

CO/6551/2004

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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2

Thursday, 28 July 2005

B E F O R E:

MR JUSTICE OUSELEY

THE QUEEN ON THE APPLICATION OF BRADSHAW
(APPLICANT)

-v-

OFFICE OF THE SCHOOLS ADJUDICATOR
(RESPONDENT)

Computer-Aided Transcript of the Stenograph Notes of
Smith Bernal Wordwave Limited
190 Fleet Street London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
(Official Shorthand Writers to the Court)

PETER OLDHAM (instructed by Douglas Silas Solicitors) appeared on behalf of the
CLAIMANT
CLIVE SELDON (instructed by Treasury Solicitors) appeared on behalf of the
DEFENDANT

J U D G M E N T
(As Approved by the Court)

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1. MR JUSTICE OUSELEY: The Claimant is the secretary of the Save the Mere Oaks Action Group which campaigns with the parents of pupils at Mere Oaks School in Wigan and with members of the public to keep it open. The Claimant is also the parent of a pupil at that school. It is a special school.
2. The Claimant challenges the decision of the School Adjudicator, dated 22nd September 2004, to approve the proposals of Wigan Council, as the Local Education Authority, to close Mere Oaks Special School and to replace it with new provisions at other schools. The largest group of pupils would be transferred to Hindley Community High School and the others would be dispersed to other local schools. This is in pursuit of what is thought to be the beneficial policy of educating those who attend such schools in mainstream schools instead, with adaptation and support. The proposal is due to take effect in September 2006.
3. Permission to challenge the decision has been given on only one of the various grounds originally raised. It relates to the way in which the Adjudicator considered the financial arrangements for the new provision.
4. Section 29 of the School Standards and Framework Act 1998 requires LEAs to publish proposals to discontinue a community school, which proposals have to be sent to the "School Organisation Committee" for the LEA's area. This committee includes representatives of religious groups, parents, schools and the LEA officers and members. Where objections are made to a published proposal, as happened here, the proposals require the approval of the School Organisation Committee, the procedures for which are regulated by Schedule 6 of the 1998 Act. If the SOC is not unanimous in its decision the proposals must be referred to an Adjudicator, who is a person appointed by the Secretary of State for Education and Skills.
5. Paragraph 3(7)(a) of Schedule 6 to the Act requires the Adjudicator to "consider the proposals afresh". By reference back to paragraphs 3(2) to (4), the Adjudicator can reject or approve the proposals, or approve them with modifications.
6. By subparagraph (4):

"When deciding whether or not to give any approval under this paragraph the committee shall have regard to

"(a) Any guidance given from time to time by the Secretary of State; and

"(b) The school organisation plan for the committee's area;

"And the committee shall not give any such approval unless they are satisfied that adequate financial resources will be available to enable the proposals to be implemented."
7. The relevant statutory guidance related to finance is as follows:

"33. The Decision Maker must be satisfied that any capital required to implement the proposals will be available. Normally this will be some form of written confirmation from the source of funding on which the promoters rely. In the case of a Local Education Authority, this may be from an authorised officer within the authority.

"34. ... Proposals may NOT be approved conditional upon availability of capital from sales or otherwise (although they may be approved conditional upon the entering into of a Private Finance Initiative transaction).

"35. Implementation of proposals may depend on the disposal of land previously used for the purposes of a county or community school, perhaps because of capital receipts. Those bringing forward proposals and the Decision Maker should therefore assure themselves that any necessary consent for disposal of the land under paragraph 2 of Schedule 35A to the Education Act 1996 has been received from the Secretary of State. Consent is also necessary for the disposal by foundation or voluntary schools of any publicly funded land and buildings under Schedule 22 of the SSFA 1998.

"36. The prior agreement of the Secretary of State will also be needed where it is proposed that capital should be raised from the disposal of school playing fields (details are given in DfES Guidance 0580/2001 "The Protection of School Playing Fields and Land for City Academies" published in July 2001). Proposals dependent on disposal of land for their implementation may not receive full approval until consent for their disposal has been received."

8. The SOC did not approve the proposal at its meeting on 27th April 2004. There was strong opposition to it from the Schools Group within the SOC and one of the issues raised was the financing of the proposal because of the cost of replacement provision. The proposal was then referred to the Adjudicator. A meeting was held on 1st July 2004 at which the Adjudicator heard from LEA officials, a Councillor and parents. The Schools Group had sent him also extensive written submissions raising many objections to the proposals, including many which related to the question of finance.
9. The Adjudicator then produced his decision dated 22nd September 2004 approving the proposals. He said in paragraph 4:

"4. As required by paragraph 3(7) of Schedule 6 to the Act, I have considered the proposal afresh. I have had full regard to the guidance given by the Secretary of State and to the School Organisation Plan for the area as required by paragraph 3(4) of Schedule 6 to the Act..."

10. The Adjudicator then said that he had considered all the papers put before him and set out what I take to be the main material which he had considered. This included the agenda and supporting papers for the meeting of 27th April 2004 objections, representations and counter-observations. He described the proposal and briefly introduced the objections which included the claim that there was no clarity about the

capital budget which was to be funded by the sale of school sites. He identified the need to consider finance based upon the statutory guidance. He concluded:

"26. The Schools Group of the Committee expressed concern in two areas of capital funding. The first was a view that consideration should not be given to capital work at Hindley High School outside the context of the BSF bid. Secondly, they were concerned about the security of the capital funding. BSF is a long term bidding programme and it would not seem appropriate to wait on that bid before pursuing a policy which the council supported. At the meeting I attended the Council made a clear commitment to make capital funding for this project available and indicated that it was not dependent on the sale of school sites."

11. The Claimant focused particularly on that last sentence.
12. It is alleged by the Claimant that those conclusions are irrational. If the Adjudicator had in fact relied simply upon the material referred to in that last sentence, he would have relied upon a mere oral comment which could not possibly meet his obligation to be satisfied himself about the funding commitment, especially where it was said that the funding was dependent on the sale of school sites. For largely the same reasons it was said that the guidance had been ignored and insufficient reasons had been given for any conclusion he had reached about funding. This was particularly so if he had taken other material into account but had not referred to it in expressing his conclusions. He had also effectively failed in his duty to consider the matter afresh because he had simply adopted the mere assertion of the LEA.
13. Much of these arguments depend upon what the Adjudicator actually did take into account and mean and on what material was available to him. There were issues about that. The Claimant objected to any reliance by the Adjudicator upon witness statements from himself and from LEA officers which explained the background to his reasoning. It was said that this contradicted or was different from the reasoning of the Adjudicator as he expressed it in his decision letter and that should be discounted when assessing the lawfulness of the decision. The reasoning also showed unlawfulness.
14. It is necessary to set out the background in more detail in order to appreciate the strength or otherwise of those submissions.
15. On 18th December 2003, Wigan Council's Assistant Director of Education, Ms Gilbourne, whose responsibility was school inclusion, provided a report for the Lifelong Learning Panel and the same report later went to the Wigan Council Cabinet. The purpose of the report was to ask members of the panel, "to agree the proposals on how the capital funding will be secured for the implementation of the changes outlined as part of the review of specialist provision." That specialist provision included the closure of Mere Oaks Special School and replacement mainstream provision. Members were asked to:

"Ring-fence the proceeds from the sale of the following schools: Atherton Two Porches; Hindley Tanfield; Standish Mere Oaks or Woodfield;

"Give permission to use future capital receipts from the sale of schools that may close over the coming years due to the impact of falling numbers;

"Include the estimated proceeds of sale in the capital programme for 2004/2005;

"Release the estimated proceeds of sale from the school sites in advance of any sale."

16. The short report which went with those recommendations said that before the review of special school provision could begin the formal consultation phase, "it is necessary to demonstrate that adequate capital funding has been secured to enable the proposals, detailed in the report, to be fully implemented."

17. In section 2 of the report it described what the funding was required for:

"2.1 Funding is necessary to make adaptations and improvements to the schools sited at Montrose, Green Hall and Brookfield to allow increased access for pupils. The estimated cost of these adaptations amounts to £2,153,760. In addition, there will be costs involved in the demolition of Mere Oaks, Tanfield and Two Porches, which could cost an estimated £120,000 -- this is based on previous demolition costs.

"2.2 Further funding is required for the adaptations needed at Hindley Community High School and to meet the shortfall at the new Hindley Resourced Primary School which will have on site a hydro-therapy pool. The cost of this amounts to £2,046,510.

"2.3 Additional funding will be needed to include an observation and assessment unit at the proposed new Wigan West School. The estimated cost for this is £300,000."

18. This amounted to costs of about £4.62 million. The proposals to secure funding were set out as follows:

"3.1 To ring-fence the proceeds of sale from the following sites: Two Porches School (£150,000), Tanfield School (£250,000), Mere Oaks School (£2,500,000), or Woodfield School (£2,000,000).

"3.1.1 The Director of Land and Property has stated that the valuations are based on the knowledge of land transactions elsewhere within the Borough. They should be viewed as reasonable estimates of the likely capital value of each sale.

"3.2 To utilise capital receipts, released from the future sales of mainstream schools which may be closed as a result of falling rolls, to fund the difference between the estimated costs and estimated receipts.

"3.3 Include the estimated proceeds of sale in the capital programme for 2004/2005.

"3.4 Release the estimated proceeds of sale from the school sites in advance of any sale."

19. Thus the sales of the identified school sites would yield £2.9 million if Mere Oaks Special School were sold. So some £1.7 million would have to be found from the sale of school sites which were not identified in the report and if the costs were to be incurred before the receipt of any proceeds of sale, there would be a requirement for bridging funds. This issue was next discussed under the heading "Conclusion":

"4.1 Implementation of the proposed changes involves spending capital monies that are estimated to be in excess of the capital resources to be generated from the disposal of surplus special school sites. The capital expenditure would also be incurred in advance of the sale proceeds becoming available and therefore there would be a requirement for bridging funds.

"4.2 The content of this report has been shared with the Director of Finance and IT."

20. The panel accepted the report.

21. The report then went before the Cabinet on 8th January 2004. The Director of Education said that there were no alternatives available for consideration. The Cabinet resolved as follows and the terms of this resolution were important in the submissions of both parties:

"1. That the report now submitted be accepted.

"2. That the proceeds from the sale of Atherton Two Porches, Hindley Tanfield and Standish Mere Oaks or Woodfield Schools be ring-fenced for this purpose.

"3. That future capital receipts from the sale of mainstream schools that may close over the coming years due to the impact of falling numbers be allocated to meet the shortfall detailed in the report.

"4. That the estimated proceeds of sale from the three Special Schools to be included in the Capital Programme for 2004/2005.

"5. That the estimated proceeds of sale from the Special Schools sites and the potential receipts from the sale of mainstream Schools that may close be released in advance of any sale for this purpose."

22. When the issues went to the School Organisation Committee on 27th April 2004 the minutes show that the Schools Group asked questions about the way in which the proposals would be financed. Mr Muirhead queried what he saw as the small amount available for the Hindley Community High School Scheme. The minutes record Ms Walton, Assistant Director of Education with responsibility for the development of services, saying as follows:

"6.25 A Walton clarified that a report had gone through Cabinet, a copy of which was in the prescribed information, which had the approval of members that any shortfalls to deliver the special needs proposals would be underwritten by the Council. This would be in the form of an interest-free loan, paid back from the capital receipts from the sale of sites as a result of any primary school closures or single sitings. The release of some sites would be inevitable given that the birth rate is set to fall further.

"6.26 She also stressed that the scheme had been fully costed with help from SEN colleagues and architects."

23. Mr Oldham for the Claimant made something of the way in which that which had been only "possible" in the report to the Cabinet had become "inevitable" when Ms Walton was describing the same report to the SOC and to the public who had attended that meeting.
24. When the matter came for consideration before the Adjudicator, the Schools Group prepared a written submission dated 14th May 2004. Mr Sheldon for the Adjudicator drew attention to what he said this showed about the real concerns and understanding of the Schools Group as to the financial arrangements for funding the new provision. It said that the capital costs were unknown and could rise and that that raised the issue of the budget. It said:

"To commit potential future capital receipts to open ended building development proposals that have not been agreed or costed appears highly questionable. In the first instance because no schools have yet been identified for closure, the amount of capital receipt that may be obtained is unknown. Secondly, capital receipts of this type should perhaps be considered in the context of potential improvements for all schools. To commit future funding sources to an unknown project cost at one school may well have a disproportionate detrimental effect on other schools in the Borough.

"Even if the principle of committing funding generated by the sale of future closing primary schools is accepted, a further issue arises concerning the potential value of these unidentified sites. School playing fields are now protected by legislation, consequently, potentially leaving only the building and playground (other than that used for organised games) as the saleable part of the site. It may take the closure of a significant number of primary schools to fund the eventual capital cost of these proposals."

25. Although Mr Sheldon acknowledged that this raised the issue of finance, as Mr Oldham had said, he argued that it did so in the context of concerns about the damage which could be inflicted on other educational needs if so large a part of the budget were committed to the special needs provision, and funding had to continue to be provided at an uncertain future cost out of school sales and at an uncertain future sale price of unidentified schools. The Schools Group, he suggested, was not concerned that Wigan Council could not actually fund the costs and still less that it had not committed itself to

funding the costs. That he said was the point that Mr Oldham was now making in his submissions here.

26. The Adjudicator held a public meeting on 1st July 2004 at which the Schools Group and the SOC were present with LEA and school representatives. The minutes record the Adjudicator asking the LEA representatives to make a presentation paying particular attention to four points, including how the proposal would be resourced. It is recorded on that point in the minutes that the presentation simply said, "Costs will be met by council, which is documented". Mr Frost from the Schools Group asked at the end for firm figures on funding. The Adjudicator is minuted as saying, "[that he was] satisfied that there was a clear commitment from the Council to provide capital resources...".
27. The Claimant accepted that the Adjudicator had said words to that effect. There was some debate before me as to whether there had been any mention of documentation at that meeting. The Claimant took issue with that but there had been no earlier attempt to counter it with evidence. I was told that the Claimant or someone else would be prepared to provide a sworn statement that there had been no mention of documentation. I accept that he would have been ready to say truthfully that he could not remember anything of that sort being said but I find it hard to accept that the words were recorded when they had not been used. In any event the real issue is as to the significance of what the Adjudicator had in mind when writing his decision.
28. In addition to those contemporaneous documents I was favoured with later material in witness statements. I turn to these now, but before doing so I recognise the force of the decision in **R v Westminster City Council, ex parte Ermakov [1996] 2 All ER 302**. In that case, which concerned the duties of a housing authority under the Housing Act 1985 in respect of homeless persons, there was a statutory duty to give reasons for a decision but when the decision was challenged by judicial review, the reasons given were said to be different. The Court held that although evidence could be admitted to elucidate or exceptionally to correct or add to reasons which had already been given, it should be very cautious about allowing that. It could happen where there had been an error of transcription or inadvertently words had been omitted or the language used itself was unclear. But it should not be admitted to create contradiction or a fundamental alteration in the reasoning previously given.
29. As to the witness statements, first the Adjudicator's statement says that at the public meeting on 1st July 2004 the LEA officer said that, "funding was available for meeting costs and that it was not dependent on the sale of school sites." He was aware from the SOC documents that there was documentation confirming that commitment. The Councillor with Cabinet responsibility for education confirmed that commitment. The Adjudicator also said that he was aware from the documents that there was a decision of the Council, which is the Cabinet decision of 8th January 2004. He said of it that although the source of funding might ultimately be the sale of school sites, the money would be released for the purpose of alternative provision prior to the sale of those sites. The Adjudicator took the view that that minute confirmed that money was available for the work needed.

30. Ms Gilbourne said that at the 1st July 2004 meeting she had confirmed that the funding would be provided and that that had been documented on previous occasions. She also said that it was not dependent on the sale of school sites and although there were capital receipts from such a source which confirmed the replacement resource at Hindley, "there were alternative sources from which funding could be brought forward if for whatever reason the school sites did not realise sufficient funds or realised no funds at all."
31. Secondly, Ms Walton explained that the valuations of the school sites on the 18th December 2003 report were cautious and professionally based. She suggested that the purpose of that December report had been to seek permission for the expenditure "to be made against the capital receipts from the special schools and for the shortfall to be funded from future capital receipts of other closing schools." She summarised the reasons why she says that officers were able to recommend the funding process; these included a surplus of £3 million in the education capital budget, which although committed to other projects could be used to fund the special needs review expenses in advance of capital receipts "if necessary commitments could be changed." Falling school roles meant that other sites would be available for disposal in 2006 and beyond. The more immediate closures of primary schools were noted. The council could also borrow money. There was also a Central Government commitment of £3 million for the next 3 financial years for school capital investment.
32. She said that the effect of the Cabinet resolution was to enable the Education Department to spend against the anticipated receipt of funds. Responding to criticism that the minutes of what Ms Walton said to the SOC referred to an interest-free loan, she said that that was a way in which a layman could describe spending against anticipated future receipts of capital funds, a common practice permitted because of continual slippage in the capital budget account which was carried forward from one year to the next.
33. In my judgment the primary consideration is the meaning of and basis for the decision letter of 22nd September 2004. It is a document which is intended to convey the outcome of the Adjudicator's consideration of matters afresh from that provided by the LEA for the SOC. It has to show that the Adjudicator himself is satisfied that adequate financial resources will be available to enable the proposal to be implemented. This is a practical issue.
34. Guidance requires the SOC and then the Adjudicator to consider various matters with care to ensure that the LEA is not being over-optimistic. These relate particularly to government funding and to the prospects of capital being raised from school site sales which have to pass through their own consent procedure. The guidance also gives some education of what one would expect to see from the LEA or provider of funds.
35. An Adjudicator's decision letter is not simply concerned to address the points which objectors may have raised. It is not in that sense an adjudication on issues between parties, although the extent of detail into which an Adjudicator might go can properly be affected by the issues raised.

36. I accept Mr Sheldon's submission that the obligation to be satisfied that adequate financial resources would be available does not mean that an Adjudicator has to be satisfied that the LEA has chosen a wise way in which to fund the provision or that there will not be damaging effects upon the way in which other competing requirements will be met. The statutory concern is with the certainty of funding and not with the wisdom of the particular method chosen. Still less is it concerned with how a particular budget would be reimbursed with the money spent out of it, save to the extent to which those considerations might in turn impact upon the degree to which it could be said that the funding arrangements were more uncertain because they were the more changeable in response to the pressures which would otherwise be left unmet. The decision letter is intended to show how the Adjudicator's conclusion relates to the government guidance on the adequacy of financial resources.
37. The decision letter should not be treated as a contract or statute. There is no statutory obligation on the Adjudicator to give reasons for his decision, but it is clear that where reasons are given they can be used to show that the basis for the decision was unlawful, whether because irrelevant considerations were relied upon or because relevant considerations were ignored. Where there is no obligation to give reasons but reasons are nonetheless given, the full rigour of **Ermakov** may not apply to a statement of supplementary reasons which may contradict or be inconsistent with the earlier reasons, but where those later reasons are inconsistent and put a very different picture forward as to the basis of the decision, it is inevitable that those later reasons will be regarded with scepticism. They are not inadmissible, however, to explain what the basis for the decision was, as they more probably would be if there were an obligation to give reasons for the decision in the decision letter.
38. I also accept that where there is a requirement to have regard to a statement of policy, any apparent departure from it would need to be justified by reasons. If a departure were not so justified, there would be likely to be a strong case that the policy had been misunderstood or ignored. See, for example, **Gransden & Co Ltd v SSE 1985 [54 P&CR 86]**.
39. With those observations in mind I turn to the decision letter. Paragraph 26 deals with the issue as to funding in one sentence. On its face it relates only to what was said at the meeting and to nothing else. It can only relate to what was said by an officer, Ms Gilbourne, or by a senior Councillor. It appears on its face to have no more solid basis than their oral comments, rather than anything which they said about documents or resolutions of the LEA. The commitment to funding upon which the Adjudicator relied in that paragraph was simply that which had been made at the meeting. Further, it contains a reference to an indication that funding was not dependent on school site sales rather than on anything firmer.
40. Paragraph 26 shows no consideration afresh of funding; rather it shows a willingness to accept the mere unexplained and unsupported word of two people who have no obvious authority to commit the LEA at that meeting. It ignores, seemingly, the guidance which requires that written confirmation be normally provided from the source of the funding. Here there was merely an oral confirmation and no explanation from the Adjudicator as to why the requirement for written confirmation in the guidance was inapplicable. I

accept that the fact that confirmation was not always required to be in writing, if that is the requirement which the word "normal" is intended to qualify, means that the requirement cannot be departed from without reasons being given.

41. I recognise that the Adjudicator says that he has had regard to the guidance and has considered matters afresh, but those words of themselves, and shorn of any background, would not satisfy me that he had understood the nature of his task and the meaning of the guidance in the light of what he actually says in paragraph 26 when dealing with the specific funding issue. If the matter had rested there I would have regarded that as a plainly legally erroneous decision.
42. But matters cannot be left there. The decision letter has to be read as a whole. In paragraph 5, the Adjudicator refers to the agenda and supporting papers for 27th April 2004 SOC meeting as having been considered by him. There is no dispute but that those papers included the report to the Lifelong Learning Panel and to Cabinet prepared by Ms Gilbourne and the response of the Cabinet to it in the form of its resolution. Nor is there any dispute but that that paper was referred to by Ms Walton at that meeting of 27th April 2004 in terms which I have set out above. This is the reference to the interest-free loan paid back from capital receipts from the "inevitable" release of primary school sites.
43. I regard it as unrealistic and artificial to approach the decision letter read as a whole as if the Adjudicator did not have in mind the report to Cabinet and the response of Cabinet to that report. They are encompassed by his references to the 27th April 2004 meeting material and by what transpired at that meeting itself. It would also be surprising, given the irrationality otherwise of the adjudicator's decision, at least as I would see it, that there was nothing else to support the views which he expressed.
44. I accept that the decision letter itself makes no explicit reference to the resolution in its very brief comment about the security of the financing arrangements. But the decision letter is not to be construed in an over-legalistic way. The lack of reference to the written commitment in the resolution of 8th January 2004 in one part of the decision letter, when it is included in another part, means that the letter cannot be construed as if he had ignored it. The explanation for the omissions may simply be that the Adjudicator focused in the fuller part of his decision letter on what happened at the 1st July 2004 meeting simply because it was the most recent event confirming what the Adjudicator thought the objectors already understood. He may have used the earlier references in paragraph 4 of his letter simply to incorporate events up to that meeting on the basis that those to whom the letter was addressed would understand what the issues were.
45. There is support for that from the concern expressed in the written submissions from the Schools Group to the Adjudicator about the impact which the use of the proceeds of sale of school sites would have on the other demands placed on the education budget. The objectors were hoping to use that impact not to say that funding was insecure because of those competing demands, but that it should not be made for that reason. I accept that there is a point at which the one can impact upon the other, but if that is the primary point made by the Schools Group, it does suggest acceptance that the funding

is in place and that it is the effect of its being in place which is what is regarded as objectionable.

46. On that analysis of the decision letter, paragraph 26 must be read bearing in mind the earlier reference to the documents of 22nd April 2004. The oral comments would have been understood as based upon the earlier written comments, if such there were, in the 8th January 2004 resolutions of the Cabinet.
47. Mr Oldham submits that that is to disregard the language of the decision letter which exclusively refers to the oral commitment, but for all the persuasiveness with which that point was advanced, I regard it as unrealistic. The decision letter read as a whole, and in the context of the continuing debate with the problems associated over funding, clearly includes the resolution of the Cabinet as part of the thinking behind the oral commitment of which the Adjudicator and the objectors were aware. I have not for these purposes given any additional weight to the witness statement of the Adjudicator, but it does seem to me that what he says there is what a proper understanding of the documents reveals anyway.
48. I have considered the minutes of the meeting of 1st July 2004 in seeking to understand what the Adjudicator meant and what he based his decision on. I do not think that they advance matters either way. It cannot be disputed but that some words were uttered about the funding commitment by the LEA, but the very brevity of the LEA comment, as minuted, suggests that if it stood alone as a basis for the adjudicator's conclusion that he was satisfied as to the funding, it would simply support the contention of the Claimant that he had no basis at all for his conclusion. It would suggest that there was a mere say so by those who were not in a position to commit the LEA. There is nothing to suggest that it alone could rationally satisfy anyone that funding was in place. However, as I have said, those comments do not stand alone because the Adjudicator had the papers for the 27th April 2004 meeting and would have understood proceedings on 1st July 2004 in the light of what he already knew.
49. I do not think that the disputed reference to the documents in the minute of 1st July 2004 assists either way. The Adjudicator already had documentary material which he could clearly see was the foundation for the oral comment or commitment. Whether or not there was a specific reference to documents on 1st July 2004, the Adjudicator would have understood the reference to the commitment in the light of documents which he had. Accordingly, nothing in that material dissuades me from the view which I have formed of what the Adjudicator took into account.
50. That is not the end of the matter, however, because the Cabinet resolution and underlying report were themselves the subject matter of debate as to whether or not they embodied the necessary commitment, or, more accurately, whether they could justify, if relied on by the Adjudicator, this conclusion that he himself was satisfied that adequate financial resources would be available.
51. The resolution does not in express terms, and it is in some ways quite striking that it does not, commit the LEA to expend any particular sums of money upon the works necessary for the alternative provision of special needs education. Still less does it do

so regardless of the LEA's ability to recoup such expenditure out of the proceeds of sale anticipated from the sale of school sites. Yet on a perhaps benevolent interpretation of the decision letter, this is the resolution upon which the Adjudicator was satisfied that adequate finances would be available. There is no other.

52. It is necessary, therefore, to see what this resolution says. The resolution accepts the report which contains proposals "to secure funding" in the ways which the resolution endorses, ring fencing certain sale proceeds and using capital receipts from future possible sales. It also accepts the conclusion of the report which deals with the implementation of the changes, through spending monies in excess of the capital resources gained from the sale of the special school sites. It clearly contemplates expenditure being committed because it examines ways in which the finance can be bridged between the expenditure and its recoupment from the sale of special school sites. It also examines how the extra costs should be funded once those proceeds of sale have been ring fenced as proposed because they would not be sufficient to cover the expenditure. That involves what is at first blush the odd idea of using capital "receipts" before they have been actually received from future sales or "released", to use the language of the report.
53. The resolution follows that pattern: the proceeds of sale of the special school sites are to be ring fenced, future capital receipts from potential mainstream school closures would be allocated to the shortfall in total capital resources. As it is inevitable that the capital expenditure will have to take place before the special schools can be sold, and even more so before any as yet unidentified mainstream school can be sold, there is again the curious language in the last paragraph of the resolution to the effect that the estimated proceeds of sale from special school sites, and the potential receipts from the sale of mainstream school sites "be released in advance of any sale for this purpose."
54. These documents in my judgment show that there was a resolution to secure funding, the ultimate source for the larger part was identified and ring fenced the potential source for the lesser amount was identified and allocated, and a bridging mechanism for the periods of delayed receipt had been agreed. The Adjudicator would have understood that there needed to be an interim funding provision because it would have been obvious that the receipts themselves could not be spent in advance of disposals which could only occur after the alternative provision had been made. Paragraph 5 of the resolution resolves that the necessary capital should be made available in advance. It only needed to look at recoupment methods because it had resolved that money be spent in advance of receipt.
55. If the Adjudicator had had no understanding of the way in which LEA finances worked before the meeting of 27th April 2004, the explanation there given by Ms Walton would have told him in layman's language that the money was to be advanced out of the LEA budget. It took the practical form of an interest-free loan, ie from one LEA fund to another.
56. I consider that a reasonable Adjudicator was entitled to be satisfied on that basis that the necessary money was available in advance of the sales and that the LEA was committed to its expenditure. Of course, any resolution can be overturned, but any

such reservation would prevent any Adjudicator ever being able to be satisfied about the availability of adequate resources, and it cannot be the case that there had to be something yet more binding from the LEA before the Adjudicator reasonably could be satisfied that adequate financial resources were available.

57. The interim source of funds, although not specifically identified as being, for example, a particular capital surplus, was asserted to be available and there was a resolution to make it available. The ultimate sources of repayment were identified and in effect allocated to that task. There was no evidence suggesting that the money could not or would not be made available in that way. There was no challenge to what the LEA said because the focus of the Schools Group case was on the implications of the expenditure for other desirable aims rather than upon the absence of such expenditure. The varying ways in which the LEA expressed the probability of mainstream school sites becoming available for sale does not prevent their sale being a reasonable source for the Adjudicator to rely on in assessing whether or not the LEA had committed itself to the prior expenditure on the replacement special school needs provisions.
58. I do not accept that this approach would involve reading too much into the Adjudicator's decision letter. It must be read as a whole and that includes accepting that the Adjudicator took into account the resolutions, the report and what he was told at the meeting of 27th April 2004 by way of explanation of the resolution.
59. I have to some extent deduced what the reasoning would have been, but it seems to me to be the reasoning which is the most likely from the documents. If I had thought that there was genuine room for significant doubt about the reasoning process which those documents could have led to and that there was an alternative view which would not have supported the adjudicator's conclusion, my view might very well have been different, but any alternative reading of the resolution is too legalistic and insufficiently attentive to the realities of what it meant however it may have been couched. The resolution was not intended to be read by lawyers looking for a loophole, but in a sensible and practical way. I accept that the Adjudicator can be criticised for the way in which he expressed himself on one of the issues upon which he had to reach his own view and it is an important issue in any case, but I do not think that such a shortfall in reasoning can be sufficient here to demonstrate or create a legal error.
60. As I have said, I have reached that conclusion without reliance on any reasoning, whether elaboration or otherwise, in the Adjudicator's witness statement or in other witness statements, save for what they show was before the Adjudicator. They are in that respect consistent with the documents anyway.
61. The remaining issue is whether the Adjudicator's conclusion on that basis failed to give effect to the statutory guidance and therefore required reasons to be given for any exception which was made. I have already accepted that if there were a departure, reasons would have had to be given and it is clear that there is no suggestion in the decision letter of a departure from the guidance.
62. The question is whether the availability of resources in this case and in the way which I have described is dependent on the sale of school sites, in the way in which "depend" is

used in the guidance. Of course there is a relationship between the decision to spend the money on replacement provision and the sale of school sites. I would also accept that if no money were expected from those sales, the LEA might very well have taken a different view about whether or not to go ahead with its closure proposals.

63. In many contexts it could be said that the one therefore depended on the other, but I do not think that that can be said here. As Mr Sheldon pointed out, the object of the guidance is to prevent closure on an over-optimistic basis as to the prospects of the necessary funding for alternatives being available. If the money were available from a loan which was clearly available it would not matter that the repayment of the loan would create real difficulties or would be unwise or politically controversial unless that could be shown to have an impact on whether the loan would actually be taken up for the necessary purposes. What is looked at in the guidance is whether the availability of the resources to be spent on replacement provision is actually contingent on receipts from school site sales.
64. There is no evidence that the uncertainty over the speed of the sale of school sites or over the amount which their sale might realise, or possible other uses to which councillors might wish to put that money when actually received, could actually affect their implementing their decision to spend the money in the first place on replacement schools provision. Once it is accepted, as the Adjudicator reasonably concluded, that the authority has adequate resources available from the budget in advance of sales and is committed to that expenditure in advance of the sales, it becomes irrelevant what happens to the repayment. In that sense, which is the relevant sense here, the availability of the resources is not contingent or dependent on the sale of school sites and that is what matters here.
65. Accordingly, and notwithstanding Mr Oldham's able advocacy, this application is dismissed.
66. MR SHELDON: My Lord, thank you. I am grateful for you sitting early today to give judgment.
67. MR OLDHAM: I am as well, thank you.
68. MR SHELDON: My Lord, the Adjudicator does ask for costs in this matter. I think you may have been alerted to the fact that there was an issue about the costs.
69. MR JUSTICE OUSELEY: Yes.
70. MR SHELDON: Whether or not we get costs does not mean that costs will actually be enforced by the Adjudicator, however what the Adjudicator seeks or what the Treasury Solicitor seeks is as 50 percent of costs appear to be privately funded --
71. MR JUSTICE OUSELEY: Sorry, I did not catch that.
72. MR SHELDON: 50 percent of the costs appear to be privately funded by the Claimant or through the group for which the Claimant is the representative, and 50 percent through the Legal Services Commission. The appropriate order would be costs for the

defendant, 50 percent of which not to be enforced without leave of the court, as would be the normal way in a Legal Services Commission case. The effect of that would be that 50 percent of the costs could be enforced if advised to do so against the Claimant.

73. MR JUSTICE OUSELEY: Yes.
74. MR SHELDON: Without coming back to court.
75. MR JUSTICE OUSELEY: Thank you. Mr Oldham.
76. MR OLDHAM: My Lord, we object to the application for costs on bases which are set out in full actually in Mr Silas' statement which is at page 719 of the documents.
77. The first and easy point, my Lord, is that the Claimant here is legally aided, regardless of the funding which happens to be behind him. If the Claimant is legally aided it is not possible for your Lordship to make an order, save the normal order (inaudible) Legal Aid costs, ie not to enforce it without the permission of the Court.
78. My learned friend cannot be in a better position as a result of Mr Bradshaw having conscientiously tried to mitigate against (inaudible) implication to bring a claim like this. That is, as it were, the easy point.
79. The other points which Mr Silas -- my Lord, I do not know whether you would like to read his statement or whether --
80. MR JUSTICE OUSELEY: I just -- it is at 717?
81. MR OLDHAM: 719, I believe. My Lord there is one at 719, another statement there.
82. MR JUSTICE OUSELEY: 719 is the one you mean?
83. MR OLDHAM: Yes, my Lord. I am told there are two 719s. There should be a statement beginning, "(inaudible)...".
84. MR JUSTICE OUSELEY: Yes, and it is 20th June 2005?
85. MR OLDHAM: My Lord, it is -- no, it is dated 30th June 2005.
86. MR JUSTICE OUSELEY: 30th June?
87. MR OLDHAM: 30th June, my Lord, yes.
88. MR JUSTICE OUSELEY: Yes. 725, it is his fourth witness statement.
89. MR OLDHAM: I am sorry my Lord, yes. I have different numbering. I think it is (inaudible) looking at the old pagination, I apologise.
90. No, my Lord, your Lordship is absolutely right, I am sorry. I have the wrong numbers. 725, yes.

91. MR JUSTICE OUSELEY: Yes.

(Pause)

92. Yes.

93. MR OLDHAM: So, my Lord, as I say, effectively two types of point. One, the clear point as I have said, the Claimant is legally aided and that is the end of it. Secondly, if it does go beyond that, my Lord, all of those policy reasons Mr Silas in my submission very eloquently sets before your Lordship, all suggest that it would be -- I think one could go so far as to say it would be wrong in principle for your Lordship to make the costs order sought.

94. MR JUSTICE OUSELEY: Why would a football pools order be wrong?

95. MR OLDHAM: My Lord --

96. MR JUSTICE OUSELEY: (Inaudible).

97. MR OLDHAM: My Lord, no. We would accept a general football pools order in the sense of there being no split between --

98. MR JUSTICE OUSELEY: I see, yes.

99. MR OLDHAM: So if the order were...

100. MR JUSTICE OUSELEY: It is just that I did not understand, last sentence of paragraph 22, needing to take time on it and say if the issues, whether they should be 50 percent or 100 percent football pools order.

101. As I understand it, Mr Sheldon's application for costs has not really drawn upon the point that this is going to, which is the fact that there is an action group.

102. MR OLDHAM: Yes, I think that is right, my Lord. Yes. So we would be -- with a normal legal aid order, in other words costs --

103. MR JUSTICE OUSELEY: Yes.

104. MR OLDHAM: -- not to be enforced --

105. MR JUSTICE OUSELEY: Mr Sheldon is not putting it forward, I think, on the basis (inaudible). But this is a different case because there have been some other contributions to the action. Am I right in that?

106. MR SHELDON: My Lord, what we are effectively saying is if you have the normal -- I am effectively asking for the permission that we have within the football pools order to have 50 percent of the costs.

107. MR JUSTICE OUSELEY: Yes, but is that on the basis that -- would your application be the same even if Mr Bradshaw were a lone individual?

108. MR SHELDON: I think it would be the same. He has brought the claim however it is being done.
109. MR JUSTICE OUSELEY: Yes. The 50 percent then arises because is it of the scale of contribution that you feel obliged to make?
110. MR SHELDON: My Lord, it was drawn to our attention at the very outset that they were having to make a 50 percent private contribution.
111. MR JUSTICE OUSELEY: Yes.
112. MR SHELDON: And that is why we pick up that figure. I do not think that there is any dispute that that is the contribution that is being made.
113. MR JUSTICE OUSELEY: Yes.
114. MR OLDHAM: I may have misunderstood matters. I thought what my learned friend was asking for was the normal football pools order in respect of 50 percent, but actual order which he may, or may not -- may then, of course he may not --
115. MR JUSTICE OUSELEY: Yes, that is what he is asking for.
116. MR OLDHAM: I am happy with the 100 percent football pools order. Your Lordship has the point.
117. MR JUSTICE OUSELEY: I have the division between you. You say your client is a normal, legally assisted person and the appropriate order would be what would normally be invited, but I think the point that Mr Sheldon makes is that it is unusual to find somebody who is legally aided who has a 50 percent contribution --
118. MR OLDHAM: Well, my Lord --
119. MR JUSTICE OUSELEY: -- and hence a different order might be appropriate. If he could get his hands, could he not, on funding to the extent of your contribution?
120. MR OLDHAM: My Lord, what I would say about that is that nevertheless the position is still that he is legally aided, so the matter stops there. Secondly, my Lord, all the policy reasons that Mr Silas sets out suggest the just thing to do here is regard somebody who has, unlike perhaps a lot of legally aided people -- no criticism of them - - but unlike a lot of such people, has actually done a lot of work to ensure the cost to the public of this mitigation is reduced. It would seem very harsh if he should be put in a worse position because of that, and indeed it would, as Mr Silas has said, potentially undermine the approach of the Legal Services Commission to these sorts of part-funding cases because there would be no interest, or there would be no benefit to a litigant in having whip-rounds, as it were, and in seeking to raise money themselves if at the end of the day he could be liable like a private client would be. So for all those reasons, my Lord, that what I say.
121. MR JUSTICE OUSELEY: Do you want to respond?

122. MR SHELDON: My Lord, as I have said -- and maybe I have confused matters -- if there is to be a football pools order it is a matter that we can ask the court to enforce all or part of those costs.
123. MR JUSTICE OUSELEY: Yes.
124. MR SHELDON: So what I would be doing if you were to make a football pools order is to ask you then to say: well, we would like 50 percent of our costs, please. The Claimant has to take the risk here. The Claimant did take the risk, but they were put on notice at the very outset that we would be seeking costs if the matter proceeded.
125. MR JUSTICE OUSELEY: Yes. Mr Oldham, the reality is we may not -- you get the order you want but Mr Sheldon says that is not the end of the matter. Assume that I make the order you want and not the order he wants, he now then says: right, now I would like the Court to give leave for it to be enforced as the 50 percent.
126. MR OLDHAM: I do not know whether he is going to do that or whether that is going to happen today.
127. MR JUSTICE OUSELEY: Effectively that is what he is saying is his stance.
128. MR OLDHAM: I do not know whether he is going to do that today, my Lord, or not. The question --
129. MR JUSTICE OUSELEY: I do not know whether he is going to do it today but it is the same thinking.
130. MR SHELDON: My Lord, that is what I have to say. I am asking you if -- and I do not know whether you are going to agree to my original request, but if you do not and you agree to Mr Oldham's --
131. MR JUSTICE OUSELEY: I do not really want to agree to it, but ...
132. MR SHELDON: I fully appreciate that, but if you accept that this is a legally aided Claimant, therefore the normal rules apply.
133. MR JUSTICE OUSELEY: Yes.
134. MR SHELDON: The normal rules are the football pool order.
135. MR JUSTICE OUSELEY: Yes.
136. MR SHELDON: We would then have to come back into court and say: we would like to enforce this.
137. MR JUSTICE OUSELEY: Yes.
138. MR SHELDON: But we are here, in court, in front of a judge who knows the case, and in those circumstances I ask for 50 percent of the costs enforced against the Claimant.

139. MR JUSTICE OUSELEY: Imagine yourself, for the purpose of this argument, in the position where you have got your 100 per cent order, Mr Sheldon has come back here and we are now a week further on.
140. MR OLDHAM: My Lord, the fact that there is a 50 percent contribution does not mean, as I understand the law -- it may be my lack of understanding -- it does not mean that my learned friend is therefore entitled to 50 percent costs --
141. MR JUSTICE OUSELEY: No, no. He is not entitled to it, but I have a discretion.
142. MR OLDHAM: My Lord --
143. MR JUSTICE OUSELEY: And you say do not exercise the discretion because the scale of the contribution only arises because it is sensible for somebody who seeks public funding assistance to do what he can --
144. MR OLDHAM: Yes, my Lord.
145. MR JUSTICE OUSELEY: -- to raise money in other ways.
146. MR OLDHAM: That is right. In effect he would be, as it were, being put in a worse position than somebody who has not... There is the further point, my Lord, which is a real practical difficulty, which is that there will be difficulties in identifying who the sources of funds would be and therefore in the practical effect of any enforcement order on Mr Bradshaw.
147. MR JUSTICE OUSELEY: Yes.
148. MR OLDHAM: Taking a step back, my Lord, your Lordship has these points, but of course this is the central funding authority, as it were, against another public funding authority and I think that is a matter your Lordship is entitled to take into account.
149. MR JUSTICE OUSELEY: Yes. What order do you then say should be made in order to avoid Mr Sheldon being in the position to come back and ask for 50 percent? This is not the football pools.
150. MR OLDHAM: My Lord, your Lordship could -- to avoid that your Lordship could order that there be no order as to costs. That would avoid it and that is certainly a matter your Lordship would be entitled in your Lordship's discretion, looking at the facts of the case, looking at the nature of the funding, to make.
151. As in any legal case where there is an order such that there be -- well, where there is an order for costs not to be enforced without the permission of the court, one party cannot stop the other side asking. It very rarely comes to it, as your Lordship knows, and there would be all sorts of arguments to put at that stage.
152. MR JUSTICE OUSELEY: Yes.

153. MR OLDHAM: The arguments I would put forward are the arguments that Mr Silas sets out. I submit it would be a very harsh result.
154. MR JUSTICE OUSELEY: Do you have anything to add?
155. MR SHELDON: My Lord, the order that Mr Oldham is putting forward is plainly not one which I would recommend to you.
156. MR JUSTICE OUSELEY: No.
157. MR SHELDON: The Claimant has failed. They failed in respect of two of their grounds and we knocked that out. There has to be, my Lord, I would submit in the favour of the respondent, and I would recommend to you two solutions and I would be happy if you take one or other of them.
158. MR JUSTICE OUSELEY: Yes. There will be an order for the Claimant to pay the defendant's costs and not to be enforced without further order of the court. I shall add some words, however.
159. The real issue between the parties, whether it takes the form of an order as originally sought by Mr Sheldon that the leave of the court be required only as to 50 percent, or whether he comes back, as he would be entitled to under the order which I have made, to seek the leave of the court to enforce it as to 50 percent, relates to the particular position which Mr Bradshaw is in.
160. Mr Bradshaw has a 50 percent contribution. His contribution is only at that level because of the way in which, respecting LSC funding guidance in difficult cases of public interest such as school closure cases, he has sought, with modest success, to obtain the assistance of others equally interested through the raising of funds through the mechanisms which are often deployed and which raise fairly small sums of money, for example bring and buys and other small events or occasions that raise money.
161. There is a dilemma for a court and, indeed, for the Legal Services Commission here. In order to bring the proceedings some financial assistance is needed from the Legal Services Commission. In order for that to be obtained, funding is to be generated not just by the individual but by those with whom he shares an interest. Yet if the impact of that is to increase costs liability for an assisted person, one or other of two undesirable consequences could flow. The first is that the assisted person is in effect unable to bring the proceedings because there is no funding because he cannot raise it. Or, alternatively, the assisted person loses any incentive to try and reduce the Legal Services Commission costs because that simply puts him in no better position at all.
162. Whilst I accept, and in making the order have done so, that in principle a conventional Legal Services Commission funded costs order should be made, those factors to which I have just referred and which are set out in the fourth witness statement, dated 30th June 2005, from Mr Silas, the Claimant's solicitor, persuade me that the enforcement of costs should not follow the usual pattern.

163. In making the order I do and in making these comments, I intend to shut out, having heard the case, any prospect of the Treasury Solicitor seeking leave from the court to enforce the order as to 50 percent based upon the considerations that are set out in the statement of Mr Silas.
164. Should circumstances change, say that money is in what is conventionally called football pools or lottery position, then in those changed circumstances such an application for leave to the court might prove successful, but in making the order I do, I make it clear that I would not expect there to be leave sought, or if sought granted, based upon the considerations which have underlain the debate which has taken place here. I intend by these remarks to prevent that. Upon that basis the order is made.
165. I would also add that although the Claimant lost, it required a certain amount of thought and effort by advocate and analysis by the judge to put the reasoning into a state which it might be thought the Adjudicator could have put it in himself.
166. MR OLDHAM: We are very grateful.
167. My Lord, Mr Bradshaw is not here, as your Lordship has probably noticed, but in case on instruction he wishes to take the matter further I wonder if I could address your Lordship briefly on permission to appeal.
168. MR JUSTICE OUSELEY: Briefly.
169. MR OLDHAM: I am grateful. First of all, what I submit was the very good arguability of the case, as your Lordship perhaps has just alluded to in your Lordship's final comments. Secondly, that reference, my Lord, the public importance of the issues to the community involved, and, thirdly, my Lord, going back perhaps to your comments just now, your Lordship to an extent, I think on your Lordship's own acceptance, has at least partly provided or elucidated the reasons which was the very basis of the challenge, so I would submit that there are good prospects, certainly reasonable prospects of an appeal succeeding.
170. MR JUSTICE OUSELEY: Yes. I am not going to give you permission. I made the remarks I do and I still adhere to them, but I think the implication is quite other than what you say. When the position is analysed, the answer becomes clear.
171. MR OLDHAM: So be it, my Lord. No disrespect was meant.
172. MR JUSTICE OUSELEY: I did not suppose for one moment.
173. MR OLDHAM: My Lord, in which case could I ask for an extension of time from your Lordship for the submission of a notice of appeal for 28 days, simply because I --
174. MR JUSTICE OUSELEY: Yes. You probably want time from the receipt of the transcript, which I am prepared to give. I do not know when that will be so I will extend it to 14 days from receipt of the transcript.

175. MR OLDHAM: I am grateful. Is it possible to expedite the receipt of the transcript or not?
176. MR JUSTICE OUSELEY: There is frankly no point because I have to look at it, and I am going to have a good holiday.
177. MR OLDHAM: My Lord, I am grateful.
178. MR JUSTICE OUSELEY: So 14 days. You have 14 days from --
179. MR OLDHAM: Receipt of the transcript.
180. MR JUSTICE OUSELEY: -- receipt of the transcript.
181. MR OLDHAM: I am very grateful. Lastly, my Lord, I think I need a public funding certificate.
182. MR JUSTICE OUSELEY: Public funding certificate.
183. MR OLDHAM: I am grateful.
184. MR JUSTICE OUSELEY: Do not wait, I will attend to some business here so be off to your other business.
185. I am sorry, Mr Oldham, I am reminded it is not the certificate.
186. MR OLDHAM: It is the (inaudible). I am very grateful to your learned associate.
187. MR JUSTICE OUSELEY: Yes.
188. MR SHELDON: My Lord, if I may make my absence now?
189. MR JUSTICE OUSELEY: Yes, certainly. I am quite happy sitting here on my own.

(End of judgment)