

Neutral Citation Number: [2024] EWHC 1798 (Admin)

Case Number: AC-2024-LON-000471

**IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 July 2024

Before:

THE HONOURABLE MR JUSTICE CHOUDHURY

Between

The King

on the application of

LONDON BOROUGH OF ISLINGTON

Claimant

-and-

SECRETARY OF STATE FOR EDUCATION

Defendant

-and-

**(1) THE INTERIM EXECUTIVE BOARD OF THE
SCHOOL**

**Interested
Parties**

(2) THE BRIDGE MULTI-ACADEMY TRUST

**PAUL LEVY-ADOPHY ON BEHALF OF 'PARENTS
SUPPORTING POOLES PARK PRIMARY SCHOOL'
(AN UNINCORPORATED ASSOCIATION)**

Intervener

Joanne Clement KC and Raphael Hogarth

(instructed by **London Borough of Islington**) for the **Claimant**

Alan Bates (instructed by **Government Legal Department**) for the **Defendant**

Paul Levy-Adopho, the **Intervener**, in person

Hearing dates: 8 & 9 May 2024

JUDGMENT

MR JUSTICE CHOUDHURY :

Introduction

1. Pooles Park Primary School (“the School”) is a mainstream primary school, maintained by the Claimant Council, the London Borough of Islington (“the Council”). Following an inspection on 9-10 November 2022, the School was rated as “Inadequate” by Ofsted. That rating imposed a duty on the Defendant, the Secretary of State for Education (“the SSE”), to make an Academy Order under s.4(A1) of the *Academies Act 2010* (“the 2010 Act”). The effect of making an Academy Order is that the School would become an Academy under the control of an Academy Trust and would cease to be maintained by the Council. The SSE has the power to revoke an Academy Order under s.5D of the 2010 Act, a power which is, under the SSE’s policy, to be exercised only in exceptional circumstances. One such circumstance is that “the school would not be viable as an academy”. The Council considered the School to be unviable as a consequence of, amongst other matters, falling pupil numbers in the Borough, the surplus of school places, projected financial deficits and the Ofsted rating making it the only school in the Borough rated as “Inadequate” at the time. Its view was that the School should close but of course it would have no power to effect a closure if the School became an Academy. As such, the Council invited the SSE to revoke the Academy Order. However, the SSE declined to do so, having reached the conclusion, based on a ministerial submission, that the School *was* viable as an Academy. It is that refusal decision (“the Decision”), made personally by Baroness Barran (“the Minister”) on behalf of the SSE on 14 November 2023, that is the subject of the Council’s application for judicial review. The Council contends that the Decision was, amongst other matters,

irrational and based upon inadequate inquiry. On 21 March 2024, Morris J granted permission, granted interim relief prohibiting the taking of any irrevocable steps towards conversion to an Academy, and expedited the claim.

2. The Council is represented by Ms Clement KC with Mr Hogarth, and the SSE is represented by Mr Bates. I am grateful to all Counsel for their written and oral submissions. Shortly before the hearing, I granted permission to the group, “Parents Supporting Pooles Park Primary School” (“PSPPPS”) to intervene and to make brief submissions against the Council’s application. I was assisted in this regard by written and oral submissions made by Mr Levy-Adophy on behalf of PSPPPS. I am grateful to Mr Levy-Adophy for his clear and cogent submissions in favour of the School remaining open and as to the School’s importance to pupils, parents and the local community.

Factual Background

3. The Council is responsible for strategic planning in relation to education within its area. One of the factors to be taken into account in determining strategy is the demographics of the area, which can of course change over time, and which in turn will affect pupil numbers. The evidence of Jonathan Abbey, the Council’s statutory Director of Children’s Services, is that there has been a significant reduction in pupil numbers across London in recent years. This is due to a number of factors, including falling birth rates, falling EU migration, and families moving out of Central London. The Council’s School Organisation Plan for 2022-25 (“the Plan”) summarises the position as follows:

“... across our 46 primary schools, almost one in five Reception places are unfilled. The primary roll dropped by over 300 pupils across all year groups in the last year. This has contributed to

surplus places across all primary schools in all year groups totalling over 18%, or 2,800 of places. At six primary schools, surplus places exceed 30%. We expect this surplus to continue to rise if no action is taken.”

4. As schools receive most of their funding on a “per pupil” basis, carrying a significant number of surplus places imposes significant financial pressures. Many costs lines for a school, such as property and some staff costs, are fixed, irrespective of the number of pupils attending. When a school is operating significantly below capacity, its funding will be much reduced, but those fixed costs will still have to be met, resulting in a financial deficit, which can affect the standard of educational provision.
5. Mr Abbey explains that the surplus of places across the Borough needed to be rationalised. One means of achieving this is to reduce what is known as the Pupil Admission Number or “PAN” at a school. The PAN is the number of school places that the admissions authority (i.e. the Council) must offer in the age group at which pupils are normally admitted to a school. For the School, the PAN is the number admitted to the Reception year. The PAN is expressed, not as the number of individual pupils admitted, but as a number of “Forms of Entry” or “FE”, with each FE equating to 30 children. Thus, if a school has a PAN of 2FE, the Council must admit up to 60 pupils to the school. The reduction of the PAN is subject to a complex and time-consuming statutory process.
6. It was in that context of falling pupil numbers that, on 13 October 2022, the Council’s Executive Board adopted the Plan, which sets out the Council’s strategy for “manag[ing] surplus capacity in our schools to ensure the best outcomes for our children and young people and sustainability of schools”. The Plan noted that the Council has “a legal duty to ensure that every child has a

school place and need[s] to plan to ensure that we have capacity for this. However, we must also ensure the financial viability of every school and pupil numbers are critical to determining the funding of a school.”

7. The Plan sets out how the Council proposed to address the surplus of school places, explaining that there would be an iterative process involving review of the viability of smaller schools with no capacity, improvements in the quality of education across all schools, reducing the pressure of inflated energy costs by supporting amalgamation and federation, and supporting an inclusive culture across schools through the development of Additional Resourced Provision (“ARP”) in mainstream school sites. ARPs are one of the means by which local authorities can make provision for children with special educational needs (“SEN”).
8. The Plan stated that capacity reduction would be “phased”, but also stated that closure, though a last resort, “may have to be considered”. The Plan contained a commitment to working in partnership with the Regional Schools Commissioner (now known as the “Regional Director” or “RD”), and set out criteria that would guide proposals to reduce capacity. These criteria included: (i) financial stability, (ii) level of surplus capacity, (iii) role projections, (iv) parental preference for each school, (v) quality of education, (vi) the demographics of the pupil population, (vii) available steps to improve viability, (viii) opportunities for merger, (ix) the condition of the school buildings, and (x) the effect on any other services run by the school.
9. At that stage, the proposal for the School was to reduce its PAN from 1.5 FE, and that the Council should prioritise the School for “potential co-location of

other service provision in the community”. The proposals for other schools in the area included that for Montem primary school, which was to reduce its PAN from 2FE to 1FE from September 2024. It is notable that there was no proposal to close the School as at the date the Plan was adopted.

10. The School is a maintained mainstream primary school, with 207 pupils¹ on the school roll between Reception and Year 6, as at the date of these proceedings.
11. The School was, like all other state-funded schools, subject to Ofsted inspections from time to time. Following an inspection on 9–10 November 2022, Ofsted judged the School to be “Inadequate”. It concluded that the School’s curriculum was poorly designed and implemented, that pupils did not develop sufficient knowledge and understanding, and further comments included that the quality of education, early years provision and leadership and management were all inadequate. Ofsted concluded that, pursuant to section 44 (1) of the *Education Act 2005*, the school needed to be placed in special measures.
12. The Ofsted rating of “Inadequate” triggered the operation of s.4 (A1) of the 2010 Act, which requires the Secretary of State to make an Academy Order in respect of a school so rated. Accordingly, on 13 February 2023, the RD made an Academy Order in respect of the School on behalf of the Secretary of State.
13. The first phase of the Plan involved a total reduction of 2.5 FE, through the amalgamation of two schools in the Barnsbury planning area and PAN reductions across the Borough. As Mr Abbey explains in his evidence:

¹ Claimant’s Statement of Facts and Grounds at [43].

“...our plan was to approach capacity reduction in a phased way, starting with PAN reduction and then considering closure as a last resort. The first phase involved a total reduction of 2.5 FE, through the amalgamation of two schools in the Barnsbury planning area (achieving a reduction of 0.5 FE) and agreed PAN reductions at Highbury quadrant primary school in Highbury, Montem school in Hornsey, New North Academy in Canonbury, and the School (achieving a reduction of 2FE). That reduction, equivalent to 75 places, was clearly not sufficient to deal with the 402 vacancies identified ...”

14. The Council, therefore, considered it necessary to proceed to Phase 2 of the Plan. This included a proposal to close the School. Although the decision to proceed to phase 2 of the Plan only came after the Ofsted rating in respect of the School, the Council maintains that the decision to do so was not made simply because the School was in special measures. I accept that contention. It is clear from the content of the Plan, the matters being considered by the Council at that time, including the number of surplus places, financial budgets and sustainability, that the decision to move to phase 2 was a natural progression from what had gone before and was not triggered solely by the Ofsted rating, although it might be fair to say that the Ofsted rating was what effectively tipped the balance in favour of closure of the School.
15. In fact, the proposal to close the School arose in light of a detailed evaluation of the status of all of the schools in the area to assess their sustainability. This evaluation considered various factors against each school, the results of which were entered into an Evaluation Matrix, producing an overall score for each school. The factors taken into account in the Evaluation Matrix included the percentage of vacancies, first preferences as a percentage of PAN, financial and educational standards, as well as the Ofsted rating.

16. When evaluated against the matrix, the School was the lowest scoring community school in the borough, with a score of seven points. The School had 42% vacant places, which was only marginally greater than three other schools whose vacancy rates were 36%, 38% and 40%, respectively. The matrix scores for those schools have not been provided. Other key factors in the evaluation included the following:
- i) the School had the lowest number of pupils on roll of all the schools in the Planning Area.
 - ii) The number on roll (“NOR”) had been declining for several years with further falls projected.
 - iii) First choice preferences for the school were lower than nearby schools. As at the date of this analysis – 8 March 2023 – the School was projected to end the 2022 – 23 year with a deficit of at least £78,000 and was also projected to be in deficit for the following year.
 - iv) Neighbouring schools had spare capacity to the extent that it would be possible for groups of children and even whole year groups to move together from the School.
 - v) The school was the only Islington primary school without a ‘good’ or ‘outstanding’ Ofsted rating.
17. More recent figures suggest that final year-end position for 2022 – 23 was a deficit of around £170,000, an increase accounted for by processing of pension costs. The end of year deficit for 2023 – 24 was, at the time this claim was filed, projected to be around £259,000.

18. The Council conveyed its position on the viability of the school in briefing notes to the Secretary of State on 8 and 31 March 2023 and 19 April 2023.
19. Internally, a report dated 9 March 2023, recommending the adoption of phase 2 and closure of the School, was prepared for the Council’s executive. On 20 April 2023, the Council’s executive approved the recommendation and resolved to begin an informal consultation on the closure of the School at the end of the year. The consultation document was published on 28 April 2023, and the consultation ran until 5 June 2023. Responses to the consultation were overwhelmingly against the proposal to close the School. There is strong community support for the school as is made clear by the submissions of the PSPPPS.
20. As the Council would lose the power to proceed with the closure of the School if it were converted to an Academy, the Council sought to have the Academy Order revoked. Accordingly, by way of an email dated 25 April 2023 from Mr Abbey to the RD, Claire Burton, the Council formally invited the Secretary of State to exercise her discretion to revoke the Academy Order. In that email, Mr Abbey stated as follows:

“As DCS, it is my duty to champion children and families, with the proposal to match a sponsored academy with Pooles Park, that it would severely compromise the falling rolls situation in Islington. Should our proposal to close Pooles Park not progress, I would then be forced to explore options around the closure of another local school in the same planning area, as part of our implementation of our School Organisation Plan. To close a school rated as good in the same locality, seems perverse and does not sit well, when there is sufficient capacity to place all the pupils attending Pooles Park at schools that are currently rated good or better and are all within walking distance.”

21. Meanwhile, the Secretary of State sought to identify a suitable sponsor for the School. It is the role of the RD, acting on behalf of the SSE, to identify the most suitable Academy Trust to support the particular school, and to broker the new relationship between that Academy Trust and the school. In addition, where a request is made to revoke an Academy Order, it is the responsibility of the RD to consider that matter and form a view, although the actual decision as to revocation is taken by the Minister based on information and advice as to whether revocation of the Academy Order is the most appropriate course.
22. The RD's officials used their extensive knowledge of Academy Trusts and of the local area in order to identify trusts that had the ability and the resources to provide the school with the support needed. The Secretary of State approached five trusts, four of which were Multi-Academy Trusts ("MATs") already operating in Islington. In writing to the trusts to inform them that a suitable sponsor was being sought, the project lead ("PL") in the RD's team was careful to alert the trusts to the fact that there were concerns relating to viability at the School given the level of surplus places in the area.
23. Two of the five trusts, ARK and CoLAT, responded on 31 March 2023 to state that they did not want to be considered as sponsor, citing concerns about viability and taking on a 1FE school with falling pupil numbers. Another trust, Bellevue Place Education Trust, had initially shown some interest but subsequently withdrew from the process. Two trusts did express an interest in taking on the School. These were Learning in Harmony ("LiH") and The Bridge Multi-Academy Trust ("the Trust"), which already ran several schools in Islington, including Hungerford School.

24. The Council undertook its own analysis of the trusts that had shown an interest in taking on the School. Ms Burton comments that this was an “unusual step” and not something that local authorities usually carry out. The Council concluded that none of the sponsors had “a credible growth plan that would support the educational and financial viability of [the School]”.
25. In the SSE’s view, the fact that two trusts had shown a keen interest in taking on the School is significant. As Ms Burton explains:

“... My officials and I generally place considerable weight on the detailed analysis conducted by trusts in order to establish whether a particular school, in a particular location, is capable of making the necessary improvements, and/or is “viable” going forward. That is especially so where the trust in question is highly experienced and/or has relevant local knowledge. Experienced trusts do not take on additional schools – especially schools that have received an “inadequate” rating – without very careful thought and “due diligence””.

26. Ms Burton also comments that trusts have boards of directors who are responsible for (amongst other things) the financial health of the schools that they manage and that it is for them, using their expertise and knowledge to make judgments as to whether or not they will be able to support a particular school to succeed. She further notes that trusts have an interest in only taking on those schools which they consider, with a reasonable degree of confidence, can be turned around successfully, and that trusts conduct “careful due diligence to ensure that they have such confidence”. It is in that context that Ms Burton states that:

“... The key from my point of view is to find out whether the trust in question believes – based on its having a carefully thought out plan – that it can create a model that renders plausible the future thriving of the school. An important part of my role and that of my team is to assess the extent to which we

have confidence in what the trust tells us – rather than (necessarily) to replicate the analysis that they have conducted.”

27. Both LiH and the Trust submitted documents in support of their bids to sponsor the School. They both referred to the fact that they had successfully addressed falling rolls and raised performance in cohorts at other schools that had similar problems and set out the strategies for achieving the same with the School. The PL invited further detail from the two remaining trusts, probing them as to how they would work to increase pupil numbers in order to “make the school viable going forward”. Both trusts said that they would operate the School as a 1FE school, which was consistent with the Council’s own strategy under phase 1 of the Plan. More specifically, LiH’s response included the following:

“It is important that we preface our answer to this question with a healthy dose of realism. It won’t be easy to immediately raise pupil numbers at the school; there is clearly a diminishing pupil population in the area, and the inadequate judgement is also likely to have a short-term impact on parental preferences. We are, however, confident that we could stabilise numbers so that the school operates at capacity as a one form entry school within three years. This means that we will have to invest some trust reserves into the school in the short term. Some difficult choices may need to be made, for example we will need to radically (sic) consider where there may be duplication across New North and Pooles Park and rationalise.

In the long term the best way to stabilise numbers is to offer a great education so that the school is a school of choice...”

28. Central to the Trust’s proposal was the possibility of establishing a “shared resource” model with Hungerford for which it was already the sponsor, and which would result in costs savings. Hungerford had been rated ‘Inadequate’ following an Ofsted inspection in 2017 and was therefore subject to an Academy Order. A more recent Ofsted inspection in 2022, when Hungerford was under the control of the Trust, rated it as “Good” although there are still some shortcomings in relation to academic performance at the school. In a

document entitled “Why Pooles Park?” submitted with the Trust’s bid, Dr Penny Barratt, CEO of the Trust, said as follows:

“We would propose designing a staffing structure which runs across both schools, with one Headteacher, one Deputy Headteacher and staff who work on both sites. This would enable us to share knowledge and skills across the two schools. It also makes both schools financially viable for the foreseeable future.

In addition, we would replicate our approach to special educational needs at Pooles Park. We would accept all pupils who wanted to attend the school or who the Local Authority chose to place at the school (including special school overflow placements). The school is in Islington but is on the border of Islington, Haringey and Hackney. Our willingness to accept and work with pupils with significant special educational needs could be communicated to all three local authorities. All are having real difficulties finding placements for all their pupils identified as having special educational needs. We could provide a solution. This also adds further security to the viability debate.

In time, the SEN provision could be formalized into a unit for both schools.

Sponsoring Pooles Park provides a local solution for the pupils presently attending the school, ensures that Hungerford Primary School remains financially viable by staffing across the two schools and provides a model of inclusion which will meet the needs of a large number of pupils with significant special educational needs, at both schools. This could provide a model for other areas across London where they are also facing falling rolls but want to maintain local schools and urgently need additional provision for pupils with special educational needs which is local and cost-effective.”

29. The Trust proposed to encourage applicants with SEN across both schools, developing a centre of expertise for SEN teaching within a mainstream setting. The Trust considered that this would enable both the sharing of knowledge and skills, and (given the increasing number of pupils with SEND and the difficulties attached to placing them appropriately) was likely to attract pupils

both from within and outside the local authority, supporting the long-term viability of the School.

30. The PL had asked the Trust for information as to how they had addressed performance issues at Hungerford school given that it would be necessary to make similar improvements at the School. Dr Barratt explained that the location of and pupil base at the School was amongst the most deprived of all schools (quintile 5) and that about 13% of pupils had an Education and Health Care (“EHC”) plan compared to a national average of around 1.8%. It was in that context, said Dr Barratt, that the performance figures must be viewed. She further stated that there had been an improvement on the previous year amongst this cohort, which had a very high level of SEN including pupils with autism or non-verbal difficulties. The results were discussed with Ofsted, who on seeing the context and that the Trust had things in place to improve the situation, did not consider this an issue.

31. Dr Barratt went on to state:

“We also know that if we are successful in sponsoring the school we are likely to attract a much higher number of pupils with special educational needs, as it is known that we can and will meet their needs and there are a large number of primary school pupils with significant SEND not yet placed. We know this through our place planning meetings for The Bridge and for Hungerford. These pupils will bring additional funding. These are not included in the budget projections.”.

32. The reference here to “The Bridge” is to a separate special school operated by the Trust and located in Islington.

33. On 1 June 2023, the PL requested more information from the Trust in relation to the pupil numbers for the 23/24 academic year within the financial forecast and queried whether these were realistic. Dr Barratt replied:

“... [t]he pupil numbers are based on 196 students. I believe the previous year 2021-22 they were 217, so a fall of around 10%. This is a best guess as I don’t know what the pupil count is for the last census in May 23 and what new admissions they are expecting in Sept 23.”.

34. The PL’s response was that he was concerned that the numbers may be too optimistic as his understanding was that there are currently 186 pupils on roll with the potential for numbers to drop further. The PL queried whether the Trust’s model was flexible enough to allow it to support this number of pupils and still achieve an in-year surplus. Dr Barratt replied that she had confirmed with the Head Teacher of the School that the NOR was 198 and that he had indicated that he expected the figures to be “around the same” for September.

35. On 20 June 2023, Dr Barratt sent the PL a financial assessment that modelled forecasting scenarios (“the Modelling”). This set out a proposal as to how the School would operate with both current projected mainstream pupil numbers and lower numbers with increased SEN intake. The Council was not aware of the Modelling document until late in the proceedings. It contends that the Modelling demonstrates that the Trust’s own assessment of the viability of the School was based on an assumption that the Council would fund a “special unit” at the School and provide £870,000 of funding for this unit in 2024/25 and £1.16 million per annum thereafter. The Council’s position is that it would not fund any such unit and that as such the Modelling was based on a fundamentally incorrect assumption. The Council contends that once that error is accounted

for, the figures clearly demonstrate that the School would be in deficit and plainly unviable. I shall return to this document below.

36. The PL summarised the various options available to the RD in an options paper presented to the Advisory Board for the London Region. The options included at that stage: transfer to LiH, transfer to the Trust, or closure by the Council. The Advisory Boards, formerly known as “Head Teacher Boards”, are responsible for advising and challenging the RD on Academy-related decisions. The Advisory Board is comprised of eight members, all of whom have extensive experience of leadership in the education sector. One of the members of the Advisory Board is Dr Barratt. However, given the potential conflict of interest, she did not participate in any decisions relating to the future of the School.
37. The PL’s summary weighed up the three options across several pages of analysis and concluded as follows:

“25...Closure of Pooles Park would help the Council to reduce surplus in the borough by removing 3 forms of entry from the primary system, it would also be likely to increase numbers at other local primary schools who are also struggling to fill places. However, there is also currently the possibility that an academy sponsor could give the school a long term future, and the school could remain open to serve the local community, albeit at a reduced size. The Council have not put forward any alternative options other than closure. Given that we have two academy sponsors who are keen to sponsor Pooles Park and are confident that they could make it viable as a 1xFE school, we feel that sponsorship by a strong sponsor, in this case the Trust, is a preferable option to closure. This would allow the school to remain open and education provision to continue to be locally accessible in a deprived area. However given the availability of places in other schools locally, all of which are good or better, it is a finely balanced decision.” (Emphasis added)

38. The Advisory Board (without Dr Barratt) considered the options, and there was, according to Ms Burton’s witness statement, a clear consensus that “the Trust’s

was a credible, viable option which was by a considerable margin preferable to the closure of [the School]”. The RD considered that the Trust had a strong model of trust-level governance arrangements and was led by a highly experienced educational professional who had been head teacher of several successful schools, a national leader of education and an Ofsted inspector. The RD also considered that the Trust had: a clearly articulated school improvement strategy; a strong financial position; several schools in Islington rated either “Outstanding” or “Good”; experience of improving an “Inadequate”-rated mainstream school (namely Hungerford) albeit there was still progress to be made; and had strengths in the particular areas identified in the School’s Ofsted report as requiring improvement. Ms Burton states that she gave particular consideration to the question of whether the Trust had properly considered the viability issues raised. She was aware from her own experience as RD of the challenge of surplus places facing local authorities across London and that many of these are facing an increasing demand for SEN places which they struggle to meet. She noted that the vacancy rate at Hungerford itself was running at 56% (it being a 2FE school with 185 students on roll against a capacity of 420). However, it had been explained to the Advisory Board that some of the capacity at Hungerford was being used to cater for the needs of the students of a special school located on-site at Hungerford (The Bridge Satellite Provision). Ms Burton was impressed by the Trust’s creative approach to using the physical capacity at Hungerford school, which also had the benefit of generating income to meet the costs of the school’s operations. Ms Burton was also impressed that the Trust’s proposal sought to take full advantage of the possible relationship across Hungerford and the School with both schools to be run as 1FE schools

sharing staff resources. In short, she felt the model proposed by the Trust “offered an innovative approach to the dual challenges of surplus places and increasing demand for high quality provision for students with SEND within a mainstream setting”.

39. The RD acknowledged that there was an element of risk in that the shared leadership structure might not produce the efficiencies required or that the demand for places for students with additional needs will not be realised. She concluded, however, that:

“... From my knowledge of the demand for places across London and from a knowledge of the Bridge MAT’s experience, this was, on balance, a sensible and pragmatic decision that made strategic sense. I thought that the proposal deserved to be given the opportunity to succeed. I was reassured that my board members all highly experienced leaders in the sector, agreed with me, and were equally excited by the opportunity that this proposal offered.”

40. On 22 June 2023, the Council’s Executive decided to proceed with the proposal to close the School “to address the significant decline in pupil numbers, if the Department for education do not identify an Academy sponsor...”.
41. By letter dated 26 June 2023, the RD formally communicated the decision to appoint the Trust as sponsor of the School.
42. The Council contends that the decision to appoint a sponsor trust came as a “complete surprise”. However, I cannot see how that could be the case given that there had been an Academy Order in place for some months and the Council had conducted its own analysis of three of the trusts that had expressed an interest in taking over the school. The SSE had not objected to consultation on closure taking place but did not thereby indicate any assent to such closure. The

decision to appoint a sponsor trust certainly did not come “out of the blue”, although it was clearly a disappointment to the Council.

43. That disappointment was expressed in strong terms in an email dated 29 June 2023 from Mr Abbey in which he stated that the decision to appoint a sponsor undermined the Council’s strategic plan to manage school places across the borough and that the “unprecedented decline in pupil numbers in inner London” constituted an exceptional circumstance warranting revocation. The letter went on to state:

“The Ofsted inadequate judgement in November 2022, together with the 56% surplus Reception capacity and a growing financial deficit budget, all demonstrate the request for a revocation of the Academy Order, allowing the Local authority can proceed to closure, is in the best interests of children.

Our challenge is based on the section within the Schools Causing Concern Guidance that references the DFE decision being based on the ‘best interest of children.’ Appointing an academy trust does not support the ‘best interest of children’ because we will be forced to close another good or outstanding local school.”

44. At a subsequent meeting between the RD’s officials and the Council on 21 July 2023, it was suggested by those representing the Council that the decision was a “political decision in support of academisation”. That suggestion was refuted. On my reading of the papers, I can see no sign that the decision was driven by political concerns. There is undoubtedly an underlying belief on the part of the RD that academisation is generally a good thing, a belief that is consistent with the view of the Government at the time that:

“...schools in general should benefit from being part of an academy trust. In the Secretary of State’s view, transferring underperforming-maintained schools to academy trusts is the most effective means of securing their rapid improvement”: Schools Causing Concern Guidance at p.39.

45. However, the decision to appoint the Trust as sponsor was based on various factors as identified above, none of which appear to be political or influenced by political objectives.
46. On 13 July 2023, the RD made a submission to the Minister that the request to revoke the Academy Order should be refused. Attached to the submission were various documents, including the options paper, the Plan, the Council’s consultation document and its briefing notes on the School.
47. The Minister followed up with a meeting with her officials before making a decision. The Minister stated that she wanted to be clear that the Advisory Board was doing the best for the children of Islington and not focusing too much on developing the Trust as a trust. The Minister noted that the results at Hungerford school were relatively poor and that there were falling rolls in the Borough. Further information was sent to the Minister in relation to the performance at Hungerford school. The Minister subsequently agreed that the appropriate course appeared to be to support the RD’s recommendation. The Minister’s decision was not sent out at that stage and therefore remained potentially subject to change.
48. On 21 July 2023, the Council sent a pre-action protocol letter challenging the refusal to revoke the Academy Order. The SSE responded contending that the proposed claim was premature as no final decision had yet been taken on the request to revoke the Academy Order.
49. On 3 November 2023, the RD submitted a second submission (“the Submission”) on the Academy Order revocation request. This further submission was made in order to deal with the concerns raised by the Council’s

pre-action protocol correspondence. The Minister was then provided with the same documents as before as well as, amongst other matters, the minutes of the Council’s executive meeting on 22 June 2033 (at which the decision to close Poole’s Park was confirmed), and the pre-action protocol correspondence.

50. The Submission set out the background, including the Council’s preferred option of closure and the selection of the Trust as preferred sponsor. In a section headed “Advice”, the Submission referred to: (i) the discretion to revoke an Academy Order and that this was only to be exercised in exceptional circumstances, one such circumstance being that the SSE considers that the School would not be viable as an academy; (ii) the definition of “viability” set out in internal guidance; and (iii) the RD’s view that the School remains viable as an academy and that the Academy Order should not be revoked.

51. The Submission went on to highlight the key concerns raised by the Council. These were: (i) the existence of surplus places in the planning area and the impact of not closing the School on other schools in the area; (ii) the viability of the School given the declining roll; (iii) educational standards at the School and the analysis of factors showing it to be the lowest scoring community school in the Borough; (iv) the Council’s view that none of the potential sponsors would be able to secure swift and sustainable improvement with the Trust’s performance at Hungerford being questioned as it still had a vacancy rate of 56%, six years after becoming an academy; and (v) the effect of not closing the School on the Council’s ability to strategically plan the school estate (and thereby disabling it from meeting its statutory duties to manage school places as set out under s.14 of the *Education Act*).

52. Each of these concerns was addressed in the Submission. In conclusion, the recommendation in the Submission was as follows:

“We recommend that you, Baroness Barran, refuse the request to revoke the academy order issued to Pooles Park because we have identified a strong academy sponsor who is willing to support the school, and following our policy consider the school to be viable as an academy. We have considered the concerns raised by Islington and believe these can be addressed through this strong sponsor. Keeping the school open will allow a strong local sponsor to support the school and provide additional places for students with SEND who are unable to access a place elsewhere, it will also ensure the school remains opens as a resource for the local community, including the community garden on the site. **Do you agree?**”

53. On 14 November 2023, Baroness Baron, the Minister for the school system and finance, agreed with the recommendation in the Submission and refused to revoke the Academy Order.

54. In summary the Decision stated:

- i) Despite the surplus places in the School and the local area, the Minister is “content” that the School has “a viable long-term future” with a strong academy sponsor. Having considered all the evidence, the Minister considered that the School “would be viable as an academy”. Under the Trust, the School has the “potential to not only improve standards for pupils but also to increase pupil numbers and to expand the special educational provision available in the local area”. The Minister’s view is that it is in the best interests of pupils that the school remains open and is “given the opportunity” to improve.
- ii) The Trust has, “set out a plan to ensure the long-term viability” of the School by operating a shared resource model across both Hungerford

and the School. As the Trust has extensive expertise operating special schools, they plan to admit “any child that needs a place who has been unable to obtain a place in another local school or special school”. There is a “strong interest” in developing extra specialist support for children with SEND within mainstream settings, a need which the Trust would be well placed to meet.

- iii) The new sponsor will operate the school at 1FE (that is, accepting one class of pupils each year) and will not seek to increase forms of entry to add to surplus in the area. The Minister said that the decision does not prevent the Council from planning school capacity, as there are other options available to manage the surplus of places in the Hornsey planning area, including “reutilisation of space for different purposes, amalgamation of schools, co-location of services and reduction of PAN in schools”.
- iv) The Minister noted that a strong MAT has the capacity and experience to turn around a school with poor performance, as demonstrated by the Trust’s work with Hungerford School, which received a ‘Good’ Ofsted judgment in October 2022. The Trust operates five schools in Islington, including four special schools, so knows the local Islington context. The Trust is in a stable financial position and “has plans to address surplus places at Hungerford School”. Although school performance data at Hungerford School is below local and national average, results show improvement, and the Trust recognises that there remains more to be done to improve performance.

- v) Receiving an inadequate judgment does not, on its own, justify a local authority selecting that school for closure.

Legal Framework

55. By s.13(1) of the *Education Act 1996* (“the 1996 Act”) a local authority must:
- “contribute towards the spiritual, moral, mental and physical development of the community by securing that efficient primary education and secondary education [...] are available to meet the needs of the population of their area”.
56. By s.13A(1), read with s.13A(2)-(5) of the 1996 Act, the Council must exercise these functions with a view to: “(a) promoting high standards, (b) ensuring fair access to opportunity for education and training, and (c) promoting the fulfilment of learning potential by [all persons under the age of 20].” By s.14(1)(a) of the 1996 Act, the Council “shall secure that sufficient schools for providing [...] primary education [...] are available for their area”. Local authorities have a number of powers with which to discharge these functions, including the powers to determine admissions arrangements and reduce the PAN, and the power under Part 2 of the *Education and Inspections Act 2006* (“the 2006 Act”) to establish, discontinue or alter a school. When exercising these powers, a local authority must have regard to guidance published by the Secretary of State (“the School Closure Guidance”), which provides that reasons for closing a maintained school include where there are surplus places elsewhere in the local area which can accommodate displaced pupils and there is no predicted demand for the school in the medium to long term; or it is no longer considered viable. If a maintained school is converted to an Academy, a local

authority no longer has the power to discontinue the school. This is because the power in s.15(1) of the 2006 Act does not apply to Academy schools.

The Council's SEN commissioning functions

57. Local authorities owe a number of statutory duties to children with SEN under Part 3 of the *Children and Families Act 2014* (“the 2014 Act”). The local authority must identify children and young people in its area who have or may have SEN (s.22) and is responsible for those children once they have been identified or brought to the authority’s attention (s.24). Under s.27, all local authorities in England are under a duty to keep under review “the educational provision, training provision and social care provision made in its area for children and young people who have special educational needs or a disability”, and to “consider the extent to which the provision [...] is sufficient to meet the educational needs, training needs and social care needs of the children and young people concerned”. A local authority is under a duty to prepare and maintain an EHC Plan where it is necessary for special educational provision to be made for a child or young person in accordance with such a plan, and the local authority is then under a duty to secure the special educational provision specified in the EHC Plan: ss.37(1) and 42(2).
58. The arrangements for commissioning/funding SEN provision in mainstream schools or Academies are set out in the ‘High needs funding: 2024-2025 operational guide’ (“the High Needs Guide”) and the SoS’s operational guide on the notional SEN budget for mainstream schools for 2024 to 2025. In summary, local authorities are provided with a “high needs funding block” as

part of the Dedicated Schools Grant by the Secretary of State. SEN provision in mainstream schools and Academies is funded through: (1) the “notional” SEN budget (an identified amount within the school’s normal delegated budget, or an Academy’s general annual grant) to meet the cost of special education provision for all children - up to £6,000 per pupil; (2) “Top up” funding, provided from the high needs funding block to fund the additional cost of a particular pupil’s special educational provision over and above the £6,000 threshold expected to be funded by the school/Academy out of its normal funding; and (3) “high needs place funding”: provided if a local authority decides to commission a SEN unit or Additionally Resourced Provision (“ARP”) in a mainstream setting. If an authority decides to commission this provision, it will fund a certain number of places at £10,000 per place (made up of £6,000 place funding together with the £4,000 ordinary per pupil funding if the place is occupied) and pay this £10,000 if the place is not yet occupied.

The Academies Act 2010

59. By s.4(A1) of the 2010 Act, the Secretary of State must make an Academy Order in respect of a maintained school in England that has been graded ‘Inadequate’ by Ofsted and has been deemed to require significant improvement or placed in special measures. Such a school does not become an Academy immediately. Rather, the Secretary of State will identify a sponsor (an existing Academy trust) to try to improve the school. By s.6(2) of the 2010 Act, the local authority must cease to maintain the school on the date on which it opens as an Academy.
60. The Secretary of State has a discretion to revoke an Academy Order before entering into any Academy agreement. That is the discretion at issue in the

present case. Section 5D (1) of the 2010 Act states that “the Secretary of State may by order revoke an Academy Order under section 4(A1) or (1)(b).” This is a broad power, but, like any statutory power, it must be exercised lawfully. The Secretary of State has a number of policies on revocation: one published policy, and a number of unpublished policy documents.

(i) Schools Causing Concern Guidance

61. The Schools Causing Concern Guidance (“the SCC Guidance”) contains the Secretary of State’s published policy on revoking Academy Orders. This states that the power to revoke an Academy Order will only be used in “exceptional circumstances” as it is the Secretary of State’s view that schools in general should benefit from being part of an academy trust. The guidance gives three examples of “exceptional circumstances”. The first is that “[t]he Secretary of State considers that the school would not be viable as an academy (in these cases, we would expect the local authority to close the maintained school and the Secretary of State can direct them to do so if necessary)”. The policy goes on to state that the examples are not exhaustive, and the Secretary of State “will consider each case on its individual merits”, taking account of any reasons put forward as to why revocation is in the best interests of the pupils served by the maintained school.

(ii) Internal Viability Guidance

62. The “Viability guidance: dAO² revocation and school closure” (“the Internal Viability Guidance”), dated September 2018, explains that “[t]he minister is

² “directive academy order”: an internal departmental term used to denote an Academy Order issued as a result of an ‘inadequate’ Ofsted rating.

setting a high bar to deploy the agreed policy” on revocation. At paragraph 1, the Internal Viability Guidance states the Government’s ‘definition’ of viability:

“A financially unviable school is one where:

- a. projections indicate large financial deficits going forward; and
- b. there is no realistic prospect of it achieving financial viability due to low numbers on roll and insufficient demand for places based on projections of need and capacity in the local area over the medium to long term and therefore future levels of surplus places”.

63. This guidance sets out a procedure for an assessment of viability. In summary, the PL is to (a) commission a “viability assessment” from the local authority by sending a template letter requesting a range of data; and (b) the PL should then assesses this information, reach a view on viability and prepare a full viability assessment in the form set out at Annex C for consideration by the regional headteacher board (now the Advisory Board). The RD should then reach a conclusion on viability on the basis of this analysis, followed by a Ministerial Submission.

(iii) Internal Academy Order Guidance

64. The “Directive Academy Orders: Full internal operational guidance”, dated July 2020 (“the Internal Academy Order Guidance”) states that “[t]he Secretary of State has agreed four circumstances under which an Academy Order/ dAO may be revoked..., subject to a ministerial submission”. These are essentially the three in the SCC Guidance, plus a fourth in which a school is judged as ‘requires improvement’ overall but is assessed as ‘good’ in relation to leadership, and improvements are not as a result of support from the sponsor. Against (only)

these four circumstances, the answer to the question, “Can dAO be revoked?”, is listed as “Yes”.

Grounds for seeking judicial review

65. The Council contends that the Decision is unlawful on five grounds:

- i) First, the Secretary of State’s conclusion that the School is viable was irrational.
- ii) Second, the Secretary of State failed to take any, or any reasonable, steps to acquaint herself with relevant material in breach of the *Tameside* duty (*Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014).
- iii) Third, in all the circumstances, the refusal to revoke the Academy Order was irrational.
- iv) Fourth, the Decision unlawfully frustrated the Council’s exercise of its own strategic planning functions, so as to defeat the purpose of the relevant statutory scheme.
- v) Fifth, the Secretary of State unlawfully fettered her discretion by the over-rigid application of her policy on revocation.

66. I shall deal with each of these grounds in turn.

Ground 1: Conclusion on viability is irrational

Ground 1 - Outline of the parties' submissions.

67. Ms Clement submits that the conclusion that the School was viable was both irrational in the *Wednesbury* sense (i.e. was so unreasonable that no reasonable authority could ever have reached it) and demonstrably flawed in that there was no evidence to support an important step in the reasoning: see *R (Law Society) v Lord Chancellor* [2019] 1 WLR 1649 (approved by the court of Appeal in *R (Johnson) v Secretary of State for Work and Pensions* [2020] EWCA Civ 778). This is for six reasons:

- i) First the decision as to viability was based on modelling assumptions that were unarticulated (never having been drawn to the decision-maker's attention), unquestioned (never having been scrutinised by officials), and unreal. It is said that the Trust's model was dependent on millions of pounds of ongoing funding from the Council's high needs block, or an incorrect assumption that the Council would commission and fund a special unit or special school, without ever asking the Council whether it would do so. Absent that assumption, the Trust's own modelling showed that the School would not be viable. There were also erroneous assumptions as to the NOR and the Council's willingness to pay for restructure, redundancy and certain capital refurbishment costs. The Council states that it was not willing to pay for these matters. There was a failure to follow the SSE's own internal guidance on the assessment of viability.
- ii) There was no basis for the view that there was "potential [...] to increase pupil numbers", given the falling pupil numbers across London and the

rates of vacancies in Islington schools. If there existed children with SEND to take up the places – from Islington or neighbouring boroughs – they would have taken up the (many) vacant places at Hungerford, which has 288 vacant places. These facts are said to undermine the Modelling which presumes there are 30/40 children with SEN that are looking to be accommodated each year.

- iii) It was irrational to conclude that adopting the same model as in Hungerford at the School would make it viable given that Hungerford itself continues to operate with a high vacancy rate and under financial strain. Furthermore, the Decision failed to take account of the fact that the Trust's proposal would mean that there would be two schools, only 1.25 miles away from each other, offering similar provision and therefore competing for scarce pupils. This would threaten rather than promote viability.
- iv) There was no rational basis for the conclusion that sharing resources with Hungerford would make the School viable. This approach had been shown not to realise sufficient savings at other local schools and would not realise savings at the School, where there is no Deputy Headteacher in post to share, and the Assistant Headteachers already divided their time between senior leadership roles and classroom teaching.
- v) The conclusion on viability was based on assumptions/assertions about PAN reduction that were illogical and unsupported by evidence. The figures suggest that even with 1FE, the Reception class would be far

from full, and the School would still be faced with the difficulty of meeting fixed costs from a limited per pupil budget.

vi) The Minister wrongly gave weight to the financial stability of the Trust when the question is whether the School is viable. It is submitted that the Minister ought to have put aside the Trust's resources in coming to the Decision.

68. Mr Bates, for the SSE, submits that the issue of future viability is one of finely balanced judgment in respect of which there is a wide margin of discretion, and that the Court should be slow to interfere, particularly given the legislative default position that there be an Academy Order for a school rated 'Inadequate' and guidance that this should only be revoked in exceptional circumstances. He further submits that the SSE was entitled to afford significant weight to the Trust's views and assessments, its resources, the fact that its proposal would address a need that would not otherwise be met and the innovative nature of the proposal. The RD fully recognised that there was an element of risk in conversion, but it was far from irrational for the SS to decide that the proposal be given an opportunity to succeed.

69. The Submission contained all that was legally relevant for the Minister to determine the question of viability and there is no requirement for the Minister to descend to the level of detail involved in the modelling. It was entirely rational for the SSE to take account of the Trust's resources and to rely upon its assessment of the demand for SEN places and as to the potential savings to be achieved from the shared staffing structure that was proposed. The Council may

disagree with those assessments but that does not render the SSE’s reliance on them irrational.

Ground 1 - Discussion

70. In *R (Law Society) v Lord Chancellor* [2019] 1 WLR 1649 (approved by the court of Appeal in *R (Johnson) v Secretary of State for Work and Pensions* [2020] EWCA Civ 778), Leggatt LJ and Carr J (as they then were) explained irrationality as having two aspects:

“98...The first is concerned with whether the decision under review is capable of being justified or whether in the classic *Wednesbury* formulation it is ‘so unreasonable that no reasonable authority could ever have come to it’: see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223, 233—234. Another, simpler formulation of the test which avoids tautology is whether the decision is outside the range of reasonable decisions open to the decision-maker: see e.g. *Boddington v British Transport Police* [1999] 2AC 143, 175, per Lord Steyn. The second aspect of irrationality/unreasonableness is concerned with the process by which the decision was reached. A decision may be challenged on the basis that there is a demonstrable flaw in the reasoning which led to it—for example, that significant reliance was placed on an irrelevant consideration, or that there was no evidence to support an important step in the reasoning, or that the reasoning involved a serious logical or methodological error.”

71. Where a relevant decision is taken by a Minister based on information provided by others, a question arises as to how much of the detail considered by those others needs to be provided. In *R (National Association of Health Stores & Another) v Department of Health* [2005] EWCA Civ 154, the issue was whether, in deciding whether to make an order prohibiting the sale of a product for medicinal purposes, the decision-maker was required to know that one of the experts who opposed the ban was a leading authority on the subject and had carried out a particularly detailed scientific survey on the issue. Sedley LJ

considered that “it might ... have been very much better if the additional information noted had been part of the submission to the minister...”. Sedley

LJ went on to conclude, however:

“60... But what in the end I am unable to accept is that the minister had less information than the law required. The test is the familiar public law test: was something relevant left out of account by him in taking his decision? It is not, with respect to Mr Cavanagh, the different question whether his decision was vitiated by an error of fact (as to which see now *E v Home Secretary* [2004] *QB* 1044).

61.. I have found Brennan J's judgment in *Peko-Wallsend* particularly helpful here. He said (at 61):

“A decision-maker who is bound to have regard to a particular matter is not bound to bring to mind all the minutiae within his knowledge relating to the matter. The facts to be brought to mind are the salient facts which give shape and substance to the matter: the facts of such importance that, if they are not considered, it could not be said that the matter has been properly considered.”

Then at 64:

“[The] decision cannot be attacked on the ground that the minister has not given sufficient *weight* to detriment, but it can be attacked if the minister fails to have regard to detriment. The minister may deny any weight to detriment, but only if he has first had proper regard to that matter.”

And at 65:

“The department does not have to draw the minister's attention to every communication it receives and to every fact its officers know. Part of a department's function is to undertake an evaluation, analysis and précis of material which the minister is bound to have regard to or to which the minister may wish to have regard in making decisions The consequence ... is, of course, that the minister's appreciation of a case depends to a great extent upon the appreciation made by his department. Reliance on the departmental appreciation is not tantamount to an impermissible delegation of the ministerial function. A minister may retain his power to make a decision while relying on his department to draw his attention to the salient facts.”

62.. Given the constitutional position as this court now holds it to be, a minister who reserves a decision to himself — and equally a civil servant who is authorised by him to take a

decision — must know or be told enough to ensure that nothing that it is necessary, because legally relevant, for him to know is left out of account. This is not the same as a requirement that he must know everything that is relevant. Here, for example, much that was highly relevant was appropriately sifted by the Commission in formulating its advice and then distilled within the department in order to make a submission to the minister which would tell him what it was relevant (not simply expedient or politic) for him to know. What it was relevant for the minister to know was enough to enable him to make an informed judgment. This centrally included the Commission's advice and the reasons for it. It also included the fact of Professor Ernst's opposition and the essential reasons for it. All this he had.

63.. Did the legally relevant material go wider than this? In *CREEDNZ Inc v Governor General [1981] 1 NZLR 172* Cooke P drew the distinction, which our courts had previously failed to draw, between things which are so relevant that they must be taken into account and things which are not irrelevant and so may legitimately be taken into account. It is axiomatically only a failure to take into account something in the former class that will vitiate a public law decision. Whether something falls into this class is typically a mixed question of law and fact, although — as with the statutory requirements to consult the CSM and to take account of the Commission's findings — it may be a matter of pure law.

64.. Here, while — as I have said — it might have been better had a certain amount more been drawn to the minister's attention, I am unable to hold that the three matters omitted from the briefing were things which either the statutory purpose or the nature of the issue before the minister made so relevant that a lawful decision could not be taken in ignorance of them. They are all things which undoubtedly enhanced the case against a ban, but that is not the test. Their context is a departmental submission conveying among other things a view reached by the Commission after a debate initiated by Professor Ernst on his newly published meta-analysis. Professor Ernst's standing and the quality of his paper will have been of considerable significance to the Commission. For the minister, by contrast, it will have been part of the background and not, in my judgment, something he had to know in order to take his decision.

65.. The decision not to put before the minister the exact reasons given by Professor Ernst for his conclusion seems to me closer to the borderline. It is one thing for the minister to know that a member of the Commission was against a ban. It is arguably another to read in his own words why. But among the accepted facts is that the submission summarised Professor Ernst's objections to a ban. In the absence of a copy of the submission

itself there is no good reason to suppose that the summary did less than justice to the objections, and the gap closes.” (Emphasis added).

72. The question therefore is whether the Minister, in determining whether to exercise the discretion to revoke the Academy Order on the basis that the School was not viable as an Academy, had all the information that it was legally relevant for her to know in order to make that decision.

73. It is also relevant to bear in mind that the discretionary power in question was one which governed whether or not to revoke an Academy Order that was mandated by the terms of s.4A(1) of the 2010 Act and which is, under the SSE’s policy, to be exercised only in exceptional circumstances, one of which was that the School was not viable as an academy. As the School is not currently an academy, there is a large element of judgment involved in the assessment of viability, such assessment being based on a prediction of likely outcomes upon academisation. Where such assessments are made by those with expertise which the Court does not possess, the Court will, in determining the lawfulness of such assessment, give due deference to that expertise. That that is the correct approach was confirmed by Fraser J (as he then was) recently in another academisation case, *R (Somerset County Council) v Secretary of State for Education* [2021] ELR 110:

“[85] Before I turn to the individual grounds specifically, it is worth recording that the purpose of this judgment is not to substitute the court’s view of whether Swanmead should become an academy trust, with that of the Commissioner. That is not the function of judicial review. These proceedings are concerned with the lawfulness of the Commissioner’s decision.

[86] In *R (Campaign against Arms Trade) v Secretary of State for International Trade* [2017] EWHC 1754 (Admin) a group concerned with the arms trade brought a challenge to the grant by the Secretary of State of export licences for arms sales to

Saudi Arabia. The Divisional Court (Burnet LJ and Haddon-Cave J, as they both then were) gave valuable guidance at [209] on the approach of the courts in situations where there was such a fine balance between competing issues. They referred to anxious scrutiny, verging on anguished scrutiny in that case, and made clear that the courts will recognise the institutional competence of decision makers. The court made clear that ‘such self-evidently finely balanced judgements are paradigm matters for evaluation and decision by the Executive’. That is no doubt a classical statement of the approach of the courts to such matters, and I follow it without hesitation. The court will also give due deference to the expertise of the decision-maker. In the instant case, it demonstrates how important it is that the different matters on either side of the balance are considered.

[87] There is also a distinction to be made between whether something is a material consideration at all, and the weight to be given to that. The latter is for the decision maker, subject to rationality. This statement is again a classic one, set out in numerous authorities including the House of Lords in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 780 per Lord Hoffmann. The former is a question of law, and the latter is a matter of judgment (in that case planning judgment, but the principle remains the same).”

74. Ms Clement’s submissions rely heavily on the fact that the Modelling considered by the Board of the Trust in deciding whether or not to make a bid to sponsor the School, was not put before the Minister or referred to in the Submission. The question therefore is whether it was legally relevant for the Minister to have the level of detail considered in the Modelling or whether the contents of the Submission were sufficient.
75. The decision that the Minister had to make was “whether the School is viable as an academy” (emphasis added). The highlighted words of the SCC Guidance are significant. A school may be considered by a local authority to be unviable based on the information available as at the date of the Ofsted rating or as a result of its own investigations. However, the making of an Academy Order necessarily means the involvement of an Academy Trust, which will introduce

substantial changes to the way in which the school is managed and run, and potentially, in its attractiveness to the parents of potential pupils. If viability “as an academy” is to be assessed, then the potential impact that academisation will have must be taken into account. This will clearly involve questions of judgment given that one is considering projected outcomes as an academy and not on the basis of the status quo ante, i.e. the position as it was before becoming an academy. In that context, the SSE is right in my judgment to attach considerable weight to the assessment of viability by a potential MAT. As Ms Burton said in her evidence:

“... My officials and I generally place considerable weight on the detailed analysis conducted by trusts in order to establish whether a particular school, in a particular location, is capable of making the necessary improvements, and/or is “viable” going forward. That is especially so where the trust in question is highly experienced and/or has relevant local knowledge. Experienced trusts do not take on additional schools – especially schools that have received an “inadequate” rating – without very careful thought and “due diligence””.

76. The fact that three trusts were disinclined to make a bid because of concerns about viability does not preclude or render unreasonable the attaching of weight to the fact that two trusts did make a bid. The circumstances and experience of the various trusts were different, and it would be surprising if, in any such exercise, all potential sponsors took precisely the same view as to the challenges of taking on a particular school. The two trusts who did express an interest, LiH and the Trust, were both “highly experienced” trusts with a number of schools in their control, some located in the Council’s own area.
77. Of course, it would not be reasonable for the SSE to accept the fact of an expression of interest as itself being sufficient to indicate viability. The SSE

would be expected, as part of the duty to make reasonable inquiry, to test the bids put forward. There is evidence that that was done. The PL, for example, probed the Trust on several matters from the NOR that the Trust took into account to the likelihood of increasing performance at the School given the track record of the Trust at Hungerford. It cannot be said here that the SSE simply took what the Trust was saying at face value without due scrutiny.

78. As to the Modelling, this was a “Board Proposal Paper” containing “financial forecasts for Pooles Park”. Ms Clement submits that the Modelling was not subject to any scrutiny by the PL or RD and that if it had been it would have been apparent that it was seriously flawed and based on unreal assumptions. Ms Clement makes several detailed criticisms of the Modelling, which I shall consider in turn:

79. There is reference in the Modelling to a “special school” or “special unit”. Ms Clement submits that that is not something that the Council would ever have agreed to fund and that the assumption inherent in the modelling that the Council would do so is therefore fundamentally flawed. Dr Barratt explains that the projections contained in the Modelling:

“... were and are not based on an assumption that a formal ARP at Pooles Park would be commissioned and funded by Islington LA. Rather, my projections are based on my belief that we will be able to offer provision which attracts up to 40 pupils with EHC plans within the next two to three years. Those children may come to us from Islington, or they may come to us from other local authorities – most likely, they will come from several different LA areas, given the physical location of the school, which is very close to the boundary between the London boroughs of Islington, Haringey and Hackney.”

80. Ms Burton states that she was clear that:

“...there was never an intention or suggestion from the DfE that Pooles Park would be able to become a special school, and nowhere in any of our evidence is that referenced. We are clear that a mainstream school cannot ‘become’ a special school. It was never assumed that The Bridge would convert a mainstream school, either Hungerford or Pooles Park into a special school. The intention was always for the Bridge MAT to accept pupils with EHC plans, with a possibility of formalising this provision at a later date, as they are a strong special trust with experience of educating children with SEN in a mainstream setting. It is unfortunate that in the Pooles Park Board Report 15.06.23, it states “mainstream school and special school places” when in reality, the project lead (“PL”) assumed (as most would internally) that the special school places refer to SEN places, either in the form of an ARP or simply in the form of educating pupils with SEN needs in a mainstream setting.”

81. Based on this evidence, it is clear, in my judgment, that the proposal did not, despite initial appearances, rely upon the establishment of a special school or unit at the School funded by the Council. Rather, the proposal was, as had been ongoing at Hungerford for a number of years, to accept pupils with EHC plans. Whilst the Modelling does refer to a “special school” and “special unit”, it also concludes, “If the mainstream numbers continue to fall, then consideration would have to be given to converting to a special school”. That conclusion tends to support the view that the scenarios in the proposal were not formulated on the basis that the School would be a special school from the outset. As such, I accept that the neither the PL nor the RD proceeded on the assumption that there would be a Council-funded special school or unit upon conversion to an academy. Moreover, the Submission did not suggest otherwise to the Minister, instead merely stating (as was the case) that conversion to an academy would “provide additional places for students with SEND who are unable to access a place elsewhere.” This aspect of the irrationality contention therefore falls away.

82. Ms Clement’s next criticism is that, alternatively, the SSE proceeded on the incorrect assumption that the Council would provide millions of pounds of ongoing funding from its high needs block. Dr Barratt’s evidence about this may be summarised as follows:

- i) There was no assumption on her part that the Council would provide such funding, in particular for any formal ARP at the School.
- ii) There is a distinction between formal and informal ARPs (although no difference in the quality of education provided under either). An “ARP describes places that are reserved at a mainstream school for pupils with a specific type of SEN, taught for at least half of their time within mainstream classes, but requiring a base and some specialist facilities around the school.”
- iii) Demand for SEN places far outstrips the provision currently available. Some local authorities, including the Council, have commissioned (via a Service Level Agreement) places for pupils with EHCs in mainstream schools. This is an informal ARP under which the levels of funding would be agreed by the commissioning authority. Hungerford is presently subject to such an arrangement under which 39 Islington pupils with SEN are educated.
- iv) A formal ARP would require approval from the RD for a “Significant Change” to the Academy’s funding agreement.
- v) The level of funding for each pupil depends on their particular needs and the stage of their education. This ranges from £17,322 for a KS2 pupil

with social, emotional and mental health needs (SEMH) to £32,334 for a KS1 pupil with such needs. These amounts do not include the Age Weighted Pupil Unit element of funding.

- vi) Dr Barratt’s projections were not based on an assumption that a formal ARP at the School would be commissioned and funded by the Council. Rather, her projections were based on her belief that the Trust would be able to offer provision which attracts up to 40 pupils with EHC plans (from several different authorities) over the next two to three years.
 - vii) At a meeting held in March 2023, between the Trust and the Council’s Strategy and Commissioning Manager it was noted that there was a possible need for more specialist provision to help meet the needs for children with Autistic Spectrum Conditions in the borough.
 - viii) Dr Barratt had “no doubt [that the trust] would have been able to fill the places by offering places to the neighbouring LAs, if demand from the Council had been lower, given the acute shortage of specialist SEN places in mainstream settings in the London Area”.
 - ix) There is evidence of numerous inquiries for primary places at The Bridge School in Islington with about 17 such inquiries having been made between January and April this year from within Islington and other areas.
83. What one can draw from that evidence is that there is considerable demand for provision for pupils with SEN to be educated within a mainstream setting and that it was not unrealistic for this experienced CEO to believe that places for up

to 30 to 40 pupils with EHC plans, funded on an informal ARP basis, could be filled within two to three years of the Trust taking over. Those pupils may come from the Council’s area or from other neighbouring authorities.

84. Ms Clement submits that one only has to look at Hungerford, where there are currently many vacancies (at least on paper), to appreciate that there is no such demand, and that, further, the presence of the Trust has not resulted in any appreciable improvement in that school in terms of NOR. The first criticism, namely that Hungerford has many vacancies, disregards the fact that that school’s site is partly occupied by a special school also controlled by the Trust. That occupancy means that there is limited capacity to take on pupils, a fact expressly acknowledged by the RD in the Submission (see paragraph 38 above).
85. In any event, the fact that there are vacancies at Hungerford does not establish that Dr Barratt is wrong about the demand for SEN places. Dr Barratt’s assessment of demand is based on her knowledge of the sector and her extensive experience. She is, undoubtedly, an expert in the field. Her assessment of the increasing demand for such places is supported by her evidence of knowledge acquired in her capacity as Chair of Islington’s High Needs Group, in which capacity she noted “an unprecedented demand for places for children with autism (due to a significant increase in diagnoses) and with social emotional and mental health difficulties (including due to the impact of Covid).” She also refers to the significant number of inquiries from various London authorities since January this year for places at The Bridge School. Whilst these inquiries are for places at special school, they cannot be disregarded in assessing the level of demand for SEN places for pupils, the parents of many of whom might prefer,

if available, specialist SEN placements within a mainstream setting. Far from producing any real evidence of the absence of such demand, the Council's own SEND Strategy refers to a "year-on-year increase in the number of children and young people with SEND, particularly those who have an EHCP, which accelerated during and post pandemic. This is in line with a national trend". Dr Barratt's evidence also drew the Court's attention to a note of a meeting in March 2023 with the Council in which there was discussion about "the possible need for more specialist provision to help meet the needs for children with ASC in the borough". The evidence also highlights the effect that conversion to academy status can have on the attractiveness of a school to parents deciding upon schooling for a child and the consequent effect on the NOR. This is not because of a school's new academy status as such, but because of the additional efforts made by academies to market and promote their offerings as something different and better than that which existed before. Thus, LiH referred in its bid to making the School "a school of choice" and both LiH and the Trust referred to their experience in successfully addressing falling rolls in schools they had taken over. This is not to suggest that these trusts can somehow buck the demographic trends in an area, but what it does establish is that in considering projections of the NOR, allowance can be made for the potential effect of academisation on the attractiveness of a school to parents. Such projections will involve questions of judgment, based on experience and cannot readily be gainsaid by the Court.

86. As to the second criticism that the Trust has failed to effect any appreciable improvements in 6 years at Hungerford, it cannot be ignored that the most recent Ofsted rating of "Good" does signify a marked improvement in performance.

There remained concerns about performance at Hungerford. However, the evidence suggests that far from ignoring or disregarding such concerns, the Trust's track record was queried, and reassurance was sought that these concerns were being addressed. The Submission acknowledged that there "was still progress to be made" in this regard.

87. The Council's position is not so much that there is no demand for SEN places (a contention that would be untenable in my view), but that that the Trust had incorrectly assumed that the Council would fund them to the tune of £870,000 in the first year and £1,160,000 in the second year. Mr Abbey's evidence was to the effect that if the Council had been asked about such funding it would have been refused. Part of the Council's concern was that such funding was intended to establish a special unit or a formal ARP at the School. For reasons already discussed, I do not find that to be the case. Dr Barratt's evidence is that her projections are based on her "belief that [the Trust] will be able to offer provision which attracts up to 40 pupils with EHC plans within the next two to three years. Those children may come to us from Islington, or they may come to us from several different LA areas, given the physical location of the school, which is very close to the boundary between the London boroughs of Islington, Haringey and Hackney."

88. The expectation was not, according to that evidence, that the Council would fund the entire cohort of 30 to 40 pupils mentioned. The drafting of the modelling might suggest otherwise as the funding for the "special unit" is said to derive from "Funds Delegated by the LA", the "LA" in question being the Council, and in the 'caveats' section of the document, it is stated that "LA agree

to place 30 students at £29K per student from September 2024”. However, I bear in mind the evidence that the modelling, upon which the Council places great emphasis, was merely intended to show the Board of the Trust “at a relatively high level what [it] could do with [the School], rather than a rigid plan that [it] would follow...” and that “the scenarios were intended to be applied flexibly...”. Dr Barratt states that she had:

“... no doubt we would have been able to fill the places by offering places to the neighbouring LAs, if demand from the Council had been lower, given the acute shortage of specialist SEN places in mainstream settings in the London area, relative to the rapidly rising level of demand.”

89. Viewed in that context, it may be inferred that the reference to the Council paying for the cohort of additional SEN pupils was no more than a convenient shorthand in circumstances where there was a high degree of confidence that the demand would materialise even if not all of that demand emanated from the Council.

90. As to the amount of funding that might be derived from that cohort of SEN pupils, there is clear evidence from Dr Barratt that:

“15. Total funding for a pupil with autism and severe learning difficulties is £23,534 (23-24 amount). Total funding for an identified Key Stage 1 pupil with SEMH is £32,334 (acknowledging the extreme challenges these pupils present). Total funding for an identified Key Stage 2 pupil with SEMH is £17,322. These amounts do not include the Age Weighted Pupil Unit [“AWPU”].”

91. Based on such amounts, the level of funding assumed in the Modelling might be said to be towards the upper end of the range but cannot be said to be wholly unfounded or unreasonable for a “high-level” indicative document such as the

Modelling. As to the four scenarios included in the Modelling, I make the following observations:

92. Scenario 1 – This refers to an existing NOR of 182. That appears to be the correct figure (or slightly lower than the correct figure of 186) at the time the Modelling was presented to the Board. It is acknowledged that this is almost 10% lower than the previous year. There is then reference to shared leadership and shared admin staff “with TBHUN”. This is a reference to The Bridge School Hungerford with which resources were to be shared. Finally, there is a reference to a Classroom restructuring. The net effect of these savings is said to be a surplus of £29,000. Ms Clement criticises the NOR figure as too high as compared to the correct figure by the time of the Decision in November 2023. However, the figure was correct at the time the Modelling was produced. Moreover, it was made clear to the Minister that the NOR had fallen sharply year-on-year since 2018 and that this “was not expected to change significantly”. Scenarios 2 to 4 are based on further reduced NOR of 167 and 150. The figure of 167 was the figure for September 2023 as projected by the School itself in June 2023. It was far from irrational or unreasonable to rely on these figures in the Modelling. Whilst these are projections, the essential message that the NOR is on a sharp downward trend is acknowledged in the Modelling and was communicated to the Minister.
93. The Council is dismissive of the Trust’s projected savings based on shared resources, stating that “no savings could be realised by sharing a Deputy Headteacher as the School does not currently have one, and no savings could be realised by sharing Assistant Headteachers because these staff at the School

already double up as classroom teachers”. However, as Dr Barratt explains, the proposal involved the current headteacher of Hungerford, Mrs Stephens, becoming Executive Headteacher of both schools whilst remaining in the same pay bracket. As a MAT, the Trust has greater flexibility to set pay as compared to local authorities and Dr Barratt confirms that it has already been agreed with Mrs Stephens that her pay would not increase notwithstanding the increase in her responsibilities. Similarly, the roles of Deputy Headteacher and Assistant Headteacher in Curriculum and Inclusion would also be shared. These shared roles, in conjunction with the slimming down of teaching staff as a result of combining year groups leads to a saving, according to Dr Barratt, of just under £250,000 for the School. This evidence, which is not seriously challenged, highlights the danger in the Council simply applying what it would or could do in analysing the viability of the School, and failing to take into account the greater flexibility available to an academy. Given that the question is whether the School is viable “as an academy”, it is vital to take account of the latter. As Dr Barratt points out this flexibility allows the Trust to move resources to where they are needed most and:

“... means that I can provide additional staffing and support to Pooles Park from within the schools in my trust and can draw on the wider resources that we are able to fund as a trust. To focus solely on Hungerford and Pooles Park is to fundamentally misunderstand the context of a MAT and the opportunities that the MAT model provides. It underestimates the wider resources (in terms of funding, staff, expertise, community relationships and goodwill) that we as a trust can provide to support the pupils across both schools. One small example: the Head of School Improvement for [the Trust] is currently doing a lot of work at Pooles Park, support that we as a MAT can mobilise quickly and at no cost to Pooles Park.”

94. Scenarios 2 and 3 – The NOR in these scenarios is 167. The reduction is accounted for by a reduced figure for delegated funds. The scenario then presents the surplus / deficit for the School without the additional cohort of 30 SEN pupils (incorrectly referred to as a “Special Unit”) and then a separate column taking that cohort into account. As Mr Bates submits, the deficit of £77,265 without taking account of any additional SEN cohort, would be readily offset by, for example taking on 30 pupils even at funding levels considerably lower than the £29,000 per pupil envisaged in the Modelling. For reasons already set out, I do not consider it to be unreasonable for this internal indicative modelling document to make projections on the basis of the higher sum, which sum is comparable to the levels of funding already being obtained for at least some SEN pupils with greater need. Similarly, if the expected number of SEN pupils was not achieved, then corresponding adjustments to the level of outgoing costs would be likely to result in the otherwise relatively modest deficit being offset.
95. Scenario 4 – This considers the position a further year on in 2025-26. There is a reduction in NOR to 150 and an increase in the additional SEN cohort to 40. Further proposed consolidation of the leadership team and classes, results in an overall surplus.
96. The Modelling contains some “Caveats” and refers to a number of matters that should be in place for the model “to have the right start”. That language suggests that these factors were desirable but were not essential for the model to work. These included the funding by “DfE/LA” to replace the roof and all windows. The Council once again says that this would not have been agreed. There is

nothing to suggest that these capital works were required to be done immediately to render the school safe or anything of that nature. The fact that these items were not immediately costed suggests a reasonable degree of confidence (again based on past experience of negotiating legacy matters when taking over a school) that such costs could realistically be funded in due course whether by the Council or the Department (or potentially from grant funding, which, I am told, Hungerford managed to obtain for some of its capital works).

97. A further criticism made by the Council is that the Trust’s proposal would mean that there would be two schools only 1.25 miles apart offering similar provision with the result that they would be competing for scarce pupils. However, the Trust not only proposed a reduction to 1FE at both schools – which was consistent with the Council’s Plan – but also expected the additional cohort of SEN pupils. If the evidence as to demand from that cohort (from within and outside the Borough) is credible, as I find it is, then the scarcity of non-SEN pupils, which is undoubtedly the case as far as the general demographic is concerned, is not an issue.

98. It is suggested by the Council that there was an unlawful failure to observe the Internal Viability Guidance in that the stipulated viability assessment was not carried out. It is noteworthy that one of the entries in the assessment template request provides: “Details of work that has gone into finding a sponsor”; and “Likelihood of being able to find a sponsor willing to take the school on...” This suggests that the assessment template has less relevance where one or more potential sponsors have already been identified, an interpretation of the Internal Viability Guidance that is reflected in Ms Burton’s evidence. It is clear at any

rate that the existence or otherwise of a potential sponsor is a relevant consideration in assessing viability. Other parts of the assessment template provides that information be sought from the Local Authority about various matters, including its financial health, projected pupil numbers, surplus places in the area, and the authority's attitude to closure. All of this information was obtained in the course of the PL/RD's inquiries about the School, and it cannot be said that there was a failure to conduct a viability assessment that was, in substance if not precisely in form, compliant with the Internal Viability Guidance.

99. Ms Clement's final point under this ground is that the Minister was wrong to give weight to or even take account of the financial stability of the Trust. I do not accept that submission. The fact that a trust is financially secure with substantial reserves is clearly a relevant factor in determining whether a school taken on by that trust would be viable as an academy. As mentioned above, trusts can operate with greater flexibility with their resources, including by the allocation of resources to where they are needed the most and can do so without falling foul of any guidance against cross-subsidisation. Not taking that ability into account would be to disregard one of the principal and differentiating characteristics of a Multi-Academy Trust. Taking it into account does not displace the question to be asked, namely whether the School is viable as an academy; it is merely another relevant consideration in answering that question. The Council's own financial analysis of the potentially interested trusts suggests that it recognised the relevance of the bidding trusts' respective financial stability.

100. In my judgment, the Submission presented the Minister with all the information that it was legally relevant for her to know before making the Decision. The Minister was made aware of, amongst other matters, the falling NOR, the surplus of places, the increasing demand for SEN places, the Trust's proposal which was based around additional SEN provision and shared resources, the wider local interest in maintaining the School, and the Council's concerns, including the issues with Hungerford. The Council's principal contention is that the Minister ought to have had the Modelling document and ought to have had pointed out to her that it was flawed in various respects. As set out above, some of the contended flaws in the Modelling were in fact based on understandable but incorrect assumptions on the part of the Council about the nature of the proposed model and the level of dependence on funding from the Council. There is also a disagreement as to the level of potential demand for SEN places in respect of which I have found in favour of the SSE. Once these concerns are put to one side, then the Council's main criticism is that the Minister ought to have been provided with the detailed figures in the Modelling. However, the detailed figures in the Modelling, which were indicative projections in any event, were not legally relevant for the Minister to know. The Minister was entitled to rely on the summary provided by her officers, including their conclusion that the School, supported by the solutions proposed by the Trust, was viable as an academy.
101. The Submission included the following (by reference to the relevant paragraph number of the Submission):

- i) [7] - A statement that “unless the SoS considers the school to be unviable academisation should continue”. Ms Clement submits that this is a misdirection and/or indicative of the Minister failing to consider the issue with an open mind. I fail to see any misdirection. The Submission must be considered as a whole, and it is apparent that in the immediately preceding paragraph [6], the Submission makes express reference to the fact that the power to revoke will only be used in exceptional circumstances. Whilst there may be other circumstances in some cases that might be regarded as exceptional and warranting revocation of the Academy Order, it is not in dispute that the principal potentially exceptional circumstance in this case was whether or not the School is viable as an academy.
- ii) [8] (first one³)– The definition of viability, or, more accurately, the lack thereof, contained in the Internal Viability Guidance is fairly summarised.
- iii) [9] (first one) – This summarises the RD’s view that that criteria for finding that the School is not viable are not met. The Council criticises this part of the Submission for failing to mention that the School is in deficit. In fact, the deficit for 2023-24 is mentioned at [16] when setting out the Council’s concerns.
- iv) [14] – The RD states that the “LA has yet to exhaust the steps identified in its own school organisational strategy and is potentially jumping to

³ The paragraph numbering in the Submission has gone awry with paragraph numbers 8 and 9 appearing twice.

the threat of closure of another good school as a means of exerting leverage over the RD to support the closure decision.” Whilst it is unfortunate that the Council’s reference to the potential need to close another school is referred to as a potential “threat”, that does not render the Submission irrational. It is a fact that the Council has mentioned the potential need to close another school. The RD’s tendentious description of that does not detract from the fact that a relevant matter – namely the possibility that another school would have to close if the School did not – is being brought to the Minister’s attention.

- v) [17] – The RD states that, “The Bridge Trust, a successful local MAT, sets out a workable model to ensure the long-term viability of Pooles Park, in the context of falling rolls across the borough...”. For the reasons already set out, it was not wrong or irrational of the RD to state that the model was “workable”. It was not relevant for the Minister to know the precise levels of deficit or surplus in order to be able to take the decision on viability required of her. The position might have been different if the viability assessment required a trust to demonstrate a particular level of liquidity before it could be said to be viable. There is no such specified level here. Indeed, a school operating with a significant but manageable deficit could still be considered viable if there were a realistic prospect of reducing the deficit in subsequent years. The assessment of viability involves a question of judgment.
- vi) [18] and [19] – These paragraphs provide more detail as to how the proposed model will achieve savings and refer to the shared staffing

structure and the provision of SEN places. Once again, it is not necessary for the Minister to see the actual figures involved in order to be in a position to make the Decision.

102. In short, all of the Council’s concerns about viability were appropriately summarised and addressed. The Modelling contained a level of detail that it was not necessary for the Minister to know, and it was not unreasonable in the context of the finely balanced judgments that had to be made, to attach considerable weight to the Trust’s assessment on viability. The supposed fundamental errors and incorrect assumptions are, on analysis, not such at all. In all the circumstances, the Minister’s decision based on those judgments, with which the Council may disagree, cannot be said to be irrational either in the *Wednesbury* sense or on the basis that a legally relevant matter was not taken into account.

103. For all of these reasons, Ground 1 fails and is dismissed.

Ground 2: Breach of the *Tameside* duty

104. The Council submits that the SSE failed to comply with the *Tameside* duty (*Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014) to make adequate inquiry in respect of the following matters: (1) whether the pupil numbers upon which the Bridge Trust’s modelling was based “remained as forecast” in June 2023; (2) whether the Council would use its high needs funding to fund a special unit at the School, to provide place funding and top up funding of £29,000 for 30 pupils from

September 2024 (plus a further 10 children from 2025); (3) whether the remaining “caveats” in the modelling would be funded by the Council; (4) the extent of the vacancies at Hungerford School, and the likelihood that additional pupils existed that could attend the School; (5) the Trust’s “plans to address surplus places at Hungerford School” after six years of having failed to do so; (6) the budget deficit facing both schools; (7) the staffing structure that the Trust proposed to adopt as part of the “Shared Resource Model”, and the extent of any savings that could be generated by this model; and (8) what “other steps” the Council could take to avoid the need to close/amalgamate a school in the relevant schools planning area.

105. It can be seen that most, if not all, of these issues have already been considered under Ground 1. Addressing them very briefly in turn, the position is as follows:
- i) Pupil Numbers – The PL did query whether the NOR relied upon was too optimistic. It was not unreasonable for the Trust to rely upon the figures for NOR provided by the School as at June 2023 when the first revocation submission was prepared. There was a further reduction in the NOR by the time of the Submission and Decision in November 2023. That figure emerged only two or three weeks before the Decision. However, the Submission and the Decision were very much predicated on an acknowledgement of the declining roll and reducing per pupil income. That the NOR was not updated again does not render the SSE’s inquiries inadequate⁴.

⁴ It is noted that other documents, such as the Council’s pre-action protocol letter of 22 December 2023 and the Statement of Facts and Grounds, state that the School had 207 pupils on roll. It is not

- ii) Special Unit – It was not the Trust’s proposal to establish a special unit or formal ARP in the short term. That was understood by the RD and there were no inquiries about this to be made.
- iii) Caveats – The Modelling was not dependent on these caveats, several of which constituted the sorts of legacy issues that are, according to the RD, “standard” matters for negotiation in preparing for conversion to an academy and which might result in costs being borne by the DfE (or another source) and were not critical to the quality of the Modelling.
- iv) Vacancies at Hungerford – For reasons already considered, these were not as high as the Council’s analysis suggests. Dr Barratt’s belief that there was a demand for further SEN places was based on her knowledge of and expertise in the sector, was not inconsistent with the Council’s own assessment of SEN demand and was something to which the SSE could attach considerable weight.
- v) Failure to address surplus places at Hungerford – This is addressed by (iv) above;
- vi) Budget Deficits – The deficits at the School were expressly acknowledged. The SSE was entitled to attach weight to the assessment of the Trust that its proposal was workable and likely to ensure the School’s long-term viability;

clear whether that is an error or based on other parameters. I have, nevertheless, approached the adequacy of inquiry issue on the basis that the 143 figure was correct as at the date of the Decision.

- vii) Shared Resource Model – The Council might disagree with the likely benefits of this model. However, the SSE was entitled to accept the assessment of the Trust that sharing resources between the School and Hungerford was likely to produce substantial savings. Whilst it is not necessary for the Trust to prove that substantial savings will be achieved, the evidence adduced by Dr Barratt in this regard is credible, and I see no reason to reject it.

 - viii) Other steps to avoid the need to close the School – It is not clear what further inquiry it is said that the SSE ought to have made in this regard. The Council’s view was that there was nothing more that could be done to avoid the need for closure, whereas the SSE took the view that the Council had not exhausted all of the possibilities - such as amalgamation and using the School for the colocation of other services - mooted in the Plan. Further inquiry is unlikely to have resolved the position. However, the existence of an unresolved dispute does not necessarily render the SSE’s inquiries into a matter inadequate.
106. Ms Clement submits that the SSE’s response to Ground 2, which was that she was “not required to conduct her own detailed financial or other modelling” in an assessment of viability is to erect a “straw man” in that the SSE was merely required to read the Modelling and ask whether the assumptions underpinning that Modelling would occur in practice. It appears to be accepted therefore that the SSE was not required in the circumstances of this case to undertake her own detailed financial modelling. That must be right. Financial modelling would be a matter for a sponsoring trust, although even then, a particular trust may be

able, depending on the circumstances, to reach a reasonable view on viability without the need for such modelling. The real criticism, as it seems to me, is that the SSE failed to question the underlying assumptions in the model. However, as the discussion above shows, it was the Council that made some understandable but incorrect assumptions about those underlying assumptions. As the RD makes clear in her evidence, contrary to what might be suggested by the phraseology used by the Trust, “It was never assumed that The Bridge would convert a mainstream school, either Hungerford or Pooles Park into a special school...” and that the “intention was always for the Trust to accept pupils with EHC plans, with a possibility of formalising this provision at a later date.” The Submission and the Decision were made on that basis.

107. For these reasons, Ground 2 fails and is dismissed.

Ground 3 - Irrational refusal to revoke the Academy Order in the circumstances

108. The submission here is that even if the Secretary of State had been entitled to conclude that the School was viable as an Academy, it was nevertheless still irrational to refuse to revoke the Academy Order, given the exceptional circumstances of the case and the effect of refusing to do so, which would be to divert children from Good/Outstanding schools to a school that was Inadequate.

109. In my judgment, this contention fails to acknowledge that one of the purposes of academisation is to address the “Inadequate” Ofsted rating giving rise to the making of the Academy Order in the first place. If the Academy Order were to be revoked because the School was the only Inadequate rated school in the

Borough, it would defeat the purpose of the Academy Order as it would deprive it of the opportunity to improve. The situation where a school is the only Inadequate rated school in an area cannot be considered an “exceptional circumstance” in itself warranting the revocation of the Academy Order. The level of vacancies at the School was only marginally greater than that at several other schools in the Borough and was not so substantially different as to place it in a different category altogether, albeit that the School was scored lowest in the Council’s Evaluation Matrix. It certainly cannot be said to be irrational, in these circumstances, for the SSE not to take the course of revoking the Academy Order.

Ground 4: Improper purpose and/or frustration of the Council’s statutory duties

110. Here, the Council relies on the principle that “[M]inisters cannot frustrate the purpose of a statute or a statutory provision, for example by emptying it of content or preventing its effectual operation”: *R (Miller) v Secretary of State for Exiting the EU* [2018] AC 61, §51. It is said that the SSE’s failure to revoke means that the Council is not able to secure that efficient primary education is available to meet the needs of the population or able to promote high standards and the fulfilment of learning potential in Islington. That is because the Decision forces the Council to close a good or outstanding school instead.
111. This principle was considered in the school academisation context in *R (Somerset County Council) v Secretary of State for Education* [2020] EWHC 1675 (Admin). Fraser J (as he then was) held, citing *R (One Search Direct Holdings Ltd) v York City Council* [2010] EWHC 590 (Admin):

“[149] This case sets out the high hurdle that would have to be cleared by SCC for the Commissioner to have failed this test. It must be shown that by making the order, the Commissioner and the Secretary of State had ‘utterly defeated’ SCC’s target duties to provide education in the local area. The Defendant submitted that it cannot even be sensibly argued this is the case, as the academy order does not prevent education in the area.

[150] I consider that some of the necessary building blocks for SCC to succeed on this ground are present. The making of the academy order would substantially impede SCC’s ability to achieve its target duties insofar as exercise of that ability needed to impose upon Swanmead changes to which it would not agree. It would also substantially impede efficient organisation of education in the relevant area across all the schools, and also the organisation of education of pupils in the secondary age range in particular, given Swanmead was the only middle school in the relevant area that was not an academy already, and which could therefore be directed by SCC. However, I do not consider that these substantial difficulties and impediments could be said to ‘utterly defeat’ SCC’s target duties. The passage in the One Search judgment above makes it clear just how unusual such circumstances are.”

112. Ms Clement acknowledges that there is high bar to cross in making good this ground, but submits that the Decision, which has the effect of preventing the closure of the School and requiring the closure of a higher rated school, does “utterly defeat” its statutory objective of securing efficient education and promoting high standards of learning provision.
113. Attractively though that submission was made, I am unable to accept it. As in *R (Somerset CC)*, it might be said that the decision not to revoke the Academy Order makes it more difficult for the Council to achieve its statutory objectives. The fact that the School will not close may mean that the Council will have to consider other alternatives, which may or may not involve closure of another school, although such outcome is far from inevitable. However, all of that is a far cry from establishing that the Council’s ability to achieve those objectives has been “utterly defeated”. Educational provision in the Borough might look

slightly different when the School is taken out of the Council’s control, but may nevertheless be considered “efficient” and conducive to the promotion of high standards.

114. Ground 4 is therefore not made out.

Ground 5: Fetter of discretion

115. The Council’s submission under this ground is that it has unlawfully fettered the exercise of the discretion to revoke the Academy Order. This fetter arises, as I understand it, from two matters: (i) the SSE’s failure to recognise that the background of an “overwhelming and obvious need to rationalise school places...” amounted to an “exceptional circumstance” within the meaning of the SCC Guidance; and (ii) the advice in [7] of the Submission that, “therefore, unless the SoS considers the school to be unviable academisation should continue” was unlawful. This had the effect, submits Ms Clement of limiting the analysis to viability considerations with the result that the Minister did not approach the question with an open mind.

116. I do not accept that there was any unlawful fettering of discretion in this case. The need to rationalise school places because of falling pupil numbers is an issue that is far from unique to the Council. Indeed, the evidence suggests that the problem is widespread and likely to endure and worsen. Whilst that would not necessarily preclude a finding of exceptionality, that background is unlikely to give rise to such a finding on its own. As to the alleged misdirection, I have already considered this above under Ground 1: see [101(i)] above. There was no misdirection. It is clear from the evidence that the Minister took account of a wide range of factors as well as viability in reaching the Decision, including

the level of surplus places in the area, the impact on other schools, the level of deprivation in the area and the use of the community garden on site as a local resource. The focus may have been principally on viability, but that was because that was the ground on which the Council sought revocation and it was an expressly listed “exceptional circumstance” in the SCC Guidance.

117. Ground 5 therefore fails and is dismissed.

Conclusion

118. For the reasons set out above, none of the grounds for seeking judicial review succeeds. The claim is therefore dismissed.