatives and given good reasons as to why these have been discounted?*
The local authority has only considered the alternative to 'do nothing'. This has been discounted …"

"*Educational aspects of the proposal*
… The local authority has considered the impact of the proposal on the quality of outcomes, provision and leadership and management. They have also considered the effect of the proposals on the delivery and standards of the full curriculum at the Foundation Phase and at key stage two. However, the proposal does not analyse the schools' current performance well enough. Also as there will be a substantial change to the leadership of the new school with the appointment of a new headteacher, Estyn is unable to validate the judgements in the proposal. …
The local authority asserts that 'this [change of management structure and provision of improved facilities] will result in the good standards currently achieved being raised even further as it is likely that the quality of teaching will improve through the sharing of good practice'. However, it is not possible to evaluate at this stage whether a new school and its governance will deliver this."

"This proposal involves the transfer of learners to alternative provision. The local authority has provided evidence that the alternative would appear to be able to deliver outcomes and offer provision at least equivalent to those currently available to those learners (including learners with SEN)."

45. Following the closure of the consultation, the matter was brought back to cabinet on 4 February 2014. One of the documents before cabinet was the consultation report required by section 48(5) of the 2013 Act and section 3.5 of the Code. The main body of the consultation report summarised and

commented on the principal responses received in the consultation process, and annexes to the consultation report documented the responses so summarised. I shall make only selective references.

45.1 Under the heading "Parent consultation", it was recorded that meetings with parents and others had taken place at Betws Primary School on 26 November 2013 and at Tyn yr Heol Primary School on 19 November 2013.

45.2 In respect of the meeting at Betws Primary School, it was recorded that a council representative had "explained that the authority has considered a number of options" in a "process [that] started a while ago". "The Council Representative also stated that research evidence concerning 'larger vs smaller schools' is inconclusive." The minutes of the meeting at Betws Primary School contained the following passage:

> "Q. This is one proposal. Are there any other options that might be considered?
>
> A. Before we reached this point we have considered a number of options. The process started a while ago. Betws as a primary school needs a new building as well as Tynyrheol and Cwm Garw. The work carried out shows there are only two sites in the Garw that will do the job of putting up a new primary school. One is in Blaengarw [i.e. in the north of the valley] and the only other site is this site and we can put two primary schools on the one site."

45.3 In respect of the meeting at the School, the main concerns recorded in the consultation report were the move to a larger school, the impact of the closure of the School on the village community, and issues regarding travel and transport. The minutes of the meeting at the School contained the following passages.

> "Q. If you have £6m to build a super school, surely the repairs for the two schools would be cheaper? But Betws school caught on fire. This probably wouldn't be happening if Betws hadn't caught on fire.
>
> A. The fire did accelerate the process."
>
> "Q. Our children are excelling, why should they go to other schools? … There won't be anything to benefit us here. We will last until it [the school building] can last out.
>
> A. This school building isn't going to last too much longer."
>
> "A. What we are hearing will contribute to community impact assessment."

45.4 Appendix 7 to the consultation report was the minutes of the consultation meeting with staff at Betws Primary School. The minutes included the following exchange:

"Q. If decided not to close the two schools will Betws still get the new school?
A. Yes, it has to and the money is there.

Q. Would the timescale still be the same?
A. Yes.

Q. On that scenario why don't you just build a new school for Betws?
A. I didn't say when. The Strategic Outline Case has gone into Welsh Government and is based on the preferred option covering Tynyrheol catchment and YGG Cwm Garw coming on the same site."

45.5 Appendix 8 to the consultation report was the minutes of the consultation meeting with staff at the School. The minutes included the following exchange:

"Q. It says that the cost of the building repairs and maintenance is £390k. Where has that come from? Is there any evidence?
A. There is. Reports are taken of school buildings."

45.6 Section 6 of the consultation report dealt with Estyn's response, which was exhibited as Appendix 10. The Report quoted the passage on educational standards, set out above, and provided the defendant's response, as follows:

"The proposal consultation document contained summaries of both schools most recent Estyn Report with links to the full inspection reports. An analysis of whether the proposal is likely to maintain or improve standards of provision and outcomes was provided by the Central South Regional Education Consortia and included in the consultation document on page 4 ('Quality and standards in Education'). The Consortia expressed their view that, 'The reliability of performance data across a larger setting would be strengthened overall as a result of the new school. The key areas for improvement for both schools are similar as the socio-economic context is the same. Both schools have a similar focus on improving various aspects of literacy, numeracy and well-being, including attendance, which should be strengthened in a larger community setting.'"

That internal quote from Consortia was repeated, though without attribution, in the consultation document; see paragraph 42 above.

45.7 Appendix 9 to the consultation report was a table and summary of the written responses received. Two passages in that appendix may

usefully be referred to. In each case, there is first a summary of the points raised by consultees; then in italics is the defendant's comment on those points.

"The option for Tynyrheol Primary has not been considered in relation to wider strategic planning in terms of the social, cultural, economic and environmental impact on the village of Llangeinor and its community. If the closure of the school goes ahead, it will leave a large hole in the community—the impact on the local community has not been addressed. Other community facilities will potentially close if the proposal goes ahead (village store, Richard Price Centre). The school is the heart of the community.

The Local Authority has looked at opportunities within the local area. However, for a number of financial and practical reasons it was determined the best solution would be to co-locate all the schools together in Betws in order to realise the associated economies of scale.

When will the Equality and Community Impact Assessments be completed and the results published?

This is published as part of this consultation report."

(It may be noted that this answer was only partially correct. Appendix 11 to the consultation report comprised the Equality Impact Assessment documentation. However, the Community Impact Assessment had not been produced by the time of the meeting on 4 February 2014.)

"Why haven't more options been given (e.g. build new school in Llangeinor or refurbish existing)?

The Local Authority has looked at opportunities within the local area. However, for a number of financial and practical reasons it was determined the best solution would be to co-locate all the schools together in Betws in order to realise the associated economies of scale."

45.8 The Equality Impact Assessment at Appendix 11 considered, among other things, disability.

"The existing Tynyrheol school is inaccessible to disabled pupils and visitors with mobility issues, as evidenced by the Authority's Access Officer's DDA audit report. It is anticipated that accessibility of provision will be significantly improved upon occupation of the new build school on the current Betws site (since the new build would be designed with due regard to Building Regulations)."

46. On 4 February 2014 cabinet resolved to authorise the publication of the proposal and to "approve the implementation of the proposal to amalgamate

Betws Primary School and Tynyrheol Primary School, should there be no objections at the end of the Public Notice period."

47. On 5 February 2014 the defendant produced its Community Impact Assessment. However it was not published at that time.

48. On 21 February 2014 the defendant published a statutory notice on the proposal pursuant to section 48(1) of the 2013 Act and section 4.1 of the Code. The notice allowed for objections to be made in writing by 21 March 2014.

49. I need only pick out a few points regarding the objections raised to the proposals.

49.1 The Governing Body of the School lodged an objection on 14 March 2014. They asked when the Equality Impact Assessment and the Community Assessment would be completed and the results published. And they said: "There has not been a recent survey in relation to the stated estimate of £390,000 backlog of repair and maintenance. We are fully aware of the issue of disabled access and until this year had a child in the school with a parent who is a full-time wheelchair user, this parent never criticised the school's access."

49.2 On 16 March 2014 the Action Group lodged a lengthy objection. Some of the main points of objection appear from the following passages.

> "Refurbishment does not seem to have been given any real consideration even though this could be funded by Schools Buildings Improvement Grant, this would also fund the improvements to disabled access to the school, which is a possibility as outlined in the survey commissioned by the Action Group."
>
> "BCBC state that they considered other options but that this was the only option that was financially feasible—there has been no information in relation to what other options were considered or the reason for them not being taken forward, other than financial.
>
> - Had consideration been given to the possibility of building a school in Llangeinor on the site of the swimming pool? …
>
> - Had refurbishment of the current building been considered?"
>
> "Section 3.2 of the Code states the consultation document MUST contain 'a description of any alternatives considered and the reasons why these have been discounted.'"
>
> "The officers who attended the consultation meetings with stakeholders stated that community impact assessments would be

> carried out[;] however this has not been the case. There has been no thought placed upon the devastating impact the closure of Tyn yr heol would have upon the wider community of Llangeinor, once again many of the negative effects are outlined in the HIA [Health Impact Assessment] report (appendix D)."
>
> "No alternatives have been considered i.e. clustering, collaboration or becoming a federation with other schools."

50. On 18 March 2014 Ms McMillan wrote on behalf of the defendant in response to a complaint that had been made by the Action Group in respect of the pre-publication consultation process. (Neither the complaint nor the response constituted part of the objections process.) I do not need to refer to the detail of the letter of response. One sentence read: "Options for education provision to serve the catchment of Llangeinor were considered and tested at officer level."

51. After the close of the objections period, the proposal was referred back to cabinet on 29 April 2014 for determination.

52. Cabinet considered a report from the Corporate Director for Children. Annexed to that report was an objections report; cf. section 49(3) of the 2013 Act. A substantial appendix to the objections report summarised the objections received and the defendant's response to them. I shall refer only to what was said concerning four matters: impact on the community, educational standards, logistical options, and organisational options. In each case the objection is summarised first and the response is stated in italics.

> "The option for Tynyrheol Primary has not been considered in relation to wider strategic planning in terms of the social, cultural, economic and environmental impact on the village of Llangeinor and its community. If the closure of the school goes ahead, it will leave a large hole in the community—the impact on the local community has not been addressed. Other community facilities will potentially close if the proposal goes ahead (village store, Richard Price Centre). The school is the heart of the community.
>
> *The Local Authority has looked at opportunities within the local area. However, for a number of financial and practical reasons it was determined the best solution would be to co-locate all the schools together in Betws in order to realise the associated economies of scale. A Community Impact Assessment was completed following receipt of the consultation responses ... There are no groups, agencies or clubs regularly operating outside of school hours at the existing Tynyrheol Primary School. Nothing within the proposal precludes the continued use of local community facilities such as the Richard Price Centre for school fetes, after school activities etc. ... Also, the bus pick-up/drop-off point for Tynyrheol pupils would be in the general vicinity of the existing school (and therefore the village store)."*

> "Estyn said it is unable to give a considered view as to whether the proposal is likely to maintain or improve the standard of provision.
>
> *... the [2013] Act places no statutory requirements on Estyn in respect of school organisation matters. Therefore as a body being consulted Estyn provide their opinion only on the overall merits of school organisation proposals. An analysis of whether the proposal is likely to maintain or improve standards of provision and outcomes was provided by the Central South Regional Education Consortia ... and included in the consultation document ..."*

> "We have been offered two options[:] stay open as we are or close, no other avenues appear to have been explored. There is ample space in Llangeinor to build a new school for children of Tynyrheol on the site of the old swimming pool. Why haven't more options been given?
>
> *The Local Authority has looked at opportunities within the local area. However, for a number of financial and practical reasons it was determined the best solution would be to co-locate all the schools together in Betws in order to realise the associated economies of scale. Numerous options for education provision to serve the catchment of Llangeinor were explored and tested at officer level and a decision was subsequently made to consult on the option proposed."*

> "No alternatives have been considered i.e. clustering, collaboration or becoming a federation with other schools.
>
> *Numerous alternatives for education provision to serve the catchment of Llangeinor were explored and tested at officer level and a decision was subsequently made to consult on the option proposed. As explained in the minutes contained within the Consultation Report that was published to BCBC's website ... a federation approach would not solve the problems with the building in Llangeinor."*

53. One document that was in the pack for cabinet members on 29 April 2014 was the Community Impact Assessment; it is undated but was, as I understand it, produced on 5 February 2014. The important part of the document is its final three paragraphs.

> "A number of responses were received during the consultation period raising concerns that the proposal will leave a large 'hole' in the Tynyrheol community—other community facilities could potentially close if the proposal goes ahead (e.g. village store, Richard Price Centre).

> However, there are no groups, agencies or clubs regularly operating outside of school hours at the existing Tynyrheol Primary School. Nothing within the proposal precludes the continued use of facilities such as the Richard Price Centre for school fetes, after school activities etc. … Also, the bus pick-up/drop-off point for Tynyrheol pupils would be in the general vicinity of the existing school (and therefore the village store).
>
> Consequently, it is not anticipated that the proposal would have a significant impact on the community if it were to go ahead."

The Community Impact Assessment had not been published, although it will be seen that part of its text had been repeated verbatim in the summary of objections and the responses to those objections.

54. At the meeting on 29 April 2014 it was decided to implement the proposal. That is the decision which is challenged in these proceedings. In the light of this lengthy summary of the background and events leading up to the decision, I turn to consider rather more briefly the grounds of challenge, of which there are four.

The grounds of the claim

(1) Failure to state alternatives

55. The first ground of challenge to the decision is that the pre-publication consultation document did not comply with the mandatory requirements of section 3.2 of the Code in respect of the identification of alternatives to the proposal. The text is set out in paragraph 12 above, but the parts of specific relevance may be repeated here for convenience:

> "In the case of all proposals, the consultation document **must** contain the following information:
>
> …
>
> - a description of any alternatives considered and the reasons why these have been discounted"
>
> "Where proposals involve the closure of a school the following information **must** be included in the consultation document:
>
> - details of any alternatives to closure that have been considered and the reasons why these have not been taken forward".

56. It is not clear to me that the different wording of the two provisions is itself significant. I should not see any important difference between, on the one hand, "the reasons why [alternatives] have been discounted" and, on the other,

"the reasons why [alternatives] have not been taken forward". This is a reason for being cautious about reading too much into different wording; it may also be noted that there are other specific requirements for closure proposals, so that it cannot be assumed that the requirement regarding alternatives has been repeated for any other reason than completeness. Perhaps there is a difference between "a description" of alternatives and "details" of alternatives. But it depends how detailed the description is and how full the details are. I am firmly of the view that the Code does not intend to require full particulars of all alternatives to be set out in the consultation document in the detail that would be appropriate to the proposal itself. That would be to make the consultation document unwieldy and the Code unworkable, which was certainly not the intention. The same must in my view apply with regard to the reasons why the alternatives were not pursued. Whether one speaks of details or of a description, what is required is that sufficient information be given to enable those to whom the consultation document is addressed to understand what alternatives to the proposal have been considered and why they have not been pursued by the proposer. Precisely what that involves in any given case will depend on the particular facts. But I do not think that it is an onerous requirement. Nor do I think that it ought to give rise to difficulties in practice, provided that the proposer and the consultees act with common sense and keep firmly in mind that the consultation process is intended to engage affected parties (see paragraphs 21 to 24 above) but is not meant to be a tool for thwarting the relevant authority's power to make robust decisions that it deems to be necessary.

57. In the present case, all that the consultation document (paragraph 42 above) said about alternatives was:

> "As an alternative to the proposal, the Council could elect to 'do nothing' and not amalgamate the two provisions. However, the advantages detailed in the 'What are the advantages if the proposal goes ahead?' section below would then clearly not be realised. Also, the issues with the current accommodation could not be addressed."

58. For the claimant, Mr Wolfe submits that this statement was a plain and obvious breach of the Code. In the preliminary review in 2010 the defendant's officers had considered all of the existing school sites for a new-build school, though they had "immediately discounted [them] as being unsuitable due to the size of the site or significant access issues" (paragraph 37 above). Indeed, the logically prior step had been taken of discounting refurbishment of the existing school site. As the lengthy discussion of the background to the proposal (paragraphs 29 to 39 above) makes clear, the defendant had not simply overlooked the possibility that the School might be refurbished and retained, whether as a separate school or as part of a cluster or federation; it had turned its face against that possibility on the grounds that refurbishment would be uneconomic and a continuation of a "patch and mend" approach to school provision, and that there were economies of scale and educational benefits to be achieved by having larger schools. Again, there was no mention in the consultation document of consideration of the possibility of clustering

or federation; such alternatives should have been considered—if they were considered, the defendant had a duty to explain the reasons for rejecting them (section 3.2 of the Code), and if they were not considered the defendant had a duty to explain why it had not considered them (section 1.7 of the Code, in conjunction with the law summarised in paragraphs 17 to 20 above).

59. In support of his submission, Mr Wolfe also points to the defendant's repeated assertion that it had considered various alternatives but its failure to identify what those alternatives were. Thus the Consultation Report stated that the defendant had considered "a number of options" (paragraph 45.2 above) and that it had "looked at opportunities within the local area" but had decided that the proposal was "the best solution" (paragraph 45.7 above). The defendant's response to the Action Group's complaint said that "options" had been "considered and tested at officer level" (paragraph 50 above). The Objections Report repeated these assertions and mentioned "numerous alternatives" (paragraph 52 above). Other such references appear in documents post-dating the decision to implement the proposal. Yet the only option actually identified was "do nothing".

60. For the defendant, Mr Beglan submitted that there was no failure to comply with section 3.2 of the Code, because there is "no requirement to set out within the consultation options which were not arguable or realistically possible options." Potential alternatives had been considered at officer level and discounted several years before the Code came into force and the consultation began. There was no obligation upon the defendant to reopen those matters when they simply did not constitute realistic alternatives. Further, the reasons why the proposal and no other option was being advanced were made sufficiently clear for the purposes of a meaningful and fair consultation and objections process. The consultation document made clear that the inadequacy of the existing school building, the cost of refurbishment and the constraints of the site militated against a solution based on the existing site. These same points necessarily militated against the possibility of addressing provision by clustering, collaboration or federation; this was a point specifically made in the meetings in the consultation process.

(2) Failure to give evidence of quality of outcomes and provision

61. The nub of this ground of complaint is that the defendant failed to develop and consider its proposal in a properly evidence-based way as required by the Code. Section 1.3 of the Code is particularly relevant; for convenience I shall set out its main terms again.

> "Relevant bodies **should** place the interests of learners above all others. … [T]hey **should** give paramount importance to the likely impact of the proposals on the quality of:
>
> - outcomes (standards and wellbeing);
>
> - provision (learning experiences, teaching, care support and guidance, and learning environment); and

- leadership and management …

at the school or schools which are the subject of the proposals …

Where proposals involve the transfer of learners to alternative provision there **should** normally be evidence that the alternative would deliver outcomes and offer provision at least equivalent to that which is currently available to those learners …

In assessing the impact of proposals on quality and standards in education and how effectively the curriculum is being delivered, relevant bodies **should** consider any relevant advice from Estyn, refer to the most recent Estyn reports or other evidence derived from performance monitoring, and take into consideration any other generally available information available on a school's effectiveness."

In summary, then, and to paraphrase: the defendant was expected (a) to put the interests of the pupils first, (b) to place paramount importance on the quality of the outcomes that would be delivered and the provision that would be offered to pupils by the proposal, and (c) to have evidence that the proposal would deliver outcomes and offer provision for the existing pupils that were at least as good as those they currently enjoyed. These were expectations (guidelines) not mandatory obligations; but the defendant was required to show proper reasons for departing from them. Section 1.7 of the Code made clear that there was "no presumption in favour or against the closure of any type of school."

62. The particular complaint is that, when preparing and publishing its proposal and thereafter when determining to implement it (section 1.2 of the Code), the defendant failed to address the need for evidence that standards for pupils at the School would be at least maintained. The defendant relied on a passage from a document produced by the Central South Regional Education Consortia, which was repeated, without reference to their source, in the passage of the consultation document dealing with educational standards and outcomes (paragraph 42 above):

> "The reliability of performance data across a larger setting would be strengthened overall as a result of the new school. The key areas for improvement for both schools are similar as the socio-economic context is the same. Both schools have a similar focus on improving various aspects of literacy, numeracy and well-being, including attendance, which should be strengthened in a larger community setting."

63. As to this passage, Mr Wolfe makes a number of observations.

1) The first sentence is concerned not with outcomes or delivery but with reliability of data.

2) The second and third sentences are not evidence that standards will be maintained for pupils at the School. They simply express the view that the focus on addressing common problems should be strengthened by the proposal. That is entirely consistent with a decrease in standards on account of other factors.

3) Estyn identified this deficiency in the proposal at the consultation stage; see paragraph 44 above. The defendant's only response to this observation was to marginalise Estyn's input and to repeat the statement by the Consortia, which were part of the information to which Estyn was responding and which did not anyway amount to evidence; see paragraphs 45.6 and 52 above.

4) As a passage in the consultation document, the claim relied on by the defendant is mere assertion. The underlying document from which it was taken is an unsatisfactory two-page document, bearing neither date nor attribution beyond its heading, "CSC Report on Proposal[:] Garw Valley Primary provision" and showing no indication of the person by whom it was prepared or the information that was considered. It was not made public or even provided to councillors until after the decision to implement the proposal had been taken; therefore it was not before the defendant and was not available as part of a fair consultation.

64. For the defendant, Mr Beglan submits that the defendant had an appropriately evidence-based approach. Estyn's remarks about the "educational aspects of the proposal" went no further than to say that there was no evidence that standards would be improved. The issue, however, was whether they would be at least maintained; in this regard, Estyn accepted that the defendant had provided evidence: see the passage set out at the end of paragraph 44 above. Further, the defendant was entitled to and did rely on all of the other material that emerged from the consultation process and on its own knowledge of the schools, their condition and facilities and the relevant locations.

(3) Community Impact Assessment

65. This ground of challenge is that the defendant failed to comply with the Code in respect of either the assessment of the impact of the closure of the School on the community of Llangeinor or the production of a Community Impact Assessment (CIA).

66. Section 3.2 of the Code required that the consultation document include information concerning "the impact of proposals on the local community". In the case of a proposal to close a school, section 1.7 of the Code provided that the case prepared by those bringing forward proposals "should show that the impact of closure on the community has been assessed through the production of a Community Impact Assessment, and how any community facilities currently provided by the school could be maintained." Annex D to the Code provides that CIAs "should ideally be included in consultation documents".

67. In the present case, the consultation period closed on 24 December 2013, the decision to publish the proposal was made on 4 February 2014, the CIA was produced on 5 February 2014, the statutory notice was published on 21 February 2014, and the CIA was in the councillors' pack for the meeting on 29 April 2014 at which it was decided to implement the proposal, although it had not been made available to members of the public.

68. Mr Wolfe points out that, although the CIA was in existence before the proposal was published and was part of the materials taken into account by the defendant on 29 April 2014, it was not made available to the public until after the final decision was taken, even though it had been requested in the Governing Body's objection (paragraph 49.1 above) and even though the Action Group's objection had adverted to the lack of it (paragraph 49.2 above). He submits that on these facts:

    1) There was a departure from section 1.7 of and Annex D to the Code, for which no good reason has been shown.

    2) There was a basic failure of fairness in the statutory objections period, because those affected by the proposal were not afforded the opportunity to address the reasoning of the CIA. This cannot be brushed aside as insignificant, because the relevant parts of the CIA (set out at paragraph 53 above) adopt a particular, and new, line of reasoning—shown by the word "Consequently"—which, whatever its merits, might be open to proper objection.

    3) Similarly, the fact that the CIA was part of the councillors' pack means that the failure to make it available to the public until after the meeting on 29 April 2014 was a material breach of sections 100B and 100D of the 1972 Act. The fact that members of the public had no right to address the meeting of cabinet is not in point, because objectors retained their rights to make contact directly with councillors to make their views known.

69. Mr Beglan observed that there was no mandatory requirement to include the CIA in or with the consultation document, and he submitted that the consultation document itself (paragraph 42 above), the consultation process itself (paragraph 45 above) and the objections process (paragraphs 49 and 52 above) had paid close attention to the impact on the community. The CIA itself was short but focused; it complied with the requirements of Annex D. Affected parties had had every opportunity to advance community-based objections to the proposal and had done so.

(4) Failure to consult AMs

70. The final ground of challenge is that the defendant failed to provide Regional Assembly Members with copies of the consultation document, consultation report, statutory notice and objections report, as required by sections 3.2 and 3.5, 4.1 and 5.1 of the Code. In fact, the defendant provided the required information to constituency AMs but not to the regional AMs.

71. The view taken by the defendant at the time and maintained by it in these proceedings was that the reference to AMs "representing the area" served or intended to be served by the schools was apt to include only constituency AMs and not regional AMs. However, without conceding the point, Mr Beglan rightly did not urge it with any vigour. In my judgment any area in Wales is represented both by its constituency and by its regional AMs. There was a clear breach of the Code.

72. The real question in this case is simply whether the failure to comply with the Code is of any significance as regards the validity of the decision to implement the proposal. On 28 April 2014 Mr Byron Davies, a regional AM for South Wales West, wrote to the defendant in respect of the proposal. He complained that neither he nor other regional AMs had been notified of the proposal and said that he had learned of the proposal a few days before Easter (that is, roughly a fortnight previously). The letter contained two full pages of text raising eleven numbered objections to the proposal. The first objection related to the lack of evidence regarding standards. The second related to the lack of information regarding alternatives. The third related to the lack of a CIA, though Mr Davies noted that the defendant claimed to have one; he asked for a copy. The letter was received by the defendant on 29 April 2014, before the meeting of cabinet that day.

73. There are two sets of minutes of the meeting of cabinet on 29 April 2014: one is the defendant's official minute; the other is a set of notes compiled by members of the Action Group who were in attendance. The former records that five councillors were present. The latter records:

> "Deborah McMillan did say that a letter of objection had been received from Byron Davies AM that morning and even though it had been received after the end of the objection period her officers had assured her and were confident that the issues raised by Byron Davies had been addressed in the objection report. She did not read out the letter nor did she summarise its contents. Copies of the letter were not circulated at the meeting."

There are statements from four of the five councillors present. Three of them state that they read Mr Davies's letter before the meeting (at least, that is how I interpret the statements); the fourth is less specific, but in the context of the rest of the evidence it seems to me to imply that he probably did read the letter.

74. In those circumstances, Mr Beglan submits that, if there was any breach of the Code, it was not a substantial breach, the AM was able to make his representations, they did not add anything material to what had already been raised in the statutory process, and the representations were considered before the meeting.

Conclusions

75. For the reasons set out below, I shall give permission for this application for judicial review, and I shall allow the claim and make a quashing order in respect of the defendant's decision to implement the proposal.

76. At the outset I must make it clear that I am not concerned with the merits of the proposal to close Tyn yr Heol School and Betws Primary School and create a single school at the Betws site. It is not the function of this court to express views, far less to make decisions, on the merits of such questions. Under the 2013 Act the assessment of the merits of the proposal is ultimately a matter for the defendant.

77. However, the defendant is required to reach its decision in accordance with the requirements of the 2013 Act and the Code. I have come to the conclusion that in a number of material respects the defendant failed to comply with those requirements. Taken together, those failures can, in my view, be seen to be both a cause of an inadequate approach to the decision-making process and symptomatic of a failure to engage with the ethos of the statutory provisions.

78. In an earlier part of this judgment I have commented on the purposes of the procedure laid down by the Act and the Code. At its heart is an emphasis on public participation in particular decisions that affect the life of any community. It seems to me that the statutory procedure reflects the attribution of an inherent value to public participation in a democratic society. It thereby also serves the two other purposes mentioned by Lord Wilson in *Moseley* (paragraph 21 above), namely the improvement of the quality of decisions and the avoidance of a sense of injustice in affected parties.

79. The relevance of these purposes comes into focus in consideration of the first ground of challenge (identification of alternatives), especially when it is taken in conjunction with what I have taken, though Mr Wolfe did not, as the second ground of challenge (lack of evidence).

80. In my judgment, it is now clear that the defendant failed to set out in the consultation document the alternatives that had been considered and the reasons why they had been discounted. The defendant's argument at the hearing of this claim boiled down to saying that the alternatives had not been realistic or viable and therefore did not have to be identified in the consultation. In my judgment, whether or not that would be a sufficient answer in respect of consultations carried out pursuant to a common law duty or some other statutory procedure, it is not a sufficient answer under the 2013 Act and the Code. The simple requirement is to give details of "any alternatives" that have been considered. The defendant's approach to this question seems to me to be fundamentally flawed. As I have said, apart from the "do nothing" option, the most obvious alternative to closing schools and opening new ones is to spend money in improving the existing schools. The documentation disclosed in the course of these proceedings shows that the defendant clearly did give consideration, albeit at a high level of generality, to this possibility; indeed, it would have been irrational not to consider it. The defendant has formed the view that refurbishment is not a sensible option.

That view may be correct, but it is not axiomatic that it is correct. The reasons why the alternative was rejected should have been stated in the consultation document. Another possible option would be to make provision on alternative sites. The defendant did not provide particulars of the alternatives it had considered; it did not even state in terms that it had considered alternative sites, and even now it is a matter of inference only that all sites considered have been identified in the course of these proceedings. Nor did the defendant even claim in the course of the statutory process that there were no other feasible or realistic options; it simply claimed that its proposal was the best option—apparently because its officers had reached that conclusion. That is not what the statutory process requires, and it undermines the clear purposes inherent in that process, because it removes from the wider public sphere the opportunity for constructive engagement with alternatives that have not been included in the proposal, and because the failure of the defendant to comply with the required discipline of clear explanation and reasoned justification of its process of reasoning is liable to compromise the intended benefits of the Code in respect of improved quality of decision-making.

81. The second ground, lack of evidence, is of a piece with the first ground. No reason has been given why, in accordance with section 1.3 of the Code, the interests of pupils and the quality of outcomes, provision, and leadership and management should not be treated as the most important consideration, or why outcomes and provision for existing pupils should not be at least equivalent to those which the School currently affords. Accordingly there should normally be evidence in the latter regard that standards in the new school would be at least equivalent to those at the School. In my judgment, the defendant failed to address this requirement in anything that could be considered an adequate manner. The remarks of the Consortia (paragraph 42) cannot constitute the relevant evidence, as the defendant seems to think they can, for at least the following reasons. First, they do not address the relevant question: the first part of the remarks deals with the reliability of data; the second part merely asserts a likely advantage (the logic appears to be akin to "two heads are better than one" or "a problem shared is a problem halved"), but even if what is said is correct—for which no evidence is provided—it does not follow that the standard of outcomes or provision will be maintained; that may or may not be the case, because the larger community setting may bring its own problems. Evidentially, the assertion is not in point, and it seems to have no greater force than the other assertion, made elsewhere both in the Consortia document and by the defendant, that the combination of staff is likely to bring the benefit of combining good practice (it might just as well corrupt good practice currently existing at the School). Second, the document from which the "evidence" is taken is unauthenticated; see the remarks in paragraph 63 above. Third, the Consortia document was not provided to the cabinet. As regards Estyn's response to the consultation, the defendant clearly understood its tenor to be summarised in the sentence: "Estyn is unable to come to a considered view as to whether the proposal is likely to maintain or improve the standard of provision in the proposed new school." That understanding is plainly correct; despite the penultimate paragraph of the response, set out at the end of paragraph 44 above, which coheres uneasily with the remainder of the response, the response as a whole clearly considered that a meaningful

comparison of existing and likely standards of outcome and provision could not be made.

82. The first two grounds of challenge, accordingly, raise concerns over the ability of the statutory process undertaken by the defendant to meet the purposes mentioned in paragraph 78 above. The failures to comply with the Code are liable to fuel the suspicion—as to which, I emphasise, I make no comment—that choices made at officer level on largely financial grounds are being presented in substance if not in form as a fait accompli ("no other option is feasible or realistic"), with assertion being substituted for evidence—or, if evidence is unavailable, adequate reasoning—in respect of the likely impact of the proposals on outcomes, provision, and leadership and management, and on the maintenance of standards for existing pupils. Further, even if the defendant's decision in favour of the proposal is meritorious—as to which, again, I make no comment—its method of proceeding in this consultation seems to me to be inimical to the interest in a high standard of decision-making, because its departure from the Code tends to exempt aspects of the process from proper public consideration and to risk obscuring the need for decisions to be based on reasons and, where available, evidence.

83. As regards the third ground of challenge (community impact and the CIA), I do not consider that there was a breach of section 3.2 of the Code, because the consultation document did include information about the impact of the proposal on the local community. The fact that the CIA was not made available to the public until after the decision had been taken by cabinet constituted, in my view, a failure to comply with section 100D of the 1972 Act, in circumstances where the CIA was part of the documentation before the cabinet members. I should be doubtful whether, by itself, that failure warranted a quashing order. The substance of the CIA was repeated in the objections report, and the chain of reasoning indicated by the word "Consequently" (paragraph 68 above) was implicit in what was contained in the objections report. However, in circumstances where the defendant had not provided the CIA with the consultation document, as it should ideally have done, its failure to make the CIA available to the School's Governing Body or to the Action Group in response to their formal objections and requests or enquiries in that regard (paragraph 49 above) seems to me to represent a departure from the requirements of a fair consultation, which in this regard I should not consider to have been displaced by the specific requirements of the statutory procedure.

84. Contrary to the view I had provisionally formed, I also regard the fourth ground of challenge (failure to notify the regional AMs) to be a ground on which the decision ought properly to be quashed. I proceed on the basis, which appeared to be assumed in the course of argument, that Mr Byron Davies was the relevant regional member. It was not contended that his ability to engage adequately in the statutory process would be irrelevant, because he was only one of several regional AMs, none of whom had been notified as required by the Code. I also take the view that Mr Davies, though justifiably annoyed that he had not been consulted on the proposal, was able to make the points he wanted to make. The evidence also suggests that the members of

cabinet were able to read his letter in advance of the meeting and that at least three of them did so. However, in circumstances where the letter was received only on the morning of the meeting of cabinet and the defendant's officers failed to draw to the members' express attention the complaints made by Mr Davies regarding failures to observe the Code and their own obligation to comply with the Code, I am not satisfied that the breach was cured or that the outcome would inevitably have been the same if regional AMs had been provided with the information to which they were entitled.

85. I may deal briefly with the question of delay, raised by the defendant in its detailed grounds and relied on by Mr Beglan primarily as a factor that should lead the court to exercise its discretion to refuse relief to the claimant. In my judgment, delay is not a reason for which I should refuse the claim or decline to make a quashing order. In this regard I respectfully agree with the comments of H.H. Judge Seys Llewellyn Q.C. when he directed that the matter proceed to a rolled-up hearing. Both before the decision to implement the proposals was taken and thereafter the Action Group and the Governing Body of the School have made proper efforts to obtain information from the defendant and have, in my view, acted with reasonable expedition both while they have been awaiting it and once they have received it. The defendant has also not shown that any prejudice to itself or to third parties is at all likely by reason of the timescale within which matters have progressed, whether with regard to its ability to reconsider its decision or in respect of the availability of funding from the Welsh Government or otherwise.

86. Since this judgment was circulated in draft, the parties have reached substantial agreement as to the terms of the appropriate order. I shall make an order accordingly. The defendant has asked for permission to appeal, and I shall adjourn that application for consideration on the papers, with directions as to the filing of short written representations in that regard.
