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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Board of Governors of Loreto Grammar School's Application [2011] NIQB 30

**IN THE MATTER of an Application by the Board of Governors
of Loreto Grammar School (Omagh)
for Judicial Review**

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McCLOSKEY J

I INTRODUCTION

The Loreto Order of Nuns

[1] The Loreto Sisters, an Order of Nuns, enjoys a richly deserved reputation, of longstanding, for the provision of highly skilled and dedicated teaching to younger members of society, mainly in the post-primary sector, in both parts of Ireland and beyond. Countless generations of pupils have been the beneficiaries of this

invaluable service to the community. One of the schools founded by the Loreto Order is the Loreto Grammar School in Omagh (hereinafter described as “*the Loreto School*”), which dates from 1858 (a year of great significance for those who profess the Roman Catholic faith). The Loreto School continues to occupy its original site at Brook Street, Omagh. This site also contains a now disused Loreto Primary School and a listed Convent building of renowned architectural merit. The future of the Loreto Grammar School on its present site in Omagh is the subject matter of this application for judicial review.

The Contours of the Judicial Review Challenge

[2] The Applicant in these proceedings is the Board of Governors of the Loreto School, Omagh (whom I shall hereinafter describe as “*the Governors*”). The Respondent is the Department of Education (“*the Department*”). The first decision which the Governors impugn by this challenge is described in the following terms:

“A decision by the Minister for Education, Catriona Ruane, MLA, and her Departmental officials, whereby she has refused to honour a pledge made by Minister Barry Gardiner on 27th April 2004 committing the Department to provide £14.6 million to fund the construction of a new school building on the existing site of Loreto Grammar School”.

The court permitted an amendment of the Order 53 Statement to permit the Governors to challenge a second Departmental decision, formulated in these terms:

“A decision by the Minister for Education and her Departmental Officials communicated on 29th June 2010 that the Applicant’s school and proposed building project was ‘non compliant’ with the Sustainable Schools Policy criteria”.

Whether these truly represent two freestanding decisions or form two parts of a greater whole is a question which I shall have to consider at a later stage of this judgment. As appears from the first of the Orders of Certiorari sought by the Governors, their primary contention is that the Minister has refused to honour her predecessor’s commitment of April 2004. The second form of relief sought is couched in somewhat different terms:

*“An Order of Certiorari quashing the Minister’s decision to make any provision of funding for the construction of a new school building **conditional upon an agreement to the transfer of the premises to the proposed multi-campus on the Lisanelly site**”.*

[My emphasis].

Thus the Governors' case is based on an assertion that the Minister has made a decision that any provision of funding for the construction of a new Loreto Grammar School building in Omagh is conditional upon their agreement that the school will migrate from its present site to a new location, described in shorthand as "Lisanelly". The latter is a former military base, now in disuse. The Governors also seek a declaration that the decision enshrined in the aforementioned letter of 29th June 2010 is unlawful.

[3] As appears from the above, the Governors' case is based on three asserted Ministerial determinations which, per the Governors' formulation, are:

- (a) A commitment, or pledge, by the former Minister for Education,, Mr. Gardiner, on 27th April 2004 that the Department would commit capital funding of £14.6 million for the construction of a new Loreto School on its existing site.
- (b) A more recent decision by the present Minister, Ms Ruane, reneging on Mr. Gardiner's pledge and intimating that funding for a new school will be available only if migration to Lisanelly occurs.
- (c) The most recent Departmental decision, which is that the Loreto School and proposed building project are "*non compliant*" with the "Sustainable Schools Policy" criteria.

While decision (a) forms one of the cornerstones of the Governors' challenge, decisions (b) and (c) are the targets of such challenge. All of these decisions are fully documented and I shall examine their respective terms presently. The Governors' case, in a nutshell, is that decision (b) frustrates a substantive legitimate expectation held by them, engendered particularly (but not exclusively) by Minister Gardiner's commitment, amounting to an abuse of power, devoid of any public interest justification and is vitiated accordingly. It is an indisputable fact that the public funding pledged by Minister Gardiner has not been provided, with the result that the preliminary steps necessary to realise the construction of a new Loreto School – which include various steps under the planning legislation, the preparation of a specification, the formulation of a tender and contract procurement – have not even been initiated. These proceedings were initiated and commenced on 30th June 2010, some six years after the Ministerial promise. Decision (c), on the Governors' case, simply added insult to injury and is attacked mainly on the basis of irrationality.

The Battle Lines Drawn

[4] As the evidence makes clear, in the events which have occurred a nexus has been forged between the Governors' redevelopment intentions for the Loreto School on its existing site (on the one hand) and an emerging, but far from finalised, Ministerial/Departmental aspiration to develop a new, comprehensive post-primary educational campus on a single site at Lisanelly in Omagh (hereinafter described as

“the Lisanelly option”). This is described in the evidence as a *“shared educational campus”* which, if developed, will entail the concentration of a currently unspecified, unknown and unpredictable number of post-primary schools presently operating in Omagh. The *“Lisanelly option”* first surfaced around four years ago and, since then, has cast an increasingly lengthy shadow over the Ministerial commitment of April 2004 and the corresponding aspiration of the Governors and trustees to develop a new Loreto School on the existing site as quickly as possible. The evidence initially assembled conveyed a distinct flavour that the *“Lisanelly option”* is at an extremely embryonic stage and is currently enshrouded in uncertainty and speculation. This evidence grew as the hearing progressed and I shall revisit this discrete issue at a later stage of this judgment.

[5] The first riposte made by the Department, while not disputing the Ministerial pledge made in April 2004 and confirming the aforementioned nexus, is to the effect that the impugned refusal decision has not been made. This, it is suggested, crystallises in two letters written by the Department in early 2010. The first of these letters, dated 8th February 2010, refers to an exercise of *“planning of schools capital investment in the Omagh area”*, arising out of the transfer of the Lisanelly site to the Northern Ireland Executive as a gift *“for use as an educational campus”*. The thrust of this letter is that the revised Economic Appraisal submitted to the Department on behalf of the school is said to be unacceptable as it omits *“full economic evaluation of the Lisanelly option”*. The same theme is echoed in a further letter, dated 23rd March 2010, which mentions *“DFP Guidance”* and highlights the need for *“a composite economic appraisal considering the potential relocation of other post-primary schools in Omagh to the Lisanelly site”*, being a pre-requisite to final Departmental/Ministerial decision making. The same stance is adopted by the Department in relation to the second of the impugned decisions, it being suggested that the *“non-compliant”* finding is not irreversible and, hence, does not operate to extinguish the substantive legitimate expectation asserted by the Governors.

[6] It may be observed that neither of the aforementioned letters specifically addresses the fundamental question of whether the Department intends to honour the Ministerial commitment made in April 2004. Neither letter really engages with the present status of the commitment and the current Ministerial/Departmental position thereon. Furthermore, Minister Gardiner’s pledge does not feature at all either in these letters *or* in other salient communications and documents, including an obviously important Departmental submission to the Minister in December 2008. Relying on the two aforementioned letters, the Department makes the case that the impugned determination has not been made as there is no finality, with the result that the Applicant’s challenge is premature and that this, *per se*, warrants a dismissal of the application. It is submitted, in the alternative, on behalf of the Department that the legitimate expectation canvassed by the Governors has no foundation. In the further alternative, it is submitted on behalf of the Department that any legitimate expectation enjoyed by the Governors was qualified and has been superseded by properly taken subsequent decisions and assessments, with the result that there is no unfairness or misuse of power in declining to give effect to the earlier

Ministerial commitment. This aspect of the Department's submissions also highlights the factors of allocation of finite public resources, the non-fettering of Ministerial discretions and the macro-political field in play.

Statutory Framework in Outline

[7] In the labyrinthine statutory maze which governs and regulates education in Northern Ireland, the Loreto School is designated a "*voluntary grammar school*". Under the legislation, which begins with the Education and Libraries (Northern Ireland) Order 1986 ("*the 1986 Order*"), duly supplemented and modified by an increasingly complex series of successive statutory measures, voluntary grammar schools are permitted to have a particular denominational ethos. This is clear from, *inter alia*, the statutory provisions regulating the body known as the Council for Maintained Schools ("*CCMS*"): see Part IX of and Schedule 8 to the Education Reform (Northern Ireland) Order 1989 ("*the 1989 Order*"). In recent years, Catholic denominational schools have constituted a majority of the voluntary grammar schools in Northern Ireland. Only two of the schools belonging to this particular sector receive no government assistance with capital costs and, in consequence, enjoy complete autonomy in their management structures. In the case of all other voluntary grammar schools, including the Loreto School, government capital funding ranges from 65% to 100% and, in some cases, extends to the individual school's maintenance costs. The possibility of 100% capital funding was first introduced in the last two decades: see Article 28 of the Education and Libraries (Northern Ireland) Order 1993 ("*the 1993 Order*"), which substituted the pre-existing Article 116 of the 1986 Order. The substituted Article 116 was, in turn, succeeded by the more recently commenced equivalent provision contained in Article 68 of the Education (NI) Order 1998, (per SR 2009 No. 183, commencing Part II of Schedule 6 to the 1998 Order: see paragraph [8] *infra*). In simple terms, the "price" for government funding of voluntary schools is a loss of absolute autonomy, since the Department of Education ("*the Department*") or the relevant Education and Library Board, or both, must be represented on the school's Board of Governors. Furthermore, the relevant school's scheme of management must be approved by the Department: see, generally, Articles 8-11 of and Schedule 6 to the 1986 Order. The effect of this mix of statutory provisions is that voluntary grammar schools maintain their ethos (typically, in the main, a religious one) and exercise a measure of autonomy, while the Department/relevant Board can influence and oversee the management of voluntary grammar schools and scrutinise adherence to relevant government policies.

[8] Article 116 of the 1986 Order which, in its substituted incarnation, can be traced to the Education and Libraries (Northern Ireland) Order 1993 ("*the 1993 Order*", Article 28) was the main statutory provision in play in the matrix of these proceedings, until replaced by Article 68 of the 1998 Order, effective from 31st May 2009. The two provisions in question are materially indistinguishable. Article 68(1) provides, in material part:

“Building and equipment grants for voluntary schools

68. – (1) Subject to paragraph (2) and to regulations made with the approval of the Department of Finance and Personnel, the Department may pay to any person in respect of approved expenditure –

- (a) incurred for the provision or alteration of the premises of a voluntary school, a sum equal to –
 - (i) that expenditure where, when that expenditure is approved, the school is –
 - (A) a maintained school in relation to which an agreement under paragraph 1 of Schedule 5 is in force; or
 - (B) a voluntary grammar school in relation to which an agreement under paragraph 1(1)(a) of Schedule 6 is in force;
 - (ii) eighty-five per cent. of that expenditure where, when that expenditure is approved, the school is –
 - (A) a maintained school not falling within head (i)(A); or
 - (B) a voluntary grammar school in relation to which an agreement under paragraph 1(1)(b) of Schedule 6 is in force

... “

It is common case that the Loreto Grammar School in Omagh is a voluntary grammar school capable of qualifying for 100% Departmental funding for the construction of a new school.

[9] In short, Article 68 of the 1998 Order empowers the Department to fully fund the provision of a new Loreto Grammar School in Omagh. The rule making power enshrined in Article 116 of the 1986 Order (as substituted) was exercised to make the Voluntary Schools Building Grant Regulations (Northern Ireland) 1993 [SR 1993 No. 457], which came into operation on 20th December 1993. Per Regulation 4, any application by the trustees of a school for the provision or alteration of school premises “... shall be in such form and contain such particulars and information as the Department may determine”. This provision is of some importance in the context of these proceedings, given the dispute which ultimately materialised between the parties, in early 2010, relating to the content of the Governors’ revised Feasibility Study and updated Economic Appraisal, compiled in their quest to secure full funding for a new Loreto School on its existing site.

II KEY DOCUMENTS AND EVENTS

Preface

[10] I begin with the prefatory observation that the documentary and affidavit evidence generated by this challenge are voluminous. This is perhaps unsurprising, given that the evidence discloses a saga of almost two decades’ vintage. This lengthy period has been peppered by a series of events – in particular

Departmental/Ministerial statements, coupled with a proliferation of correspondence, meetings and other communications. Many of these events are undeniably inter-connected and, in consequence, cannot properly be considered in isolation. The overall context is broad, lengthy and factually densely detailed. While some events, inevitably, are of greater significance than others, there are very few that can be dismissed as totally insignificant and, ultimately, all of the ingredients in the equation are interlocking to a greater or lesser extent. Furthermore, the character of the Governors' challenge, which asserts the frustration of a substantive legitimate expectation, is of obvious significance. In this context, I consider it incumbent on the court to determine whether the Governors enjoyed any substantive legitimate expectation and, if so, to measure the content and scope thereof. Equally, the court will have to examine closely the Departmental riposte. These tasks entail consideration of the relevant evidential matrix as a whole. In order to do justice to both parties, a relatively intricate review of all the evidence seems to me unavoidable. In adopting this approach, I bear in mind that in the leading decision in this field, the English Court of Appeal stated that in cases of this kind the court may have to conduct –

“... a detailed examination of the precise terms of the promise or representation made, the circumstances in which the promise was made and the nature of the statutory or otherwise discretion”.

(*R -v- North and East Devon Health Authority, ex parte Coughlan* [2001] QB 231, paragraph [56]).

1992 - 1995

[11] The evidence before the court discloses a saga of protracted dimensions. While the most recent chapter is of several years' vintage, the origins of the story can be traced to 1992. The Loreto Order of Nuns first established the school in 1858. Various refurbishments and extensions have been undertaken since then. Currently, the school educates around 900 post-primary pupils. The school premises have become dilapidated, antiquated and otherwise inadequate in many respects. In 1992, the school received a “Category 3 priority” rating from the Department. Such a rating denotes “*serious substandard accommodation*”, including features such as old classrooms of inadequate size, serious overcrowding, poorly maintained temporary teaching and ancillary accommodation and a serious shortfall in physical education facilities. Some two decades later, this rating, unsurprisingly, remains unchanged. During the period 1992 to 1994, the main occurrence seems to have been a feasibility study, carried out in conjunction with the Department, stimulated by a mutual recognition that the school had extensive further accommodation requirements.

[12] In May 1994, the school's consultants completed the Feasibility Study, which was entitled “*Proposed Renovations and Alterations to Loreto Convent Grammar School,*

Omagh". This study recorded that the school was in transition, with rising enrolment numbers, inadequate teaching and ancillary facilities and severely limited potential development land. It concluded that some 4,000 square metres of new accommodation was necessary to satisfy curricular requirements. It identified three options. The consultants advised that the third option was the most suitable. This would entail a programme of works culminating in a comprehensive redevelopment of the school and assumed the conversion of the existing Convent building for educational use. This would involve a total of seven sequential phases. Each of the options was duly costed. The presentation of this Feasibility Study to the Department triggered an obligation on behalf of the latter to undertake a so-called "*investment appraisal process*" (evidently a species of economic appraisal). This, unfortunately, was neglected by the Department. In the meantime, the shortcomings and deficiencies giving rise to the Departmental rating in 1992 of "*serious substandard accommodation*" multiplied, as would be expected.

[13] On 9th August 1994, a meeting attended by representatives of both parties was held. The minute records that the Feasibility Study "*has been accepted*", while the Economic Appraisal was under way. Several options were being considered at this stage. At this time, it was the practice for the Department to undertake economic appraisals: this changed later. The option of moving to a new site was dismissed brusquely in the words "*this is not being considered*". The intention of the nuns to vacate the Convent building was noted. The minutes also record:

"Mr. O'Toole explained that the Department would aim to complete the EA by Christmas. This will allow planning to commence on the scheme ... While it was impossible to say at this stage when work on site will actually commence, it was unlikely to be before 1998."

Thus, in mid-1994, the Department was representing that the next key exercise, the preparation of an Economic Appraisal, would be completed by the end of 1994, with an expected commencement of construction works not later than 1998. In the events which occurred, the much awaited Economic Appraisal failed to materialise. Fully four years later, the Department acknowledged that this had simply not been done. Ultimately, it did not materialise until some ten years later, at the behest of the school's consultants. Indeed, almost sixteen years were to elapse until February 2010, when the Department definitively committed itself to rejecting the then extant Economic Appraisal. These are the stark facts.

1995 – 2001

[14] Next, by letter dated 22nd February 1995, the Governors expressed "*a plea that you give our accommodation needs urgent attention*". It would appear that this elicited a phone call from a Departmental official who intimated that he would contact the consultants regarding the provision of certain outstanding information. Thereafter, in June 1996, the consultants informed the Department that the necessary costing

exercise would be completed within two weeks. It appears that these were duly provided in September 1996 and, in an internal minute dated 16th December 1996, it was recorded that they had not been considered. The Department's failure to conduct an Economic Appraisal, which had been promised by the end of 1994, continued. This remained the position in February 1998, when it was recorded that the "examination" was to be completed internally by Easter 1998. In November 1998, in response to another letter from the Governors, the Department intimated that the "Category 3" status remained and repeated that "... *the next stage was to carry out an economic appraisal*". The likelihood of the remaining six nuns vacating the Convent building was highlighted.

[15] A review of the evidence belonging to the next three years suggests that this period was characterised by continued Departmental inertia. The Governors continued to express significant concerns about the substandard school accommodation and facilities, while the Department pointed to the need for an economic appraisal. It was acknowledged that its target date of 31st March 2000 for completion of this appraisal had not been attained. In a letter dated 30th March 2001, the Department assured the Governors that "... *the appraisal has been accorded a high priority*". However, by October 2001, this had still not been carried out. The next event was, in retrospect, fairly predictable. By letter dated 16th October 2001, the Department advised for the first time that a new feasibility study seemed appropriate, as the 1994 model was of such vintage. By return of post, the Governors welcomed this development and urged that the new study be completed "*with all possible speed*". They further notified the Department that the nuns had vacated the Convent building in March 2001 and that this building "... *is now totally available to the school*". At the same time, the Governors' note (undisputed) of a telephone conversation with a Departmental representative included the following:

*"DENI to blame – hands up! – keen to make amends –
promised top priority."*

The outcome of this revival of *inter-partes* communications was a decision that a new feasibility study would be prepared.

November 2001 - December 2003

[16] On 7th November 2001, the school principal produced a short "Consultation Document". It is evident that this was to form the agenda for a meeting with Departmental representatives on the same date. The principal expressed the opinion that one of the proposals to be made was:

*"The preferred options should extend to include new build
on existing site and new build on a green field site if such a
site is identified by the school trustees".*

There is an extensive record of the meeting conducted on 7th November 2001. This documents the Governors' concerns and frustrations generated by the inertia on the part of the Department during the previous seven years. According to the record of the meeting:

"Mr. P. O'Kane [Chairman] asked what exactly a high priority meant as he had written evidence that he had been told it would be afforded the 'highest priority' ...

Ms J. Loughrey replied that the Feasibility Study would be given a high priority in view of the circumstances and then an Economic Appraisal would be prioritised with other schemes currently in the system ... The scheme was a Category 3 scheme and would be treated as being in the system."

Within two months, the Department had approved the school's proposal to appoint Messrs. E. C. Harris as Project Managers. In the Department's letter of 7th January 2002, the project was described as "Loreto Grammar School - Extension and Refurbishment".

[17] On 29th May 2002, representatives of the Governors and the Department conducted a further meeting. According to the detailed note thereof, this had the main purpose of agreeing the school's long term enrolment upon which the Feasibility Study would be based and the options to be considered in the study. Following discussion, an enrolment number of nine hundred was agreed. Most recently, it appears that the Department has been proposing a reduced long term enrolment - "LTE" - of eight hundred and fifty pupils. It was further agreed that the four options to be considered in the Feasibility Study were the following:

- (a) Do minimum.
- (b) Extend and refurbishment.
- (c) New build on existing site.
- (d) New build on a green field site.

The fourth of these options was then discussed further, with the Governors disclosing that a potential green field site had been identified. Somewhat ironically (given subsequent developments), the note of the meeting then records:

"The Department then advised that relocation away from what would be regarded as an historic and central location may cause a level of opposition among an element within the local community; the views of the Loreto Order, as Trustees of the school, would also have to be taken into account".

Finally, it was anticipated that a completed Feasibility Study would be submitted by the consultants to the Department by October 2002. This was followed by a further meeting on 21st October 2002. At this stage, only the first three of the aforementioned four options were canvassed and the revised date for completion of the Feasibility Study was determined as April 2003.

[18] The next significant event occurred in April 2003, when the new Feasibility Study was forwarded by the consultants to the Department. In June 2003, it was recorded that the Economic Appraisal (which the Department was undertaking) had commenced and the VLA had been asked to provide the necessary valuations. Meanwhile, the Governors continued to press the Department for progress, receiving the response that the Economic Appraisal should be completed by January 2004. Next, in October 2003, Mr. Kane of the Department compiled a reasonably detailed internal document in which he analysed the various options. He concluded:

“As option C [new build on the existing site] would provide a new school to current Building Handbook and Energy Conservation Standards with minimal disruption and health and safety risks to the staff and pupils, it should be regarded as the way forward. As noted above, I have some reservations about the proposed plan form but these can be addressed ...”.

This was followed quickly by a further internal minute, which advised:

“In spite of a scheme having been provided in the early nineties, the extension and refurbishment Option B is still estimated to cost in excess of the new build option ...

It is felt that Option C, the new build, would still provide better value for money”.

[My emphasis].

Soon thereafter, in December 2003, the Department transmitted the draft Economic Appraisal to the Loreto Education Trust Board. By this stage “Option C” had mutated into “Option 3” and was recommended in the Department’s Economic Appraisal. The Department’s letter of 10th December 2003 stated:

“I look forward to receiving confirmation that the preferred outcome is acceptable as soon as possible but no later than mid-January. This is necessary so that the scheme will be in a position to be considered as a contender for inclusion in the next capital programme”.

In short, having completed its Economic Appraisal, the Department concluded that the preferred option was to develop a new Loreto school on the existing site and the Governors were requested to confirm that this was acceptable to them.

January to April 2004

[19] Unsurprisingly, the Department's proposal was enthusiastically received. The views of the school's Governors and trustees were conveyed to the Department, by letter dated 15th January 2004:

"The Trustees of the school and the Board of Governors have considered the document and are delighted to confirm their acceptance of the preferred outcome as outlined in the document. The Trustees would also wish to confirm their willingness to have all remaining parts of the site, including the Convent vested for educational use."

This was followed by a letter dated 22nd January 2004 from Sister Donnellan, Provincial Superior of the Order of Loreto Nuns, which authorised the District Council to exhume the remains of deceased nuns from the school cemetery to be reburied at Drumragh Cemetery, Omagh. By this stage, the Convent had lain vacant for some three years. On the same date, Sister Fahy also wrote to the Council, offering two reasons for the exhumation decision:

"1. Convent was vacated three years ago, so there is no community living in the vicinity; therefore vandalism is a serious concern.

2. A new Grammar School is to be constructed covering the entire area of our property."

[My emphasis].

At this stage, the school had received a draft of the Department's economic appraisal.

[20] The finalised Economic Appraisal was sent by the Department to the School one month later. The subject matter of this report was described as "*the provision of adequate and suitable long term accommodation for the Loreto Grammar School, Omagh*". The report stated:

"The scheme for Loreto Grammar School, Omagh has been accorded a Category 3 classification where the criteria include accommodation inadequacies such as old, poorly maintained and/or undersized classrooms creating in some instances health and safety risks and/or serious curriculum deficiencies, a large proportion of accommodation in poorly

maintained temporary classrooms, seriously unsatisfactory ancillary accommodation and a serious shortfall in indoor PE facilities”.

Category 3 is the lowest of the three “*high priority*” gradings, in the Department’s ranking system. The report identified four options which had been agreed between the Department and the school’s trustees. The fourth of these options – new build on a green field site – was summarily excluded, due to the unsuitability of the one possible alternative site. Hence the report concentrated on three options only. Of these, Option No. 3 was defined as “*new build on existing site*”. Option No. 1 was “*do minimum*”, while Option No. 2 was “*extend and refurbish*”. Following a reasoned analysis, the Department’s Economic Appraisal concluded:

“Option 3 which would provide new purpose built school with all the obvious benefits clearly represents the best solution to the school’s accommodation needs in terms of educational requirements. It is significantly preferable in terms of unquantifiable factors and has a lower capital cost and NPV [net present cost] than option 2 and therefore represents best value for money.

Option 3 is therefore recommended as the preferred option”.

[My emphasis].

As noted above, both the Governors and the Trustees had already signalled their wholehearted endorsement of Option 3. To summarise, at this stage the Governors had submitted an updated Feasibility Study which the Department had accepted and, in turn, the Department had conducted an Economic Appraisal which endorsed the Governors’ preferred option viz a newly built school on the existing site. This represented the state of play in February 2004.

[21] In other correspondence belonging to this period, the Trust Board clearly signalled its willingness to have the Convent demolished and, to this end, it requested the Environment and Heritage Service to de-list the Convent’s façade. At this stage, the issue of “*clustering*” emerged. The protagonists involved in this subplot were the Loreto Trustees, the Council for Catholic Maintained Schools (“*the CCMS*”) and the Department. The issue is best summarised in Sister Fahy’s letter of 10th March 2004 to Mr. Lundy of the CCMS:

“Following discussions with Mr. Harry McNally, Department of Education Public Private Partnerships Unit, it has been made clear that as a possible contender for the new build programme this year, we need to cluster with a group of schools”.

This letter is significant for the further reason that it mentions the funding mechanism of “Public Private Partnerships” (“PPPs”, in shorthand) and foreshadows the important role which the Department’s PPP Unit was to play in later events. Furthermore, as the evidence establishes, Mr. McNally became one of the protagonists as those events unfolded. The theme of all of the letters during this phase was that a new school was to be built on the existing site.

[22] Next, by letter dated 31st March 2004 the Department wrote to the school principal in the following terms:

“I am writing to inform you that the Department today published the list of those schools that have met the criteria for capital funding allocations this year. The list is published on the Department’s website. I am pleased to let you know that Loreto Grammar School is included on the list. However, as you will appreciate, the Department still has to prioritise the schools on the list in terms of most pressing educational need and the available resources. As a result there is no guarantee that your school will be successful in obtaining funding under this year’s capital programme ...

When decisions are made on the 2004 capital allocations I will advise you of the outcome”.

The list accompanying this letter contains the following entry:

“Loreto Grammar School Omagh – New school on existing site – Category 3 – Voluntary Grammar School – £14.6 million”.

The amount of £14.6 million was described as the “indicative costs” of the project and the total sum of such costs for the Department’s annual capital programme was £468 million. Thus, as of 31st March 2004, the Loreto Grammar School was a contender for inclusion in the Department’s 2004 capital programme, with a proposed allocation of funding of £14.6 million to construct a new school on the existing site. It would appear that the school had secured its contender status by virtue of the accepted updated Feasibility Study, the Department’s ensuing Economic Appraisal and, presumably, the school’s “Category 3” rating from the Department.

The Ministerial Commitment of April 2004

[23] One month later, the Loreto School progressed from the status of mere contender to membership of a select group of winners. The next material development consisted of one of the key events in the overall matrix. This was a public statement by the direct rule Minister for Education (Mr. Gardiner), made on 27th April 2004. It is documented in a Departmental press release of the same date,

bearing the title, “Barry Gardiner Pushes the Fast Forward Button for Northern Ireland Schools”. Minister Gardiner stated:

“Today I am announcing a programme of £222,000,000 investment in schools in Northern Ireland. I am determined to deliver schools fit for the 21st century for every child ...

As a result of the Governance Reinvestment and Reform Initiative we are now ready to bring together the commitment and vision of those who run schools in the state and voluntary sectors with the skills and capital of the private sector”.

This would appear to constitute a clear reference to the “PPP” financing mechanism. The Minister continued:

*“In future we will have a new focus on delivery that addresses more fully the range of needs and demands across the whole of Northern Ireland. **By 2010, we will have addressed the existing known capital needs backlog on the schools’ estate”.***

I have emphasized the latter words, given their obvious significance in the present litigation context. The Minister’s statement continued:

“Our top priority is to deliver quality buildings through efficient processes ...

I am sure that school authorities will welcome more rapid progress on delivery of projects in future ...

I wish to make start on a number of pressing projects. I am today announcing that 43 schools amounting to £222 million should now proceed. The investment will fund 12 schools through Public Private Partnerships and 31 schools through conventional procurement.”

[Emphasis added].

On the same date, the Minister made a public statement reiterating much of the above and including the following noteworthy passages:

“We are committed to a new investment strategy and asset management planning to deliver a rolling programme of strategic investment in the school’s estate for the coming years so that pupils and teachers can benefit from modern educational facilities that take account of the needs of the

curriculum. I intend that by 2010 we will have addressed the existing known capital backlog in the school's estate ...

I am sure that school authorities would welcome more rapid progress on the delivery of projects in future. We will of course be consulting with the school authorities in the coming months on how this can be achieved most effectively. However, I wish to make a start on a number of pressing projects."

[Emphasis added].

In round terms, some two-thirds of the school contenders listed in the earlier March announcement were successful. The Loreto School was one of them and its project was allocated to the "PPP" procurement category, with an estimated cost of £14.6 million. Less than one-third of the forty-three successful contenders was to be financed by PPP. The majority - thirty-one - were to be financed by "conventional procurement". The press release explained:

"The new approach to delivery will include groupings of PPP and conventional projects".

This is a reference to the concept of "clustering".

[24] The successful contenders were a mixture of primary, post-primary and special schools. In the post-primary category, the Loreto School was one of the eight winners which emerged from a previous list of twenty-three contenders. The projects approved for these schools consisted either of constructing a new school or refurbishment/extension of the existing school. Within this discrete group of eight successful post-primary schools, six were to be financed by the PPP regime, while two (Banbridge Academy and St. Colman's College, Newry) were to be financed by "conventional funding": this is a reference to the "design and build" procurement mechanism, with finance provided from central funds. It is common case that whereas the two projects involving the latter two schools are now virtually completed, the building projects involving the six post-primary schools given a PPP assignment have not yet begun construction.

[25] Minister Gardiner's public statement of 27th April 2004 was followed by a letter dated 27th May 2004 from the Department to the school principal:

"Following the announcement of the schools capital programme on 27 April ... I am very pleased to confirm that Loreto Grammar School, Omagh with a capital value of £14.6 million was included in the announcement. In his announcement the Minister signalled that there was a need for new procurement and delivery arrangements, which will

be subject to consultations with school authorities. The Department and the Strategic Investment Board are currently discussing how the announced schemes will be taken forward and the implications of new delivery arrangements. The Department will discuss with you in due course how these changes may impact on the procurement arrangements for Loreto Grammar School. In the meantime I should be grateful if you would ensure that no further planning on the scheme takes place until we meet with you."

Mr. McNally, the author of this letter, was to feature prominently in subsequent communications and events. It is also appropriate to highlight, in this context, a document entitled "PPP Trustees Briefing" which, according to the evidence, was generated on 11th May 2004. Notably, this document contains a series of projected milestones and a timetable which envisaged, *inter alia*, that "service commencement" (which I interpret to denote completion of the new build project and the inauguration of the newly constructed school) would be achieved by September 2008 at latest. In simple terms, the combined effect of the Ministerial/Departmental statements of April and May 2004 was to represent to the Governors that a newly constructed Loreto Grammar School in Omagh, financed by public funding, would be completed no later than September 2008.

Mid-2004 - End 2005

[26] At this stage, the "cluster" of the Loreto School and the Holy Trinity School, Cookstown had been confirmed. Around this time, there were also several letters which had as their central theme the possibility of the Department acquiring the old Loreto Primary School and, in response to a request, the VLA duly provided a valuation of £150,000, in July 2004. Furthermore, it is clear that the exhumation of sixty members of the Loreto Order and their re-interment in a nearby cemetery was completed by the beginning of July 2004. By letter dated 10th August 2004, the CCMS informed Sister Fahy as follows:

"I write to update you in respect of the delay in the establishment of the Project Board. This is due to Department of Education and the Strategic Investment Board proposals for a new delivery mechanism for PPP".

I have highlighted the latter words, as this ultimately emerged as one of the major issues during the ensuing six years of project progress and inactivity. Next, by letter dated 17th September 2004, the school principal was informed that the Department had arranged a PPP presentation and the Governors were invited to attend. The letter continues:

"In his announcement on 27th May 2004 the Minister ... signalled that there was a need for new procurement and

*delivery arrangements, which will be subject to consultations with school authorities. The Department and the Strategic Investment Board are currently discussing how the announced schemes will be taken forward and the implications of new delivery arrangements. **The purpose of the presentation is to provide you with an overview of the PPP process along with details of the transitional working arrangements and will provide an outline of work which can be undertaken in advance of the Outline Business Case**".*

[My emphasis].

[27] In the same month, the solicitors representing the Trustees (Messrs. Murnaghan Colton) formally applied to the Environment and Heritage Service for permission to partially demolish the Convent House (a D2 listed building) on the Loreto School site. This application explained that a new school was to be constructed on the site, with the Convent façade to be partially demolished and partially retained, together with the chapel, "... for the benefit of the new school". The school's ethos features with some prominence in this application, which also stated:

"The Project Manager has stated that he hopes the project will be going out to tender within the next few months ...

The retention of considerable parts of the Convent House will benefit and enrich those who will pass through school in the years to come".

On 22nd October 2004, the Northern Ireland PPP Education Service (which seems to have the status of an independent agency) wrote to Mr. McNally of the Department's PPP Unit in the following terms:

"The Trustees of both these schools are anxious to have the project formally initiated as soon as possible. While they accept that mobilisation has got under way, the establishment of a Project Board and target dates is a priority. Given that these projects were announced on 27th April 2004, the Trustees and school communities are concerned at the lack of progress and perceived impact on education provision".

Mr. McNally's reply, in his letter of 3rd November 2004, stated:

"At the presentation that I gave to these schools recently, I provided an outline of the review which the Department is currently undertaking in respect of its Procurement

Strategy and how this may have an impact on some aspects of Public Private Partnership ...

[This] is likely to affect how Business Outline Cases are completed in the future and how projects are taken forward. In view of this it would be premature for the schools to establish Project Boards and to set target dates until the new way forward is known".

[28] During this period, PricewaterhouseCoopers ("PWC"), instructed by the Department and the Strategic Investment Board (the "SIB"), were preparing a report which duly materialised in March 2005, bearing the title "New Procurement and Delivery Arrangements for the Schools' Estate". Bearing in mind subsequent events, particularly in 2009/2010, some of the conclusions enshrined in this report are noteworthy:

- (a) For the purpose of funding capital investment in the Schools' Estate, the Department had been pursuing a combination of conventional (Design and Build) and PPP procurement mechanisms, the latter representing approximately 25% of the then current 127 approved major works schemes [paragraph 3.5.1].
- (b) PPP schemes conventionally entailed a cluster of two or three schools, with a single procurement [paragraph 3.5.1].
- (c) The education authorities had ventilated a number of concerns regarding the current arrangements for delivering capital projects and services [paragraph 3.5.2]. These included slow pace of progress and concerns relating to maintenance and facilities management.
- (d) Everyone was agreed about the need to improve arrangements for planning the estate and delivering capital projects and services [paragraph 3.6].
- (e) Referring to Minister Gardiner's statement on 27th April 2004 enunciating and £222 million schools capital building programme for Northern Ireland and the corresponding intention of addressing the "capital backlog" by 2010, the report observes:

"The scale of the investment needed to achieve this vision is now estimated to be in the region of £3.6 billion over a ten year period, which equates to around £360,000,000 annually". [Paragraph 4.1].

Read in conjunction with the Ministerial pronouncements of April 2004, this is clearly a reference to the *whole* of the "backlog". Thus, while the new build Loreto project belongs to a discrete Government

programme entailing projected expenditure of £222 million, the amount estimated for the purpose of addressing the entire “*capital backlog*” was estimated to be over fifteen times greater.

- (f) A new strategic approach to the management and development of the Schools’ Estate in Northern Ireland is required. *“In particular, the mechanisms for planning, procuring and delivering capital investment need to be modernised to take account of recognised best practice and to accelerate the timescales for delivery on the ground”*. [Paragraphs 4.2 and 6.1].
- (g) *“The new procurement and delivery arrangements will involve the establishment of partnerships with the private sector for the delivery of capital projects and the provision of services [paragraph 6.2] ... As indicated in the Investment Strategy for Northern Ireland, there will be increasing use of PPP to achieve the programme. PPP is particularly suited to procuring capital assets to achieve value for money through whole life asset management and it also increases the investment resources available, both of which are clearly necessary”*. [Paragraph 6.3].
- (h) The creation of a new “Education Infrastructure Procurement Service” is recommended [Paragraph 7.1].
- (i) The Department will continue to have *“the final say in relation to development plans”* [paragraph 7.2].
- (j) *“... the best structure for the future delivery of the Schools’ Estate in Northern Ireland is the establishment of strategic partnerships with the private sector”, to be managed by the newly established EIPS*. [Paragraph 7.3].
- (k) The successful operation of the proposed new arrangements will require *“a radical change in the way that the education authorities and the Department of Education work together”*. [Paragraph 7.6].
- (l) The newly established EIPS would be responsible for, *inter alia*, estate planning and scheme development, the procurement of private sector partners, scheme procurement and implementation and contract and performance management [Paragraph 7.6.3].

[Emphasis added].

One of the most striking features of the PWC Report is its strong endorsement of the “PPP” procurement mechanism in the education sector. [Ultimately, much later, this view was not shared by the Department]. By letter dated 31st March 2005, Mr. Rooney of the Department notified the Loreto School that the aforementioned report had been received, continuing:

“The review focuses particularly on issues of planning of the estate, approaches to procurement and how projects could be delivered more efficiently and effectively in future. The review report is being issued to education authorities for consultation”.

[29] By letter dated 22nd April 2005, addressed to the CCMS, the Department conveyed its approval of the purchase of the Loreto Old Primary School site and indicated that it had requested the Valuation and Lands Agency (“VLA”) to measure the current market value of the site. Next, on 16th May 2005, CCMS wrote to Archbishop Brady. This letter was entitled:

“Holy Trinity College, Cookstown and Loreto Grammar, Omagh New School PPP Project”.

The letter contained confirmation from the Department that “... *the project can now proceed to the next phase of procurement*”. This would require, initially, the creation of a Project Board, membership whereof would include two trustees from each school. Mr. Lundy’s letter continued:

“As Project Director from CCMS, I would also attend meetings to support and advise the Project Board on the progress of the project. The Project Board will also have access to a range of advisers and consultants [throughout?] the process and for the first stage of preparation, the Department of Education have appointed PWC to support the project in the work of this first phase”.

In sequence, two further structural arrangements, whereby a Project Assurance Group and a Project Team were to be established, would follow.

[30] The first meeting of the Holy Trinity and Loreto School “Cluster Project Board” was conducted on 30th August 2005. The minutes of this meeting documented that the Department and the SIB had engaged PWC “*as consultants for the outline business case (OBC)*”. The Project Board, which had been established on 30th August 2005, conducted monthly meetings thereafter. According to the notes generated by its inaugural meeting:

“Project has been delayed while the PWC survey on procurement has been on the table. However, DENI now says that the Project can proceed outside the proposals in this document ...

DENI have agreed that those who did the Economic Appraisal can do the outline planning for the Project”.

These minutes further record that one of the Project Board members was a Departmental representative. The minutes of subsequent meetings note that the Department had approved the appointment of Messrs. E. C. Harris "... for preparation of the Outline Planning Application, subject to approval of their cost". By this stage, Ms Angela Smyth MP had become the Minister of Education. By letter dated 21st September 2005, Sister Fahy, a Loreto Trustee, asked the Minister to assist in the steps necessary to secure approval of the demolition of the Convent building, the purpose being "... to give needed space for the new school". The letter also stated:

"A new school is at an advanced stage of planning in a PPP Project."

At this stage, the indicative timetable foresaw that construction works would begin by July 2007. The anticipated date for completion of the draft OBC report was 28th October 2005.

[31] The formal terms of reference of the Project Board included the following:

"The Project Board ... is the decision making body in all matters which affect the implementation of the procurement and an award of a contract to a preferred bidder ...

DE will have the ultimate approval role in respect of approval for the release of the key procurement documents, the appointment of the preferred bidder and the award of a contract ...

DE will also have a seat on the Project Board".

The second of the three requisite structural *ensembles*, the Project Assurance Group, conducted its inaugural meeting on 20th October 2005. Some of its members were also members of the Project Board. The overarching duty of this second group was, according to its records, "*to quality assure the project*". Chronologically, the next significant event occurred just four days later, on 24th October 2005, when the Project Board convened a monthly meeting. According to its minutes:

"Paddy McNally of DE attended and commended the group for having the appropriate structures in place for delivery of the project. He indicated that capital requirements not previously specified, for delivery of areas of the curriculum including media studies and special learning needs will be included in the schedule of accommodation ...

Chris Rainbird [of PWC] gave a timetable which would ensure a completion date of June 2009. There is a 'high risk' that this will not be achieved. The work to be completed

between now and January 2006 is crucial to progressing the proposed schedule ...

The schools indicate an affordability gap between current budget and proposed funding."

It is clear that a draft OBC was in existence at this stage. The minutes continue:

"Mr. McNally reported that DE would require six weeks to review the OBC and that discussions are ongoing with the Strategic Investment Board on the appointment of advisers for the next stage".

It was recorded that the Project Board would receive the final OBC by the end of November. There followed a discussion about the so-called "affordability gap" which the then draft OBC had highlighted. According to the minutes:

"Mr. P. McNally indicated that the Department will have to examine each PPP project to ensure that it is affordable for DE as well as being assured that the schools are committed to paying a reasonable amount ...

Mr. McNally responded that there had been a review of policy since 2004 with a higher profile of Affordability but that all schemes are being examined for PPP".

It would seem that Mr. McNally, a senior official in the Department's PPP Unit, was the nominated Departmental member of the Project Board.

[32] Four days later, under cover of a letter dated 28th October 2005, PWC forwarded the "CCMS Outline Business Case CD" to the Department. This letter recorded that, with reference to certain aspects of the project -

"... we are asking the User Assurance Group to provide information in relation to current funding levels and available spend to enable us to identify the affordability gap ... Some of the affordability numbers are subject to change".

In October/November 2005, the Department gave consideration to the fate of the Convent building. The two options appeared to be delisting and demolition or partial demolition. There was a suggestion that the PPP model did not make adequate provision for a capital project involving the retention and refurbishment of a listed building. On 21st December 2005, the Project Board held its next meeting. By this stage, the Department had formally approved the inclusion of additional school accommodation in the project. Mr. Rainbird (of PWC) advised that two key

findings had emerged from the OBC, namely affordability and timetable slippage. The minutes record:

“DE to decide, as part of the OBC approval process, if the project is affordable to the Department and that it can meet the affordability gap. Mr. Rainbird highlighted that the slippage was due to availability of information and DE approvals and that this would have an impact on completion of construction and Service commencement. Mr. Lundy [of CCMS] suggested that due to competitive market a construction period of eighteen months was feasible and that this would claw back the time frame from 2010 to 2009”.

Under the rubric “Procurement Management”, the OBC recorded:

“The Trustees wish to enter into a binding agreement with a preferred private sector contractor as soon as possible and an indicative timetable for completion of the procurement is set out in the table that follows”.

[33] In the ensuing table, the following salient milestones and target dates were noted:

- (a) Approval of OBC (by the Department, presumably): February 2006.
- (b) Issue invitation to negotiate: September 2006.
- (c) Appoint preferred bidder: March 2007.
- (d) Submit full business case: August 2007.
- (e) Obtain detailed planning permission: August 2007.
- (f) Award of contract: November 2007.

In short, the envisaged contract procurement phase was measured as having a duration of eighteen months, beginning in May 2006. The OBC further recorded that this particular aspect of the timetable “... has been proven to be achievable on accommodation projects in other sectors in Northern Ireland”. On the topic of “Contract Management”, the OBC continued:

“The procurement of this project will result in the award of two PPP contracts: one for Holy Trinity, and one for Loreto Grammar School ...

The Trustees of Holy Trinity College and Loreto Grammar School wish to commence the delivery of services in the new school accommodation at the earliest possible date”.

The second timetable contained in the OBC envisaged completion of the Loreto School Project by September 2009, an earliest occupation date of October 2009 and a latest date for service commencement of January 2010. To summarise, at this stage:

- (i) In April 2004, the terms of Minister Gardiner’s Statement signalled that the latest date for completion of the new Loreto School would be 2010.
- (ii) In May 2004, the Department mooted an earlier completion date of September 2008 (paragraph [25], *supra*).
- (iii) This remained unchanged until October 2005, when the consultants cautioned that completion could be delayed until September 2009.
- (iv) This was then modified to January 2010.

Departmental representatives were directly and actively involved in each of these important representations and decisions.

2006 – 2007

[34] In a letter dated 10th April 2006 to the Loreto Trustee Board, CCMS expressed some dismay at the slow pace with which the Department was proceeding. Next, by letter dated 20th April 2006, the Department’s PPS Unit informed, *inter alios*, the Loreto School as follows:

“The OBCs have now been received by the Department and are being reviewed to ensure they are compliant with legislation and guidance ...

The completion of the OBCs was also to attest the affordability of the projects and to advise on the suitability of the PPP procurement route. All of the OBCs have robustly highlighted the affordability issues ...

Once the affordability gap is agreed between the school authority and the Department, the responsibility for bridging the gap in funding will be the responsibility of the Department. However, the 2004 projects have not yet gone to the market and the affordability points need to be addressed before the projects can proceed ...

The Department is working with the Department of Finance and Personnel in respect of this issue across all DPP

*projects. In addition to the affordability issue, the August 2004 Treasury Guidance and the recent further guidance issued in March 2006 ... raises further consideration regarding areas that are susceptible to fast paced change or where planning horizons are not long term. The Department will also have to consider these aspects of the 2004 projects and **all of these issues when taken into account have the potential to lead to a review of the procurement route. It is for these reasons that the Department has not yet conveyed approval to engage consultants for the next phase of the projects until there is certainty about the affordability and clarity on the procurement route**".*

[My emphasis].

Explaining why, for these reasons, it would be inappropriate to appoint Final Business Case ("FBC") consultants at that stage, the letter concluded:

*"The Procurement Review and the Review of Public Administration have clearly set the wheels of change in motion. We do not intend going forward with the individual appointment of advisors or single procurement for schools **whether procured conventionally or through PPP**. The need to streamline our processes and benefit from economies of scale is the new way forward for procurement. The Department in conjunction with the Strategic Investment Board is currently considering the options for the appointment of consultants and how this might align with any new procurement process...*

When the Department has completed consideration of the OBCs and agreed the way forward it will write to each Project Board advising how the project will be taken forward, the procurement route, how the advisors will be appointed and how the school authorities will be involved in the selection process".

[Emphasis added]

Notably, the Department was promising to write in due course to all interested parties intimating "how", rather than "if", their respective projects were to be advanced. Furthermore, Mr. McNally's letter seems to convey fairly clearly that the procurement for the projects would be via *either* PPP or the conventional mechanism (described elsewhere in the evidence as "design and build").

[35] By letter dated 26th April 2006, the Department's PPSU approved the appointment of Messrs. E. C. Harris "... to prepare an addendum to the feasibility study for the [Loreto Grammar School, Omagh] PPP Project". Subsequently, by letter dated 5th May 2006 to the Department, the school's architects, Kennedy Fitzgerald and Associates, intimated that the outline planning application could not be completed until a decision had been made about inclusion, or exclusion, of the Convent in the PFI. Next, on 30th June 2006, the Department's PPSU wrote to Sister Fahy, listing a series of aspects of the OBC requiring amendment and requesting the submission of a duly amended OBC. The letter concluded:

"On completion of the amendments to the OBC referred to above the revised OBC should be submitted to the Department and it will then be necessary for the Department to submit the OBC to DFP. If this necessitates a change of procurement route then a submission will need to go to the Minister advising her of the proposal, the reason for the change and seeking her approval".

Mr. McNally's letter ended with an "Action Plan" which included the following components:

- (a) Submission of the OBC to DFP by 28th July 2006.
- (b) Notification of the way forward by week commencing 28th August 2006.

There followed a meeting on 11th July 2006, the main purpose whereof was to confirm clearly the OBC amendments required. The letter concluded:

"The Department will work flexibly with all school authorities ... to reach a decision as soon as possible for the 2004 projects".

[36] Sequentially, the next significant development was the completion of the "Addendum to Feasibility Study for the Development of Loreto Grammar School, Omagh", in November 2006, by the architects. This report records [paragraph 1.04]:

"At present the school is at an advanced stage of appraisal as a ... PPP Project for a completely new school with the proposed demolition of the existing accommodation and that no educational accommodation is provided within the Convent buildings. Parts of the Convent have been in continual educational use since the school was founded in 1855 and the school and trustees are keen for the buildings to be considered fully in any future development of the school. The aim of this Addendum is to 'revisit' the potential usage of the Convent buildings to provide useful

educational accommodation as part of future development of Loreto Grammar School”.

This report concluded:

“In summary it is considered that the best educational environment can be achieved by retaining the façade of the Convent with the new build immediately behind it, the new school accommodation in the Convent would support the core timetable educational departments which would be within a new building ...

*The PFI/PPP bidder may prepare a different master plan for the site ... In the context of a PFI/PPP scheme the cost of new build behind the retained Convent façade is not significantly higher than refurbishment and may be more attractive to bidders. It is however subject to planning approval with input from the EHS. In comparison to **complete new build** there is a cost premium in using the Convent area for some of the school functions, rather than containing all areas within a complete new build options”.*

Thus, at this stage, the professional advice to the Department was to retain the façade of the Convent and construct the new school immediately behind. Notably, the architects envisaged no PPP complications.

[37] During this period, CCMS continued to correspond with the Loreto Trust Board concerning the progress, or lack thereof, relating to the new school project. A letter dated 1st September 2006 documented delays in respect of the OBC, as the Department had not agreed fees with PWC. Next, there was a meeting on 6th September 2006 attended by, *inter alios*, Mr. McNally, CCMS and PWC. In an ensuing letter dated 16th October 2006, CCMS recorded the Department’s agreement on certain issues and intimated that this had enabled certain matters to make progress, to the extent that a revised draft OBC was expected from PWC within two weeks. Next, by letter dated 24th October 2006, Mr. McNally of the Department’s PPP Unit informed CCMS of a revised Departmental approval process in respect of PPP projects. This letter conveyed that the “*approval timetable*” would, henceforth, be triggered upon receipt of the final OBC. This would stimulate examination by various Departmental units, followed by approval by the Department’s Finance Director and consideration by DFP. All of these steps would consume a period of ten weeks. The same procedure and timetable would apply also to the Final Business Case (“FBC”). The letter further intimated:

“To avoid major issues arising during the approval process it is essential that project managers, from an early stage and on an ongoing basis, liaise closely with the various branches in the Department on critical issues such as LTEs, building

rates/costs, schedules of accommodation, derogations from the Building Handbook, site issues etc."

Finally, the letter represented that the new procedures "... will allow the approval process to operate more efficiently and ensure that issues will be dealt with at an earlier stage and resolved before submission to the Department".

[38] Mr. McNally corresponded further with CCMS, by letter dated 26th October 2006. This was clearly supplementary to the earlier letter, containing a strong emphasis on frequent liaison and communication with the Department at all material project stages. While it is evident that these new procedures would apply to the new Loreto School project, there was no suggestion that their impact on this project would be in any way dramatic or detrimental. These letters were followed by a Project Board Meeting on 6th November 2006 and the resubmission of the OBC to the Department on 8th November 2006. It was recorded that the Department responded with certain comments on 14th December 2006 and this was followed by a meeting with the Department on 4th January 2007.

[39] In the midst of these developments, an event of some significance occurred. On 11th December 2006, representatives of the Department and the Western Education and Library Board ("*the Board*") held a meeting. The documentary record of this meeting is entitled "Note of Meeting with Representatives of WELB to Discuss Future Potential Development of Lisanelly Barracks, Omagh". According to this record:

"The purpose of the meeting was to confirm the interest previously expressed in the Lisanelly site by the WELB and the CCMS and to discuss initial views on issues relating to the future development of the site for school use.

The Lisanelly site is available to DE for the future development of the education estate, however work on this must commence in the current business year and be progressed quickly. The availability of a site of this size offers an opportunity for an innovative approach to the future development of the school estate in Omagh incorporating shared facilities, enhanced provision and community use of facilities."

The possibility of the Loreto School relocating to this site was noted. The minutes further records:

"A Master plan will be required to that stakeholders can see how the site could potentially be developed, the infrastructure required, the potential for shared facilities. Considered vital that a concept plan was in place at an early stage to 'sell' the proposal to the schools involved".

In the evidence before the court, this constitutes the first reference to the Lisanelly site. It coincided closely with the Department receiving the Feasibility Study Addendum and revised OBC relating to the new Loreto School project.

[40] It would appear that the Department first briefed the school's Governors about the Lisanelly site at a meeting held on 22nd February 2007. One week previously, the Department's Economic Advisory Unit had provided comments in respect of the revised OBC and PWC were, in consequence, preparing a further revised version. At this stage, construction costs had been measured at £12.75 million. The meeting attended by Departmental representatives and the Governors on 22nd February 2007 was followed by a letter dated 8th March 2007, wherein the Department's Deputy Secretary (Mr. Rooney) stated:

"The site comprises some 118 acres and its availability presents a unique opportunity for us to address the possibility of the accommodation needs of all those schools in Omagh aiming to secure capital funding for replacement accommodation."

The letter suggested that a shared campus catering for over 4,000 pupils, both primary and post-primary, was envisaged:

"However, the Department of Education's interest in the site can only be reaffirmed if there is a clear indication of sufficient potential interest".

The letter invited the Governors to forward a completed pro-forma to the Department, *"without prejudice"*, to facilitate measurement of potential interest in the site. At this juncture, the *"Lisanelly option"* was clearly at a very embryonic stage. I shall comment on its current state of progress at a later stage of this judgment.

[41] In reply, by letter dated 16th March 2007, the school's Governors adopted an essentially non-committal position. In a letter couched in neutral terms, they requested the Department to provide substantial elaboration, concluding:

"As a school with a long tradition of excellence Loreto Education, recognised by the ETI Inspection Report February 2006 as 'outstanding' both in educational provision and pastoral care, the Board of Governors and Trustees do not wish to threaten this position and could not consider anything further until the Department clarify the issues outlined above".

[42] The following month, on 18th April 2007, there was a meeting attended by Departmental representatives (including Mr. Rooney) and the school's Governors. The evidence includes an extensive record of this meeting which documents, *inter*

alia, a series of questions posed by the Governors and the Deputy Secretary's responses. The following are particularly noteworthy:

"Will our present building project continue until clarity on the development of the Lisanelly site is reached?"

Response: The Board of Governors cannot ride two horses for a very long period. We must state our direction. The current PPP Programme for Loreto is ongoing. A decision must be made as there are implications for others.

What is the Department's preferred procurement route for delivery of Loreto Grammar School Omagh on the Lisanelly site?

Response: Best route, best value for money."

[Emphasis added]

Mr. Rooney further suggested that a new Loreto School on the Lisanelly site would not become a reality until a further six to eight years had elapsed viz. by 2013/2015 at the earliest. I observe that this contrasts sharply with:

- (a) The Departmental briefing in May 2004, which envisaged completion of the new Loreto School by September 2008 at latest (paragraph [25], *supra*).
- (b) The revised estimated completion date of October 2009, recorded in the PWC OBC of October 2005 (paragraph [33], *supra*).

Next, the Department arranged a workshop under the banner "*Lisanelly – Proposed Educational Campus*", on 17th May 2007. This was attended by, amongst others, representatives of the school's Governors.

[43] This was followed by a letter dated 6th June 2007 from the school principal to the Deputy Secretary, seeking written commitment from the Department regarding a range of issues, duly listed. The letter stated:

"The Board of Governors see their immediate need as a new building for Loreto Grammar School. How quickly can this occupancy be met –

On the existing site?

On the Lisanelly campus?...

The issue of the inclusion of Loreto Convent House in the existing building programme has not yet been resolved and is another matter of urgency as decisions with regard to the future of the Convent House impact on the existing building programme ...

We continuously have expressed our dissatisfaction with the PPP route and have always sought at least the Design and Build route."

The letter concluded:

"Given our unique circumstances the Department will have to appreciate the complexity of the situation in which we find ourselves. There is no movement on our existing building programme, no written guarantees and much uncertainty surrounding the proposals for the future Lisanelly concept".

[My emphasis].

The Department Head of Development and Infrastructure replied, by letter dated 21st June 2007. This letter addressed some of the questions raised by the Governors. It also adverted to the state of progress of the new build project, in these terms:

"In terms of the existing site there is an Outline Business Case with the Department which is being considered. The OBC is the basis for confirming the appropriate procurement for the project and the next stages and associated timescales which would be involved. The issue of the use of the Convent house is under consideration by colleagues and they will contact you about this as soon as possible."

One of the noteworthy features of this letter (and certain other Departmental communications and representations) is that it invited the Governors *to make a choice*, suggesting that, as regards the existing site/Lisanelly site "contest", the power of decision making resided in the Governors: compare, for example, the Departmental stance at the meeting two months earlier (paragraph [41], *supra*). In conclusion, the letter invited the Governors and Trustees "... *to make a decision on the potential relocation to Lisanelly*". The following day, in an e-mail to the Department, the school principal stated:

"The decision of the Board of Governors of Loreto Grammar School Omagh is not to declare interest in relocating to the Lisanelly campus. They request that all the necessary steps are taken to advance their

existing building programme and would welcome an update from the Department on its position”.

The evidence includes a note of a conversation between the school principal and Mr. Rooney of the Department on 25th June 2007. This records:

“She stated that the BOG had discussed the options in detail ...

*Their main concerns however were around the uncertainties of timescales for Lisanelly and the length of time that they may have to wait for a new school on the site. **They had decided therefore that as they were already part of a project to replace the school that they would continue with it”.***

[My emphasis].

[44] Chronologically, the next step is worthy of note. By letter dated 5th July 2007, Mr. McNally wrote to PWC, responding to the revised OBC. This letter was critical of PWC. In particular, it criticised them for submitting an OBC which did not comply with the Department’s requirements or quality expectations and failed to address earlier Departmental questions and comments. These criticisms focussed on the general performance of PWC, who had been awarded the OBC contract for (apparently) all of the 2004 PPP projects. With specific reference to the Loreto/Holy Trinity Project, Mr. McNally stated:

*“Loreto Convent Grammar School **has recently decided** not to avail of the opportunity to move to the Lisanelly site and the Outline Business Case which was on hold in the Department now needs to be taken forward. As part of this process it will now be necessary for PWC to revise the OBC in line with the ‘read across’ changes that were required in the Ballymoney/Rainey Project before the Department can start processing the OBC.”*

[Emphasis added].

Notably, at this stage the Department was not stipulating that the revised OBC assess the “Lisanelly option”. Nor did it hint that the new build Loreto project might not proceed. The letter requested that a revised OBC be provided to the Department by 27th July 2007. At this point, the new Loreto School project was clearly moving forward, without any appreciable impediment.

[45] One month later, the Department’s PPP Unit recorded that the Feasibility Study Addendum had also been gathering dust “... to allow Loreto GS to consider relocation to the Lisanelly site”. This memorandum continues:

*“As the school **has decided** not to relocate, the examination of addendum will need to be reactivated”.*

[My emphasis].

It is clear from this memorandum that there was an interdependency between the further revised OBC (soon to be provided) and the Feasibility Study Addendum. The memorandum requested the advice of the Department’s Building Advisory Branch:

“I would appreciate BAB’s consideration and comment on the preferred option contained in the Addendum and whether this option should be adopted, leading to the revision of the Economic Appraisal for the school and subsequently the OBC”.

The “preferred option” mentioned in this paragraph was the construction of a new school on the existing Loreto site. At this juncture, the new Loreto School project was clearly marching forward.

[46] There followed a significant exchange of correspondence between the Trustees and the Department. On 4th September 2007, Sister O’Connor, writing on behalf of the Loreto Education Trust Board, signalled the views of the school’s trustees to the Department. In this letter, she stated:

*“... The Trust Board is acutely aware that the Governors in Omagh have been negotiating about the need for new buildings for almost twenty years and that they have been formally involved in a PPP Project since 2004. However, to date the Outline Business Case remains with the Department and has not received approval. Time passes and a whole generation of students in Omagh has received their education in conditions that are at best substandard and, at worst, wholly inadequate. **Our priority has to be that the capital project on the present Loreto site, which has been in progress for so long now, be delivered as a matter of urgency.** Consequently we, as trustees of the school, are formally indicating to you that we are not in a position to consider the move to Lisanelly”.*

[My emphasis].

The Department replied, by letter dated 2nd October 2007:

“The Department is currently revisiting the feasibility study in respect of the preferred option for the new development,

including the viability of this option. Early indications point to reaffirming the option of the school being built on the existing playing fields and DE needs to consider this option further, particularly if the Trustees were considering disposal of the listed building and associated land. Once that work is completed, the Trustees will be provided with an assessment of the position”.

[My emphasis].

Sister O’Connor rejoined by letter dated 15th October 2007, in which she stated:

“I was happy to note the possible confirmation of the option of the school being built on the existing playing fields”.

Continuing, Sister O’Connor pointed out that the issue relating to the future of the Convent building had been in the arena from the outset and was nothing new.

“It has always been clear that the Trustees were happy to have the listed building included as part of the project and this situation has not altered in any way. Can I reaffirm the Trustees’ ongoing concern that generations of young people in Omagh continue to receive their education in substandard conditions and plead with you to ensure that there are no further delays to this project”.

[Emphasis added].

This was followed by the Department’s letter of 1st November 2007:

“The Department has completed its examination of the addendum to the feasibility study for Loreto Grammar School and can confirm that the provision of a freestanding new built school on the existing playing fields not connected to the listed building remains the preferred option. I note from your letter this is also the preferred option of the School Trustees. The Department is now examining the proposed Holy Trinity College/Loreto Grammar School PPP Project as a whole with a view to determining an appropriate procurement route in light of the latest available information on both schools. I will write to you again in the near future with a full assessment of the Department’s findings when this work has been completed”.

[Emphasis added].

The unequivocal terms of this letter require no elaboration. At this juncture, there appeared to be a clear mutuality of intentions. In her reply dated 20th November 2007, Sister O'Connor again signalled a correction, emphasizing that the Trustees were content to have the listed Convent building form part of the newly constructed school. Her letter also confirms that, at this juncture, the joint position of both parties was that a final decision regarding the appropriate procurement model was awaited from the Department.

[47] It is clear that the Department's letter of 1st November 2007 was written following consultation with its Buildings Advisory Branch. Notably, at this stage, as regards the Holy Trinity College in Cookstown, the Department was expressing substantial concerns about a rapidly dwindling long term enrolment ("LTE"), as evidenced by Ms Loughrey's letter of 4th October 2007 to CCMS. It would appear that this had potentially significant implications for the continued viability of Holy Trinity OBS. The final event of note belonging to this discrete period was the formal request for approval "... to appoint technical support in respect to Outline Planning Application for Loreto Grammar School Omagh", made by the Education Procurement Service to the Department on 28th November 2007. This request adverted to Mr. Rooney's letter of confirmation to the Loreto Trustees, dated 1st November 2007 and continued :

"Irrespective of the procurement route outline planning is required and therefore it would be prudent to proceed with this process to ensure that further delays are not encountered".

At this juncture, it is appropriate to record that, as of 1st November 2007, the Department was making two unequivocal representations to the Loreto School's representatives:

- (a) The Department's preferred option was to develop a new school on the existing site playing fields.
- (b) A final Departmental decision was to be made regarding the appropriate procurement mechanism.

The final Departmental decision on the appropriate procurement mechanism did not materialise (from the Minister) until some fifteen months later (paragraph [54], *infra*).

2008 - Enter the New Minister

[48] Based on the evidence, the next development of significance occurred in the public arena. On 6th March 2008, the Education Minister (Ms Ruane) made a public announcement under the following umbrella:

“Ruane unveils new approach to school building projects”.

This statement records an *“ambitious programme, worth over £500,000,000”, which “... will deliver the construction of almost seventy new schools in the next four years ... through the Department’s ... new major capital works framework ...”*. The text of the statement confirms that the other protagonists in this process were the SIB and certain construction companies, which had already been chosen *“through a challenging tendering process”*. The central theme of this announcement was that projects would be initiated and completed with increased speed and efficiency. While this statement was couched in general terms, it did not suggest any threat to the new Loreto school project, any change of course by the Department or any problem relating to funding. Nor did it hint at any review of procurement mechanisms. Furthermore, the *“Lisanelly option”* did not feature in this statement. Notably, this public statement was made in a context where the Department had brought to the attention of the school’s Governors and Trustees the *“Lisanelly option”*; the Governors had been invited to make a decision thereon; they duly did so, rejecting the *“Lisanelly option”*; the Department then took steps to progress the new Loreto School project OBC; the Department subsequently accepted the Feasibility Study Addendum recommendation; the Department duly conveyed to the school’s representatives that the preferred option was to develop a new school on the existing site playing fields; and the Department further represented that the next step was to confirm the appropriate procurement mechanism.

[49] Next, at the beginning of April 2008, the Department communicated to the CCMS its reservations about fluctuating enrolments in the Holy Trinity School, Cookstown (the proposed *“partner”* school in the PPP project). Writing to Sister O’Connor, Mr. Lundy (of CCMS) expressed concern that this, coupled with the *“Lisanelly Project”*, could have an adverse impact on the Loreto new build project. This provided the impetus for a letter dated 17th April 2008 from the school’s Governors to the Department. An admirable mix of passion and logical coherence, the letter implored:

“We trust that these problems relating to Holy Trinity College, Cookstown will not have a negative impact on our building scheme and delay progress even further”.

After rehearsing the saga of the previous sixteen years, the letter continued:

“Our school building is archaic, our mobiles not fit for purpose, our windows a health and safety hazard and our specialist provision totally lacking in the standards expected in a school for children of the 21st century”.

The letter concluded with the following *cri de coeur*:

"We appeal to you to clarify the position of our building programme and urge you to ensure that a new build on this school site will be the priority of the Department".

During the seven months which followed, there materialised yet another hiatus, of substantial proportions. Mr. O'Kane's passionate letter elicited a merely formal confirmation from the Personal Secretary of Mr. Rooney (by letter dated 21st April 2008), followed by a three line letter from Mr. Rooney, dated 6th May 2008, intimating an intention "... to meet with CCMS to discuss the position of Holy Trinity College" and, thereafter "... to inform you of the position and next steps".

[50] On 13th May 2008, there was a meeting attended by Departmental representatives (including Mr. Rooney) and Mr. Lundy of CCMS. The main issue debated during this meeting was the suitability of the PPP procurement model for the Loreto/Holy Trinity new build project. The Departmental view expressed was that the Holy Trinity School no longer appeared to be a suitable PPP "partner" for Loreto. The Department's record of this meeting notes that the OBC had not been examined "... because of the possibility of Loreto ... moving to the Lisanelly site". The thrust of Mr. Lundy's representations was to advocate conventional design and build as the more appropriate model. The record further documents:

"Eugene Rooney said that DE would prepare a submission to cover all the issues and based on these make a recommendation".

This submission ultimately materialised some seven months later, approximately three weeks after a further meeting attended by Departmental representatives and the school's governors (*infra*). A lengthy period of Departmental silence and apparent inactivity ensued during the intervening period.

[51] The next milestone was reached on 10th November 2008, when Departmental representatives and the school's Governors met again. This meeting was preceded by a letter dated 3rd October 2008 from the Governors to Mr. Rooney, which pointed out that no substantive response to Mr. O'Kane's letter of 17th April 2008 had been made and urged that the Department advise "*the current position*". The Department's failure to reply to this letter was unexplained at the meeting. The record of the meeting attributes the following statements to Mr. Rooney, on behalf of the Department, at the outset:

"The project of Loreto and Holy Trinity Cookstown are [sic] being reviewed by PPP as to how to best move forward. Issues have arisen with Holy Trinity regarding site, location

and size. As a result of these issues the project is moving at a very slow pace. As the situation in Omagh has changed with the introduction of the Lisanelly site, we now have to look at educational needs in the Omagh area”.

Continuing, Mr. Rooney stated that the Loreto/Holy Trinity OBC was being reconsidered “... to see if it is still suitable for a PPP project”. Mr. Rooney further suggested that the Department had begun this review earlier that year. The exchanges during this meeting continued as follows:

“Mr. Rooney - Its best to get all issues resolved before procurement starts, everything needs to be finalised.

Chairman - Is what we were told in October 2005 untrue?”

This appears to be a reference to the historical fact that in October 2005, the Department subscribed to an estimated completion date of September 2009 for a newly constructed Loreto School on its existing site (paragraph [33], *supra*)

[52] The record of the November 2008 meeting continues:

“Mr. Rooney - I was not at the meeting but can accept that should not have been said.

Chairman - We are now in the situation where there are problems with Holy Trinity which is [sic] nothing to do with us, but we are going nowhere.

Mr. Rooney - Issues need to be addressed before we can move forward. How does Loreto fit in with the Lisanelly site? ...

Chairman - Loreto and Lisanelly are two separate issues. We were told in 1992 that we were Category 3 status for a new building, we were promised £14.6 million to build on this site, how can we still be here?

Mr. Rooney - We appreciate the need for a new school, issues with Holy Trinity have slowed things up. It's how best for it to move forward with the educational needs of the Omagh area. Which route - PPP or traditional procurement will best suit our needs.

Miss Bannon – Who decided which route and when? Will Holy Trinity influence the decision?

Mr. Rooney – The decision will be made when all reviews have been completed on both schools ... We have to look at the entire situation in Omagh, does Loreto still want to proceed on this site and how does it see itself fitting in along the Education Village?

Chairman – The Board of Loreto made the decision not to relocate to Lisanelly in June 2007 and DENI were informed at that time – nothing has changed ...

I have never seen a school treated so shabbily by DENI.

Mr. Rooney – DENI need to be up to date when planning the schools estates in the Omagh area, explore the possibility of Loreto having a change of heart regarding Lisanelly. Discussions with Ministers still taking place about Lisanelly ...

Mr. Rooney – Our objective today is what is best for Loreto. What's available if Loreto is built on this site and what's available to Loreto if Lisanelly goes ahead ...

In terms of what happens next – issues with Holy Trinity will have to be assessed. Check appraisal and LTE are up to date. This will determine the size of school. If looking at a separate project from Holy Trinity Cookstown – which procurement route is best ...

Ms Loughrey – When the route is confirmed – LTE reviewed at 850, seek Department of Finance approval, outline business case and final business case appraisal. Agree a form of words re Lisanelly.”

I have highlighted these particular words, in view of the significance which they were to assume in the events which followed. The record of the meeting continues:

“Mrs. O’Hanlon – How long will this take?

Ms Loughrey – Not long ...

*Mr. Rooney – Review bundle with Holy Trinity working in parallel. Confirm LTE and Appraisal, **conventional funding still available if bundle is not working. Pass to Department of Finance who will decide what funding is in the best interest of Loreto.***

Ms Murnaghan – Can you confirm that Lisanelly will not trip Loreto up again?

Mr. Rooney – Lisanelly has always been working away in the background, it was never going to trip Loreto up. DENI recognise the needs of Loreto.”

[Emphasis added].

At the conclusion of the meeting, Mr. Rooney stated:

“We will ensure regular contact to keep up to date so there should be no confusion” .

With reference to this meeting, Mr. O’Kane’s affidavit contains the following averments:

“I reminded the officials that we had clearly stated our decision not to relocate to Lisanelly in June 2007 and had communicated our position to the Department at that time. The Departmental officials confirmed that the need for a new school had been confirmed and that conventional funding for a new build would be available if the PPP route proved unworkable. Mr. Rooney stated that the Lisanelly issue would not ‘trip Loreto up’.”

[My emphasis].

The highlighted words in this passage may fairly be described as unambiguous. The Department’s affidavit evidence also deals with this meeting and refers to the Governors’ written record thereof. Notably, no controversy is raised. In particular, Mr. O’Kane’s aforementioned averments are not disputed.

[53] The next significant event occurred on 3rd December 2008, when the Department’s PPPU briefed the Minister. This submission can be traced to, *inter alia*, the meeting attended by Departmental representatives (including Mr. Rooney) and Mr. Lundy of CCMS, on 13th May 2008 (paragraph [50], *supra*). In its preface, the purpose of the Departmental submission to Minister Ruane was described in the following terms:

“To propose a change in the PPP procurement route for Holy Trinity College, Cookstown and Loreto Grammar School, Omagh.”

The submission advised the Minister of an “*alternative approach*”:

“The alternative approach would be through conventionally funded projects”.

The Minister was asked to consider the following recommendation:

“It is proposed to withdraw these two schools from a PPP procurement route before the project is advanced any further, given the issues around the project which means that it is unlikely now to provide value for money. With your agreement this conclusion would be confirmed to the schools”.

The submission continues:

“If the recommended options in the revised EAs remain unchanged (i.e. new school buildings on existing site) it is estimated that it would take a minimum of eighteen to twenty-four months to take the schemes through the planning phase followed by a minimum twenty-four month construction period. This gives a minimum of four years before the new schools would be built through conventional funding. The progression of these as conventional capital schemes, like all others, would be subject to the availability of resources”.

This is followed by the “Summary and Recommendation”:

“The key conclusion on examination of the draft OBC last year indicated that a PPP procurement option was likely to provide a VFM gain. The OBC was prepared prior to the emerging credit crunch difficulties and it is very unlikely in the present market that the same VFM would be achieved for a project such as this with capital value of £30,000,000 ...”

[54] Following this, the submission highlights two further concerns, namely uncertainty about *where* the two new schools would be constructed and the diminishing enrolment in Holy Trinity College. It continues:

“There is uncertainty at both schools regarding their current/potential locations. The appropriate enrolment size of Holy Trinity College is an issue to be resolved. It is proposed that these two schools are withdrawn from a PPP procurement route given the issues identified which would mean that it is unlikely now to provide value for money.

With your agreement this would be confirmed to the schools.

The appraisals need to be revisited and amended as necessary and the presumption would be the two schools would proceed as separate, conventionally funded projects. (Loreto Grammar School could also potentially be part of a wider education project at Lisanelly). The Department is commencing the work required to revise the EAs for both schools as identified already in recent meetings with the schools pending the conclusion as to the procurement route”.

[My emphasis].

During the “recent” meeting to which the author of this submission refers, the two central issues debated were the appropriate procurement model and the “Lisanelly option”. Each of these topics duly featured in the Ministerial submission. Perhaps surprisingly, the submission said nothing about the trenchant and repeated objections voiced by the Loreto School Governors and Trustees to having their new school developed on the Lisanelly site. Nor did the submission advert to Minister Gardiner’s commitment in April 2004 or the preceding ten year history, dating from around 1994. Finally, the submission was silent on the series of representations and commitments made by Departmental officials to the Governors and Trustees subsequently. The *outcome* of the submission can be gauged from a manuscript note on the document:

“Content with recommendation. I agreed this weeks ago. C. Ruane, 5/02/09”.

While I have highlighted what might be considered to be certain notable omissions in the submission, it is important to correctly analyse the outcome. In short, the recommendation to Minister Ruane was to approve “*conventional funding*”, in lieu of PPP procurement, for the proposed new Loreto School and the Minister duly agreed.

2009 - 2010

[55] The pattern of the subsequent events was a familiar one, with the Governors pursuing the Department proactively for further information, progress and clarification and the Department proceeding sluggishly and, for the most part, reactively. Between November 2008 and June 2009, the Governors heard nothing further from the Department. The Departmental silence which reigned during this period is reflected in the Governors’ letter of 23rd June 2009 to the Department, requesting an urgent meeting. The Department’s affidavit evidence contains no convincing explanation for the intervening lengthy delay. Eventually, on 24th June 2009, the Department wrote to the Loreto Education Trust Board. This letter begins:

“I am writing to inform you of the Department’s decision not to proceed along the Public Private Partnership (PPP) procurement route in relation to the future capital development of Loreto College ...

The Department’s view is that an affordable, value for money solution to Loreto’s accommodation needs is unlikely to be achieved through the use of PPP procurement in the current financial climate”.

The timing of the transmission of this “decision” by the Department to the Governors is *prima facie* surprising, given the clear indications that Minister Ruane had approved this decision prior to December 2008 (*supra*). The letter then discloses that an updated Economic Appraisal is in progress, continuing:

“While DE understands Loreto’s wish to remain on the current site, the prospect of a Shared Educational Campus at Lisanelly means that this option will need to be explored fully in order to be able to demonstrate that the best value for money option has been chosen and to achieve the necessary DE and DFP approval for the business case”.

Finally, the letter adverts to the recent Ministerial involvement in relation to Lisanelly:

“The Minister, on 22nd April, chaired the first meeting of the Lisanelly steering group to oversee the work to develop a shared educational campus. The Minister has agreed that the Department will, jointly with the Strategic Investment Board, provide £2 million to develop the detailed investigation and design work necessary.”

The content of this letter contrasts sharply with the content and outcome of the meeting attended by both parties’ representatives on 10th December 2008 (paragraphs [51] – [52] *supra*). Moreover, the link between the first meeting of the “Lisanelly Steering Group”, chaired by the Minister, on 22nd April 2009 and the suggestion that the “Lisanelly option” would have to be “explored fully” seems incontestable.

[56] On either side of this letter there were Ministerial press releases, dated 22nd April 2009 and 2nd July 2009 respectively. The first of these discloses that Lisanelly remained in the ownership of the Ministry of Defence. This particular public statement coincided with the inaugural meeting of the “Lisanelly Shared Educational Campus Steering Group”, at which the Minister announced that the Department and the SIB were jointly funding an exercise designed “... to develop

exemplar designs and associated technical work for a Shared Educational Campus in Omagh". The public statement continues:

"The Lisanelly Shared Educational Campus has reached another milestone in its evolution today with the public launch of the proposed master plan for the landmark £100,000,000 schools development".

The public statement further promised an application for planning permission by early 2011. The second of the aforementioned Ministerial statements suggests that a Programme Director had not yet been appointed and that "...contracts for design, financial, legal and technical teams to bring this project to life" had not yet been the subject of tendering processes. It would appear that a public consultation exercise was initiated on 21st June 2009. This was followed by a third Ministerial press release, dated 17th September 2009, the terms of which suggest that no further progress of substance had been made. Evidently a Programme Director was appointed later that year.

[57] In the midst of this flurry of Ministerial statements, representatives of the Department and the Governors, including various consultants, held two meetings of particular significance, on 2nd and 29th July 2009. The main topic discussed during the first of these meetings was the progressively dilapidated condition of the Loreto School accommodation. The note of this meeting further conveys a profound state of uncertainty regarding the "Lisanelly option". Also noted was the "squeeze on capital expenditure into 2014". I observe that financial constraints would, of course, undoubtedly have a major impact on the "Lisanelly option", given the substantial amounts of public funding (apparently a minimum of £100,000,000 - almost five times the funding committed by Minister Gardiner in May 2004)) being mooted. The second meeting was described as an "EA Progress Meeting". At the outset, it was highlighted that the Economic Appraisal was to be submitted by the end of September 2009. It was agreed that six options would be included in the EA and the updated Feasibility Report. With reference to the "Lisanelly option", it was recorded:

"Option 6 - New build on Lisanelly site - school to provide wording to be inserted in Feasibility Study and Economic Appraisal".

I have highlighted this short passage in view of its obvious significance and, further, its symmetry with the linguistic formula contained in the record of the meeting between the parties on 10th November 2008 (paragraph [52], *supra*). The word "school" is also striking, in a context where two different firms of consultants were undertaking the revised Feasibility Study and revised Economic Appraisal. Thus, the Governors, rather than their professional consultants, were to make this particular contribution to the revised studies and proposals. I acknowledge that the Department's main affidavit contains an averment to the effect that the EA would

have to make a robust case for excluding the “Lisanelly option” on value for money grounds. This later became a matter of contention between the parties and it is noteworthy that this averment is not reflected in the detailed record of the meeting. I shall examine this discrete issue at greater length presently.

[58] According to the record of the second of these meetings, conducted on 29th July 2009, the Departmental representative (Ms Loughrey) emphasized that the “Lisanelly scheme” was “*very much in its infancy*”, while encouraging the Governors to acknowledge “*the positive outcomes that **some shared facilities** would add to **both schemes***” [emphasis added]. It is appropriate to interpose the observation that, given the history, the Departmental stress on “some shared Lisanelly facilities” clearly signalled, in my view, a new emphasis on a possible *via media*, steering a middle course between the construction of a new Loreto School on its existing site (on the one hand) and the construction thereof at Lisanelly, in tandem with other schools (on the other). This middle course, if realised, would, of course, be heavily weighted in favour of the former option. Under the rubric “Shared Facilities With Lisanelly”, it was noted:

*“It was reiterated by [Ms Loughrey of the Department] that any proposal or indication at this stage by Loreto Grammar School to look favourably on shared facilities with the Lisanelly scheme would not be binding as **the scheme is very much in its infancy**, but that it was important that the school acknowledged the positive outcomes that some shared facilities would add to both schemes”.*

[Emphasis added].

This can be readily linked to two of the Options (to be duly assessed) which were “agreed” during the aforementioned meeting, each entailing the construction of a new Loreto School on its existing site, “*allowing for shared facilities with Lisanelly*”. It seems to me uncontroversial to describe this as a compromise and, unsurprisingly, the Governors responded positively to Ms Loughrey’s exhortation. The outcome of this meeting was that various actions were to be undertaken, including the following:

“KPMG to have draft report ready for LGS review by 22nd September 2009”.

Next, in an e-mail dated 3rd August 2009, Ms Loughrey informed the school principal of a decision that “... *the school, in order to deliver the curriculum, need all the accommodation we spoke about on the site*”, with the result that partial development of any school curriculum facilities off site was no longer to be considered an option. This communication concluded:

“This means that we are unable to take this particular option forward and the consultants will therefore move forward without it”.

Thus the Department was eliminating two of the options, each linked to the Lisanelly site, agreed during the July 2009 meeting.

[59] At this juncture, it is appropriate to highlight one particular feature of the evidence summarised in paragraphs [51] - [58] above. In summary, the documentary records of two self-evidently important meetings (conducted on 10th November 2008 and 29th July 2009 respectively) indicate that in the updated Feasibility Study and Economic Appraisal, the “Lisanelly option” was to be dealt with by the mechanism of ‘an **agreed** form of words’ - in terms, a suitable linguistic formula. Moreover, the authors of this linguistic formula were to be the amateurs involved in the process (viz. the Governors) and not the professionals (the various firms of consultants retained). In context, there could only conceivably be two parties to this “agreement” viz. the Department (on the one hand) and the school’s Governors (on the other). In my view, the question which this raises is whether, considering the evidence in its totality, fairly and *in bonam partem*, a compromise had been hammered out between the two principal parties at this stage. Undeniably, the relations and communications between the parties had become progressively strained and hard edged and the Governors were pressing very strongly for an outcome acceptable to them, against the protracted background outlined in this judgment. The import of the two quoted extracts from the records of two unquestionably crucial meetings is, to my mind, substantially the same. All of this raises the question of whether the further reports to be presented on behalf of the Governors (the updated revised Feasibility Study and Economic Appraisal) were, by agreement between the parties, to address the “Lisanelly option” in a limited fashion which would be acceptable to the Department - in a manner which would promote and cement the construction of a new Loreto school on its existing site. Pausing here, I consider that there are persuasive indications in the evidence inviting an affirmative answer to this question. However, the story did not end at this juncture and it is incumbent on the court to consider also the events which unfolded during the ensuing phase.

[60] Next, by letter dated 3rd September 2009, KPMG, the school’s consultants forwarded an updated Economic Appraisal to the Department. The format of this report was to incorporate the updated Feasibility Study. I note its title:

“Economic Appraisal – Draft for DENI Comment”.

In their agreed terms of engagement, KPMG had stated the following (*inter alia*):

“We have assumed team members would be required to attend up to three meetings with DE including the initiation meeting ...

Within three months from the date of submission of the Economic Appraisal to Department of Education, the Development Branch [of the Department] has concluded review and all comments received are addressed and Economic Appraisal updated accordingly ...

KPMG will endeavour to complete the draft Economic Appraisal by 22nd September 2009 ...”.

Finally, KPMG envisaged the possibility that more than one “update” might be required following receipt of the Department’s comments on “the first draft”. The purpose of the KPMG draft Economic Appraisal was described in the following terms:

“... to undertake an Economic Appraisal of the options identified in the Feasibility Study carried out by Kennedy Fitzgerald Associates, on behalf of the Department of Education ...”.

It was further recorded:

“KPMG has prepared this Economic Appraisal in accordance with the Department of Education’s Guidance which satisfies its requirement for the Schools Build Programme and addresses the key principles of HM Treasury’s Green Book”.

Thus the Economic Appraisal and the updated Feasibility Study were inextricably linked.

[61] The “Introduction” section of the updated Feasibility Study includes the following passages:

“1.07 Prior to the development of the various options within this study, the proposals have been discussed with the school and the Department of Education.

1.08 At the meeting with the Department of Education on 28 July 2009 it was agreed that the following options for the school’s development should be reconsidered and developed further:

(i) Do minimum (without the Convent).

(ii) Extend the existing school and refurbish as required including various schemes for the development of the existing Convent.

(iii) New Build School on the existing site incorporating various schemes for a reuse of the existing Convent”.

These passages are of obvious significance in the context of the dispute which later materialised between the parties regarding the content and scope of the revised Feasibility Study and Economic Appraisal. In a later part of the report – Chapter 4 – the consultants extended the options to encompass “*new build on Lisanelly site*” (which became Option 6). In paragraph 9.02, the consultants examined and assessed this option. They recorded, *inter alia*:

“Loreto continued to plan for a new build project ...

In 2007 DENI introduced the concept of an Education Village on the Lisanelly site. The Board of Governors declined an invitation to move to the Lisanelly site ... [for the reasons then recited] ...

Given that the current facilities have serious defects, are not compliant with DE Handbook Guidance, Health and Safety or DDA Requirements and a substantial amount of mobile accommodation is past its useful life, the urgency for a new build on the existing site remains the priority of the Loreto Trustees and the Board of Governors. It is for these reasons that the School declined the opportunity to relocate to the Lisanelly site”.

[Emphasis added].

The Kennedy Fitzgerald report concluded by making the following recommendation:

“Loreto Grammar School, Omagh has an established successful history ..

It is set in the heart of Omagh Town, in a beautiful landscaped area surrounded by mature foliage. The site has a magnificent Convent House with its turrets and façade recognised as a landmark in the area and highly regarded as a Listed Building. The school site is adjacent to all amenities within the area and has direct access to the main Belfast, Derry and Dublin bypass ...

Loreto Grammar School has a proven record of outreach to the local and global community and has willingly shared its educational philosophy, facilities and experience with all sectors of the educational community. In 2006 the Education and Training Inspectorate declared the quality of education provided as 'outstanding'.

Unfortunately past development has not readily facilitated the future development of the School to meet the requirements of the current curriculum and the required educational space standard.

It is for this reason that it is more economical to build a new school on the existing site and demolish the existing unlisted buildings removing the mobile village in the process. With the development of this new school there is an opportunity to plan an attractive collegiate campus environment relating to the restored Convent House and School Chapel in a pleasant landscaped setting".

[62] The KPMG draft Economic Appraisal of September 2009 incorporated the revised Feasibility Study. It rehearsed a series of relevant policies and strategies and gave consideration to the existing Loreto School and the new build project, in this context. This report assessed, *inter alia*, four new build options. These included (as "Option 6") what was described as "New Build on Lisanelly Site". Under this rubric, the report stated:

"Option 6 proposes providing a new school on the Shared Educational Campus at the Lisanelly site ...

The school has not taken this option forward due to the following reasons:

- *The Lisanelly shared educational campus is currently at OBC2 stage and it is considered that the time frame to bring this project to procurement will not meet Loreto Grammar School's urgent requirement for a new school building.*
- *Loreto Grammar School seeks to maintain its own individual ethos and identity within the local community.*
- *Loreto Grammar School has not experienced a declining enrolment trend in recent years indicating that it can be self-sustaining without*

the requirement to share facilities with other schools.

- *The existing Loreto site is currently available for construction therefore procurement of development on this site could start immediately”.*

The latter are a reflection of the relevant passages in the revised Feasibility Study [in paragraph 9.02]. Given these factors, the report subjected five other options – but not Option 6 – to “*in depth appraisal*”: these were a “*do minimum*” option, coupled with four new build “*on site*” options. The report explained that the attached Feasibility Study had identified a total of nine options. A perusal of the report discloses that the consultants considered that there were really only two viable options – Option 3A and Option 3B, each of which was costed at £14.68 million and £14.21 million respectively. At a later stage of the report, the consultants commented again on Option 6, concluding:

“Given that the current facilities have serious defects, are not compliant with DE Handbook Guidance, Health and Safety or DDA Requirements and a substantial amount of mobile accommodation is past its useful life, the urgency for a new build on the existing site remains the priority of the Loreto Trustees and the Board of Governors. It is for these reasons that the School declined the opportunity to relocate to the Lisanelly site”.

[63] The suggestion in the Department’s affidavit evidence that this report did not consider Option 6 seems to me plainly unsustainable. What is correct is that the consultants did not subject Option 6 to “*in depth*” appraisal. The report concluded:

“Option 3B has been identified as the most economically advantageous do something option. This option involves a complete new build accommodation solution on the existing site with the multipurpose hall to the rear of the retained façade”.

It appears that following receipt of the report, on or about 23rd September 2009, the Department forwarded it to its Buildings Advisory Branch for advice. In the events which materialised, almost five months were to elapse before any Departmental response was made. Notably, the course and sequence of events specifically envisaged by KPMG, following the meetings with Departmental officials, did not eventuate. Almost simultaneously, the Governors forwarded to the Department, a “*Condition Report*”, with the following comment:

“This report represents serious issues which the Board of Governors wish to register with the Health and Safety

Department of DENI and which need to be urgently addressed by the Department of Education”.

This report was to merge with the updated EA and was forwarded on this basis. It is a document of no little significance, since it reinforced one of the major reasons for the rejection of the “Lisanelly option” viz. the urgency theme. I observe that the Governors’ “urgency case” has at no time been challenged by the Department.

[64] This was followed by a further Ministerial statement, on 15th October 2009, which articulated an intention to reshape investment plans and continued:

“Area Based Planning is a key piece of work for my Department and a significant amount of work has been completed in this area. Area Based Planning will drive the reshaping of our estate and the consequential investment plans. I have commissioned a review of current projects to ensure that all are consistent with the overall policy framework and will be viable and sustainable in the long term”.

In the same statement, the Minister identified five “pillars” upon which the education system in Northern Ireland is to be developed. These were raising standards for all; closing the gap in achievement by improving access and equity; enhancing the quality of teaching by developing the workforce; improving the learning environment through targeted investment; and transforming management cutting out bureaucracy and delivering the support that schools need. Finally, the Minister promised the future publication of “*the area based planning report which sets out a road map to delivering a better, more equitable post primary education system that will serve the needs of all our young people.*” According to the Department’s affidavit evidence, the review thereby enunciated was designed to ensure that all extant capital projects in the “Investment Delivery Plan” were “... consistent with the Department’s policy framework and hence viable and sustainable in the long term”. The outcome of this review was announced later, on 29th June 2010 (paragraph [71] *infra*).

[65] In the wake of this Ministerial statement there followed a letter dated 21st October 2009 to the Loreto Education Trust Board from the Minister, in which she professed herself “*a strong supporter of the Shared Educational Campus proposed for Lisanelly*”. The Minister explained that the Department, together with SIB, had committed £2 million “*to appoint a team to develop the next stage of the process*”, while she personally chaired the “Steering Group”. Having extolled the virtues of this project, the letter continues:

“While I will not pre-empt individual decisions on school projects, therefore, it is difficult to envisage any scenario under which post primary schools could be developed in isolation away from Lisanelly”.

I consider that this message was intended to be – and is - resoundingly clear. The letter further indicated that the Westminster Government had confirmed its willingness to give the Lisanelly site to the Northern Ireland Executive for use as an educational campus. The letter concludes:

“In view of where we are in the process your commitment to the project is an essential factor in enabling the development of the Shared Educational Campus to move forward with confidence. I know that you will consider carefully what Lisanelly has to offer for the children and young people attending your school and that you will take decisions which are consistent with their best interests. I have asked officials from my Department to meet with you and members of your Trustees/Boards of Governors to discuss in greater detail the Department’s thinking in relation to Lisanelly” .

Read fairly and *in bonam partem*, the Ministerial message to the Governors was pulling no punches. The gloves were off and the battle lines were clearer now than at any previous stage. The further evidence latterly adduced in relation to the “Lisanelly option” is considered in paragraphs [81] – [84], *infra*.

[66] I consider it appropriate to make three observations at this juncture. The first is that, at this stage, the “Lisanelly option”, viewed fairly and objectively, was, at most, a vague future possibility. The second is that when the Governors’ consultants submitted their revised Economic Appraisal, the Department had no legal interest in the Lisanelly site: it remained (and, the court was informed, remains) in the ownership of the Ministry of Defence. The third is that during the period of approximately one and a half years which has elapsed subsequently, the prospects of the vast injection of public monies (£100,000,000 or more) required to realise the Lisanelly “dream” must have, realistically, receded dramatically. This assessment, in my view, is merely realistic and uncontentious. Furthermore, it is fortified by the following averments in the Department’s second affidavit:

“The UK spending review outcome resulted in a 40% real terms reduction in the total capital funding provided to the Executive for the period 2011 – 2015. The draft budget proposes substantial reductions in the capital allocation for DE in 2011 – 2015, compared with the level for 2010 – 2011, which itself is lower than in the previous years ...

The Department of Education will have £738 million less capital funding to invest over the next four years than had been planned for. The level of funding provided is only sufficient to deliver on existing contractual commitments, invest moderately in minor works and maintain smaller but important budgets. The budget allocation cannot support the planned ‘new build’ programme and any investment in

this area, if at all possible, is likely to be sporadic and limited until 2014 – 2015.”

This affidavit also adverts to the requirement that the Department generate savings of around £140 million from 1st April 2011 and the possibility that £41 million be reclassified from capital to revenue. In this context, the following passage in the Under Secretary’s Submission to the Minister in June 2010 is also noteworthy, under the rubric “Financial Position”:

“As you are aware the capital position facing the Department in 2010/2011 is extremely challenging with a net capital budget of £169 million, which is over £84 million lower in real terms than in 2009/2010. There is little prospect that the position will improve in the coming years. With such a constrained budget position ... it will not be possible, without additional resources, to move ahead with new capital builds in 2010/2011.”

The submission also adverts to *“the capital funding crisis facing education ...”*.

[67] Significantly, the message articulated in the Minister’s letter of 21st October 2009 was repeated, in equally uncompromising terms, at a meeting some two months later. The meeting in question was conducted on 15th December 2009. This was another landmark event in the saga. The Departmental representatives in attendance included Mr. McGrath, the Under Secretary and Ms Jones, described as “Programme Director for Lisanelly”. According to the Department’s record of this meeting:

“The purpose of the meeting was to explain the current position and thinking around the Lisanelly campus and explore options for participation of the school. Mr. McGrath explained the shifting dynamic around Lisanelly with the recent gifting of the site by MOD to the Northern Ireland Executive specifically for the development of an education campus. The Minister in her letter had reiterated her commitment to Lisanelly ...

The gifting of the site strengthened the economic case for development of post-primary provision in the area on the site. In light of this, and given the economics, it would be difficult to see how a case for investment in post primary provision in the area could be made other than on the Lisanelly site”.

[My emphasis].

The highlighted words chime strongly with what I have described above as the central message contained in the Minister's letter to the Trustees. According to the school's record of the meeting, Mr. McGrath stated:

"If the Department is going to provide funds for a new build it will have to be on the Lisanelly site".

The Governors retorted:

*"The Department stated in a meeting in July that they would progress the building project on this site. **When are they going to honour that proposal? The school has been working incessantly to release a new build on this site"**.*

[My emphasis].

The school's record of the meeting continues:

*"Mr. O'Kane [on behalf of the Governors] asked where we wanted decisions to go. As far as they were concerned they had been told funds had been earmarked for development of Loreto on its existing site. Mr. McGrath explained that funds were not earmarked for individual projects. **That announcements made were based on funds being available at the appropriate time and that factors and policies changed and had to be taken into consideration."***

I have highlighted the latter words as they conveniently encapsulate the Department's response to the Governors' legal challenge. Further, according to the Department's file note:

"Mr. McGrath ... acknowledged that feelings on the issue were running high and that obviously the failure of the PFI and the delays experienced by the school in moving their project forward left them feeling hurt".

According to the school's record of the meeting, Mr. McGrath confirmed that the "Lisanelly option" was a "personal policy" of the Minister. Mr. McGrath was asked whether Lisanelly would progress without Loreto and, according to the record, "hesitantly responded 'I do not know'". He continued:

*"What I want to do today is to move on from this. **Where are we going from this point on given that there will be no new build on this site?"***

[Emphasis added].

The final entry in the Department's file note is:

"The meeting concluded with agreement that further discussions would take place on the matter".

It is appropriate to highlight this final entry since the voluminous evidence available to the court does not disclose *any* further subsequent discussions, initiated by the Department or otherwise.

[68] Nothing seems to have materialised during the ensuing two months. Next, by letter dated 8th February 2010, the Department responded to the draft revised Economic Appraisal, which it had received almost five months previously. The letter pointed out that the former had excluded the construction of a new school on the Lisanelly site from detailed consideration in the letter. The latter concludes:

"In considering the priorities for capital investment any economic appraisal needs to provide detailed consideration of the full range of options available. In the Department's view, in the absence of full economic evaluation of the "Lisanelly option", the Feasibility Study and Economic Appraisal as submitted fail to fulfil this requirement".

The letter of 8th February 2010 can be linked to an internal report from the Education Advisory Branch, dated 26th February 2010. In this report, the authors acknowledge the Governors' / Trustees' rejection of the "Lisanelly option":

*"Option 6 has been dismissed primarily on the basis of non building related issues. The argument appears to be on ethos considerations and a belief that the project would proceed quicker on the existing site. **These are matters outside our technical remit** ... Lisanelly should have been more fully considered."*

Thus the authors of this report did not, apparently, possess the requisite technical expertise to consider the Governors' reasons for rejecting the "Lisanelly option". Furthermore, their report is infected by an obvious error relating to what they describe at the "burial ground in the centre of the site": this issue had been redundant for almost six years at this juncture, following the exhumation ceremony. The report concludes:

"Although the recommendation of the Feasibility Study provides an adequate solution it is by no means an ideal one as is evidenced by the fairly low score it achieves in the Qualitative Assessment of the Economic Appraisal compared to the potential score of a new build on a new site,

notwithstanding the flawed factors considered in the analysis. The option of a new build on a new site needs to be adequately considered particularly as Lisanelly is available and adjacent. The most realistic way for this option to be taken forward is as part of the study to develop the Lisanelly site”.

The “study” mentioned in this passage was to be undertaken by the Department’s consultants.

[69] In a letter dated 3rd March 2010, which is properly described as dignified and balanced, the Governors responded with dismay. They reminded the Department of the eighteen year history, the Departmental delays, the Ministerial commitment of April 2004 and continued:

“The terms of reference for the FS and EA were agreed at the meeting attended by senior officials from the Department on 29th July 2009. The option of a ‘new build on Lisanelly site’ was expressly included as Option 6 in the Feasibility Study and referred to in Section 7 of the Economic Appraisal following discussion and direction from Departmental officials”.

[My emphasis].

The letter then highlights the Department’s failure to respond sooner to the updated FS and EA. Next, it voices the following protest:

“At the meeting of 29th July 2009 (minutes enclosed) the Department officials did not stipulate that a full economic evaluation of the “Lisanelly option” was a pre-requisite for acceptance of the FS and EA. Indeed, in the five months since the submission of the reports no one from the Department raised any issue about the need for a full economic evaluation of the “Lisanelly option” until your letter of 8th February 2010 ...

More fundamentally, we would invite you to confirm that the Department have not reached a fixed and final decision in relation to the option of a new build on the existing site. The Minister ... has stated publicly that Loreto will only be funded for a new build on the Lisanelly site. We see no purpose in committing further time and resources to the endless cycle of feasibility studies and economic appraisals if, as the Minister has publicly stated, the Department has reached a final view that Loreto Grammar School will only be funded for a new build on the Lisanelly site”.

[My emphasis].

In this context, I refer to my observations in paragraph [59] above. Adverting to the fact of having received legal advice the letter requested an urgent response.

[70] This letter elicited a reply, on 23rd March 2010, in which the Department stated:

“Firstly, I should explain that this Department in considering Economic Appraisals must be guided by the principles ... set out in the ... DFP document ‘Northern Ireland Economic Appraisals and Evaluation Guide’ ...

The purpose of the appraisal process is to identify the best value for money solution to meet the primary objectives of the EA ... to reach this outcome the DFP guidance clearly states that a full range of feasible options must be considered. The guidance also states that the completion of an EA does not necessarily bring the consideration of options to an end. For instance, changing circumstances may invalidate the EA assumptions and conclusions prior to project implementation, necessitating a review of the options. It is this section of the guidance that prompted my letter of 8th February.....

Clearly, there has been considerable discussion about the prospect of an educational campus at Lisanelly for some time, but only recently has the acquisition of the site become a reality. This means that, in accordance with DFP guidance, the potential relocation of Loreto Grammar School to Lisanelly must be considered as it is a feasible option. To take this forward effectively the consideration of this option must be included in a composite EA considering the potential relocation of other post primary schools in Omagh to the Lisanelly site. I can assure you that no decisions have been taken on the relocation of any school to the Lisanelly site. Only when a fully worked up EA, considering the accommodation needs of the post primary schools in Omagh, is approved by DFP, will final decisions emerge”.

Notably, the “DFP guidance” features (without particularity) in this letter for the first time. Furthermore, one of the central assertions in the Governors’ letter of 3rd March 2010 was that the updated FS and EA had been in compliance with the terms agreed with senior Departmental officials on 29th July 2009. Notably, the Department’s letter of reply, dated 23rd March 2010, does not dispute this self-evidently important assertion.

[71] It may be observed that the bare and unparticularised statement in the Department's letter that Lisanelly is "*a feasible option*" failed to engage in any way with the Governors' reasoned case, contained in the updated EA and articulated elsewhere, to the contrary. Notably, it was now being stated that *the Department* would have to undertake a comprehensive Economic Appraisal which would examine "*the potential relocation of other post primary schools in Omagh to the Lisanelly site*". On one view, this might suggest that the Loreto School's updated FS and EA could not fairly be criticised, prompting the rhetorical question: what kind of truly meaningful evaluation of the "Lisanelly option" could be carried out, in circumstances where not one of the post-primary schools in Omagh had committed itself to relocation there? The court's observations about this discrete issue during the hearing prompted a further adjournment to enable the Department to submit additional affidavit evidence (to which I shall refer presently).

[72] At this stage, the Governors instructed solicitors, who corresponded on their behalf thereafter. The correspondence which followed is of some little importance. Firstly, and notably, the solicitors' pre-proceedings protocol letter of 24th March 2010 contained the following assertions:

"The terms of reference for the FS and EA were agreed at the meeting attended by senior officials from the Department on 29th July 2009 ...

At [this meeting] the Departmental Officials did not stipulate that a full economic evaluation of the "Lisanelly option" was a pre-requisite for acceptance of the FS and EA. Indeed, in the five months since the submission of the reports no one from the Department raised any issue about the need for a full economic evaluation of the "Lisanelly option" until the letter of 8th February 2010."

This elicited a response, by letter dated 6th May 2010 from the Departmental Solicitors Office. This suggested that Minister Gardiner's "*proposal*" of 27th April 2004 remained alive for a period of some five years, until –

"... it was concluded that [PPI] was neither an affordable nor a value for money solution to meeting the needs of the pupils of Loreto Grammar School. This decision was notified to the school by letter of 24th June 2009 ...

The result of this decision was that a new build for the school would be considered for progression through the conventional procurement route following the submission and approval of a revised economic appraisal.

I am further instructed that it is essential that options to meet the needs of the pupils of Loreto Grammar School take account of the context within which the economic appraisal is being developed and the Department's letter of 23rd March 2010 ... highlighted that the "Lisanelly option" needed to be fully explored ... in the economic appraisal ...

Finally, I am instructed that in October 2009 the Minister announced a review of all remaining capital projects on the Investment Delivery Plan, one of which is Loreto Grammar School ...

Until the review is complete no capital projects will be released and the outcome of the review will take account of Ministerial priorities and available resources. The Department therefore cannot give a guarantee on the level of resources or when they will become available for the construction of a new school building for Loreto Grammar School".

Significantly, for a second time, the Department did not contest the Governors' unequivocal assertions about the agreement made between the parties at the meeting on 29th July 2009. I find this unsurprising, since I do not believe that the Governors, the Trustees, the architects and the financial consultants, or any of them, fabricated these assertions in any way. I readily accept the correctness of their assertions in this respect.

The Second Impugned Decision

[73] The outcome of the "capital projects review" was communicated to the Governors in another letter of unquestionable significance, dated 29th June 2010. This letter contains the second of the impugned decisions. It states that each of the relevant school capital projects had been reviewed in accordance with the criteria enshrined in the "Policy for Sustainable Schools" and the so-called "area approach to planning". A scoring methodology of fully compliant, partially compliant or non-compliant was applied to each of the projects. In the case of the Loreto new build project, this gave rise to the following conclusion:

"I wish to inform you that your school and the proposed building project, at this time, based on the available information, is deemed to be non-compliant. The issues emerging from the review which require further clarification are linked to the Sustainable Schools Criteria/Strategic Area Planning and can be summarised as follows:

It is essential that all feasible options to meet the needs of the pupils of Loreto Grammar School

are fully addressed within the context of a revised Economic Appraisal, including the potential offered by Lisanelly”.

The Department’s letter dated 29th June 2010 lists a bewildering number of Departmental policies which, notably, is expressed to be *inclusive*. There is no clearly particularised suggestion that “*the proposed building project*” for the Loreto School contravenes any of these policies. Furthermore, the particularisation of the asserted non-compliance with the “Policy for Sustainable Schools” is conspicuously invisible. The court’s observations about this discrete issue, coupled with the grant of permission to amend (*infra*), resulted in the submission of further affidavit evidence by the Department, at a late stage of the hearing. I shall consider this presently.

[74] These proceedings were initiated the following day, on 30th June 2010. The Department’s letter of 29th June 2010 must be considered in conjunction with a further Ministerial statement of the same date. This enunciated that the “capital review” was now complete and explained, in terms, that certain school rebuilding projects were compliant with the relevant Departmental policy and continued:

“I want to build all of these schools, but the rate at which I can do this is determined by the level of resources allocated to me by the Executive for school buildings. If these additional funds are not allocated to DE for capital build projects then I fear that a delay on commencing these schools for some months is inevitable”.

The statement further explains that all of the school projects in question (i.e. belonging to the Investment Delivery Plan) had been evaluated according to the “Sustainable Schools Criteria”, which are listed as quality educational experience; stable enrolment trends, sound financial position; strong leadership and management by Boards of Governors and Principals; accessibility; and strong links with the community. The statement suggests that some seventy projects were policy compliant, while a further one hundred “*potential*” projects were at various stages of Feasibility Study and Economic Appraisal, all of them having been identified as “*having serious accommodation issues*”. Finally, the statement explains that the Department’s net capital budget for 2010/2011 is £169 million, over £84 million lower in real terms than for the previous year.

[75] It is appropriate to indicate, at this juncture, that during the substantive hearing of this matter the court gave permission to the Applicants to amend their Order 53 Statement to challenge the letter dated 29th June 2010. In granting permission, I had regard to the Department’s objection grounded on delay. I also took into account, *inter alia*, that proceedings had been prepared prior to receipt of this letter and were initiated immediately thereafter. At that juncture, the

Applicants' solicitors signalled their clients' willingness to meet Departmental representatives. According to the Department's affidavit evidence, following consideration of counsel's advice, the Departmental Solicitor's Office responded by letter dated 28th July 2010, to the effect that all issues raised by the Applicants had been addressed in the letters sent on behalf of the Department on 23rd March and 6th May 2010, while signalling the Department's willingness "... to consider any new information or further points which the Applicant may wish to put to it". The next significant development was the grant of leave to apply for judicial review, on 21st September 2010.

[76] I now turn to consider the additional evidence submitted on behalf of the Department during the course of the hearing. This was substantial in volume and I shall highlight some of its salient features only.

The "Sustainable Schools" Policy

This is the policy on which the second impugned decision was seemingly based. Although undated, this policy appears to have been published by the Department in 2008. Its thrust is apparent from the Ministerial Foreword:

"The Policy for Sustainable Schools will form an important aspect of the area-based planning approach being developed ...

The policy sets out six criteria and associated indicators that should provide a framework for helping to consider issues of school sustainability. The criteria cover the strength of links to the local community, educational experience, enrolments, financial position, school leadership and management and accessibility."

In the text, there is an emphasis on the object of "having schools that are viable in both educational and financial terms". The concept of area planning also features. The overarching aim of the policy is to improve the quality of education in Northern Ireland. The aforementioned criteria (which are rehearsed in Chapter 6) are prefaced in the following way:

"There are a number of quantitative and qualitative criteria and indicators linked to consideration of the longer term viability of a school which are summarised under six headings".

Having listed the criteria and noted the "associated indicators", the text continues:

"It is important to stress that the intention is not to have a mechanistic application of the criteria and indicators, but to

provide a view of how effectively a school is functioning and of the range of factors affecting its performance ...

It is clear that the criteria are inter-related and there is expected to be a significant correlation across sustainability factors ...”.

The policy recognises that its application could result in a range of solutions – including closure, amalgamation and shared campus. The essence of the policy is further illuminated in the concluding Chapter:

“8.1 Over 1250 schools representing a variety of sectors have developed over the years, but there has been a lack of a consistent planning framework. While there are many excellent schools, there are also schools, at both primary and post-primary levels, which are experiencing difficulties. The good teaching provided can often be at a professional cost to the teachers. Too many small schools within the system can also result in a drain on the overall education budget, leaving too little resource across the system ...

When considering options such as potential amalgamation or closure options, educational, economic and community issues will need to inform decision making.”

If one were to attempt a very concise summary, the policy at heart *seems* to be aimed at identifying struggling and declining schools, with a view to providing cost effective solutions which will simultaneously be compatible with high quality education. The Department’s letter of 29th June 2010 to the Governors (paragraph [73] *supra*) is to be evaluated in this light.

[77] The further evidence submitted on behalf of the Department included three Ministerial submissions. In the first, dated 4th December 2009, the Minister was reminded of the ongoing review of schools capital projects designed “... *to validate that all are consistent with the policy framework for the Department*”. The aim of the review was to determine “*the continuing viability and sustainability of these projects*”. One of the discrete aims was framed in terms “*to ensure VFM [value for money] through support for viable and sustainable provision*”. A later submission (dated 31st March 2010) noted that of the capital projects embraced by “the Investment Delivery Plan” some twenty had been completed, twenty-one were under construction and the remaining sixty-seven were at various stages in the approval process. The Loreto project belongs to this largest group. The significance of a project belonging to the IDP is that the IDP formed part of the formal Northern Ireland Programme for Government 2008/2011, representing yet another aspect of the litigation matrix which the court must consider. This submission further noted:

“As a result of the significantly reduced budget and contractual commitments already in place the Department is faced with a situation where the ability to release new build projects is significantly curtailed ...

There is a pressing need for the Department to develop a longer term strategic approach to the development and maintenance of the estate to ensure cost effective use of public funds ...

The complexity of the issues required the Review Group to invest a significant amount of time considering each project in its own right as well as taking a strategic view of the provision and needs of each area”.

While the materials annexed to this submission recorded that Loreto was one of (only) twelve schools allocated to the “major concerns” [i.e. non-compliant] category, the reasons for this are unexplained. The definition of this category is:

“Major concerns about the project in relation to DE policies which would require a reworking of the proposal”.

In a further Ministerial submission dated 25th June 2010, the Deputy Secretary observed:

“Expectations are high not only in relation to those schools on the Investment Delivery Plan but also among those schools currently at the early stages of planning ...

Without a massive increase in the capital budget there is little prospect of these projects being funded in the foreseeable future”.

This submission also speaks of “the capital funding crisis facing education”. In the final reckoning, Loreto was one of only eight schools out of the sixty-seven concerned deemed “non-compliant”. Loreto is not mentioned in any of these submissions to the Minister. Nor is there any mention of the Ministerial commitment of May 2004 or the subsequent Departmental representations to the Governors and Trustees, express or implied.

[78] The aforementioned Departmental policy was added to the evidential matrix before the court at a late stage of the proceedings. Consideration of its content, coupled particularly with the eighteen year saga which preceded it, renders all the more surprising the absence of any particularity or elaboration in the Department’s letter dated 29th June 2010. This letter is declaratory, not explanatory. It is expressed in conclusionary terms. It could not have conveyed to its recipients the true reasons

for the finding of non-compliance and I readily conclude that it did not do so. According to the Department's third affidavit, the "key" reason for the non-compliant determination was the failure of the Loreto School's draft revised Economic Appraisal to fully assess the "Lisanelly option". The relevant internal record stated:

"A stand alone project, as proposed ..., should not progress

...

Fully realised EA that adequately considers potential of Lisanelly is required".

According to another, related record, the other two reasons for the non-compliant determination were the absence of agreement between the Governors and the Department about the school's long term enrolment and (as explained by Mr. McMillen) the impact of the Governors' new build proposal on future educational planning in the Omagh area (which does not seem to add significantly to the *first* reason).

The DFP Guidance

[79] The "Northern Ireland Guide to Expenditure Appraisal and Evaluation" (the "NIGEAE Guidance") a DFP production, was exhibited to one of the affidavits sworn on behalf of the Department during the hearing. Its predecessor was the HM Treasury "Green Book". At the outset, it states:

"The principles in this guide must be applied to all proposals that involve spending or saving public money, including EU funds, and to all proposed changes in the use of public resources. All such proposals should be supported by evidence of suitable appraisal, approval, management and evaluation. There are no exceptions to this general requirement".

The Guidance contains an illustrative table entitled "The Basic Steps of an Economic Appraisal". This lists ten steps, with appropriate accompanying explanatory text. The fourth step is described as "Identify and Describe the Options" in these terms :

"Identify and describe a base line option, usually the status quo, and a suitably wide range of alternative options".

[My emphasis].

Here one finds a cross-reference to paragraph 2.4 of the Guidance, which contains the following material elements:

“Comparison of alternative courses of action is at the heart of appraisal. It is only by comparing the alternatives that the real merits of any particular course of action are exposed ...

It is useful to begin by identifying a ‘long list’ of options, containing all the initial ideas about possible solutions ...

Imaginative thinking should be encouraged ...

*The long listed options usually need to be sifted to produce a more manageable ‘short list’ of options for in depth appraisal. This should be done according to specific, stated criteria. These may be expressed in terms of, for example, **failure to satisfy the principal objectives of the proposal, or violation of important constraints regarding finance, manpower availability, policy commitments, site suitability and so on.** Where options are rejected in this way, the precise manner in which they fail to meet the criteria should always be explicitly explained.”*

[Emphasis added].

[80] In the context of these proceedings, the passages reproduced above are unquestionably the most important part of the Guidance. In my view, considered and construed fairly and objectively, they yield the following analysis:

- (a) It is for the proposer to identify alternatives to his proposal.
- (b) The exercise of identifying alternatives is non-prescriptive.
- (c) The proposer and his advisers are clearly given a reasonable margin of appreciation.
- (d) It is entirely permissible to consider and reject an option *without subjecting it to in depth appraisal*. This should be accompanied by a reasoned explanation.
- (e) In the matter of both selecting and assessing options, questions of judgment, to be evaluated by reference to the specific fact sensitive context under scrutiny, arise.

In my view, the relevant provisions of the NIGEAE Guidance must also be juxtaposed with the 1993 Regulations (see paragraph [9] *supra*). Regulation 4 clearly confers a measure of discretion on the Department regarding the “*particulars and information*” to be provided by a school when funding of the kind under

consideration is requested. Thus, pursuant to this statutory measure, the Department had the power to engage with the Loreto representatives in the manner in which they did, particularly in November 2008 and July 2009. I shall consider the significance of this presently.

The “Lisanelly Option”: Current State of Play

[81] It is apparent from the substantial body of evidence relating to this discrete issue ultimately adduced by the Department that the Western Education and Library Board (“*the Board*”) was the initial driving force, in 2006. I have already recorded some of the ensuing events of significance, in paragraphs [39] – [44] above. It would appear that there are nine post-primary “candidate” schools for this site, five of whom have expressed some interest. There is no doubt that the proposers and supporters see in Lisanelly an exciting vision for the future provision of post-primary school education in the Omagh area. The evidence includes a DFP letter of 24th November 2008 to the Department, containing the following passages of note:

“This project relies on a large number of stakeholders combining to deliver a project with novel educational features and an urban regeneration dimension on a site that is strategically important to Omagh. Whilst the concept of a new kind of collaboration between schools is attractive, it faces many potential pitfalls particularly in relation to getting the stakeholders to agree on governance arrangements ...

Whilst the project is said to have been in development for two years, there appears to have been relatively limited progress in working out the details. It would be very risky to commit significant expenditure on the basis of such high level analysis ... [which] leaves too many vital elements still to be worked out ...

There would need to be a fully worked up OBC, containing hard analysis of options, costs and affordability ...

The proposal ... is novel, challenging and risky and raises many questions about [value for money], affordability and achievability...

There are broad indications of support from stakeholders, but nothing by way of firm commitment ...

There are significant issues in terms of affordability and educational priorities and there is a considerable risk that costs will increase ...”

[My emphasis]

This letter also expresses, in detailed terms, substantial reservations about the extant Outline Business Case. The outworkings of this sobering letter are contained in an attached schedule where one finds, *inter alia*, the blunt criticism that the shortlisting of options “*lacks credibility*”.

[82] Chronologically, the next landmark event was the inaugural meeting of the “Steering Group”, chaired by the Minister, in April 2009. At this stage, the limited aim was to procure from the relevant consultants what was described as “*exemplar design*”. The cost of this was estimated at £2.1 million and this expenditure was approved in the full knowledge that *no school* had committed itself, as recorded in the “Background” to the “Principles of Engagement with Schools”. The Ministerial public statements associated with this event and its aftermath are summarised in paragraph [55] above. These included a commitment that an application for planning permission would be made by early 2011. In a calendar annexed to a document entitled “Terms of Reference”, it was suggested that the “*exemplar design*” stage, to include completion of the second version of the Outline Business Case, would be completed by September 2010 and approved by DFP by December 2010, with contractor procurement to begin in January 2011. It was further estimated that outline planning approval would be secured by December 2010. In a letter dated 15th June 2009, DFP expressed further reservations:

“...I do have underlying concerns that money may be wasted on this preparatory work if ultimately the Lisanelly project will not be affordable to your Department ...

We would therefore need reassurance that if the project is found to be a viable option your Department will treat it as a priority and find the funding to carry it through from within its own resources.”

The Departmental letter of reply, dated 17th June 2009, identified four specific post-primary schools which were considered “*most in need of urgent replacement*” which could be accommodated on the Lisanelly site. It was suggested that the site could embrace two further schools. The letter continues:

“I can confirm that the development of the shared educational campus is a top priority for the Minister and that all of the political parties have indicated their support for the proposal in the Assembly ...

*I can confirm that **if the project is viable** it will be a high priority for the DE Investment Programme ...”.*

[Emphasis added].

Finally, this letter acknowledged the need for (a) a statement of intent from the schools in question and (b) a memorandum of understanding, to be executed by the schools, followed by a memorandum of agreement at a later stage.

[83] In its rejoinder letter of 19th June 2009, DFP, pointedly and studiously, noted all of these representations and commitments. However, it requested further information relating particularly to estimated costings and the issue of schools commitment. Subject to receipt of the information requested, DFP did not object to the Department proceeding with the OJEU advertisement. Some four months later, the willingness of the Westminster Government to gift *a portion* of the Lisanelly site to the Northern Ireland Executive for educational purposes was confirmed. The possibility of “*delays in securing these disposals*” was explicitly noted. This commitment formed part of the Hillsborough political agreement. Subsequently, by letter dated 15th February 2010 to the Department, a DFP official stated:

“... I am now prepared to grant DFP approval to the Business Case for the external consultancy at a cost of £3.1 million plus programme costs of £142,000 for a project director over the next two years ... for a maximum of two years ...”.

The most recent development consists of the completion of the consultants’ “Stage B Report”, in November 2010. I have considered this report and find it unnecessary to reproduce its content, *in extenso*. Within the report, the authors note:

“Negotiations are ongoing to bring the sites into the ownership of the NI Executive ...

For the purposes of this study we are continuing on the six school approach with the LTEs as previously agreed with DE”.

Loreto is one of the six schools in question and is noted to have an enrolment of 914 pupils as of February 2008. The consultants advised that the most economical solution would consist of six schools with maximum sharing. This was their baseline for comparing the financial benefits of this option with other options. While the reports noted that some schools “*have immediate need for a new facility*”, there is no suggestion of anything approaching a binding commitment on the part of any school.

[84] Objectively, I consider that the evidence relating to the “Lisanelly option” is susceptible to the following analysis:

- (a) While there are eight contender schools on paper, only four appear to be interested in the project.

- (b) The envisaged memorandum of understanding has not been executed by any school.
- (c) The envisaged memorandum of agreement has not been executed by any school.
- (d) The “Provisional High Level Programme” has no time limit, even indicative, for steps (b) and (c). The labels “*provisional*” and “*high level*” require no elaboration.
- (e) Outline planning approval was *not* secured by December 2010 and there is no evidence that a planning application has been submitted.
- (f) The second Outline Business Case was *not* approved by DFP by December 2010.
- (g) There is no evidence that the contractor procurement process has begun.
- (h) Applying the template of the “RIBA Outline Plan of Work”, which details a total of eleven stages beginning with appraisal and concluding with post practical completion, the Lisanelly project appears to be hovering in the vicinity of the first stage.
- (i) The likely cost of the project will exceed £100 million. This is, on any showing, a huge amount of public money.
- (j) The financial climate has worsened dramatically since the inception of the Lisanelly possibility.

While I have noted the “project expectation” averments in the Department’s third affidavit, these appear to me to be (understandably) couched in cautious, restrained and qualified terms and must obviously be treated with circumspection, given the analysis above. One of the key averments is the following:

“Capital funding for the Lisanelly campus will need to be considered alongside competing priorities with DE and taking account of the available budget”.

In other words, the Lisanelly possibility could be summarily extinguished by the stroke of a Ministerial pen, at any stage. Economic justification, with ensuing political accountability, for such a step will not be hard to find.

III THE PARTIES' COMPETING ARGUMENTS

[85] The Governors' challenge to the first impugned determination can be reduced to a short and simple proposition: the Minister and Department, by their actions and inertia, have frustrated the Governors' (and Trustees') substantive legitimate expectation that a new Loreto School would be developed with public funding on the existing site. Some eighteen years after the beginning of the saga and six years following Minister Gardiner's commitment there is a state of abject stagnation. The submissions of Mr. McGleenan on behalf of the Governors made clear that while substantial reliance is placed on Minister Gardiner's statement of April 2004, his clients' challenge belongs to a wider canvas. It was submitted that Minister Gardiner's statement constituted a clear and unambiguous pledge, devoid of any relevant qualification. Minister Gardiner's statement, it was argued, was the first of several ingredients which generated the substantive legitimate expectation for which the Governors contend. The Ministerial statement, in tandem with the ensuing "infrastructure", is readily comparable with a private law contractual arrangement. The statement was made in public and, during ensuing years, was confirmed and buttressed by a series of representations and commitments made by senior Departmental officials. This process continued during a period of some six years, without any significant modification or interruption.

[86] Mr. McGleenan further submitted that, during the critical recent phase of events, there had been a clear failure to acknowledge the existence of Minister Gardiner's statement, the ensuing Departmental representations to the Governors and trustees and the expectations thereby generated. It was contended that no sustainable explanation for the rejection of the draft revised Economic Appraisal has been provided. It was submitted that the standard in play is fair, forthright, honest and consistent conduct by the public officials concerned in their dealings with the affected citizens or group. Mr McGleenan further submitted that unconscionable and unjustifiable delay on the part of the Department and Ministers concerned during a period of some eighteen years is readily demonstrated. All of these factors combine, in summary, to crystallise in Mr. McGleenan's ultimate submission that this is a clear case of abuse of power which is not redeemed by any properly demonstrated public interest.

[87] The arguments on which the Governors' challenge to the second impugned determination is based highlighted the lack of clearly expressed and particularised reasoning in the most recent Departmental letters in March and June 2010. It was submitted that this deficiency has not been rectified by either the further affidavit sworn on behalf of the Department or the additional documentary evidence. Mr. McGleenan's submissions also focussed on the suggested impropriety of employing the "Sustainable Schools" policy as a tool for the exercise in question. It was submitted that this entailed a distortion of normal administrative processes, giving rise to an outcome which was counter intuitive. It was further submitted that the Department's assessment of the "LTE" issue is unsustainable, as the evidence establishes that Loreto has always been an over-subscribed school, with a modest

reduction in enrolment during recent years which compares favourably with the more significant enrolment reductions evident elsewhere in the education sector.

[88] I would summarise the submissions of Mr. McMillen, on behalf of the Department, in the following propositions:

- (a) No final decision regarding the funding of a newly constructed Loreto School in Omagh has been made.
- (b) The Ministerial statement of April 2004 did not have the effect of engendering the expectation advanced by the Governors.
- (c) The Ministerial statement of April 2004 was a bona fide expression of the Government's intentions at that time. It did not commit the Government to funding a new Loreto School in all eventualities.
- (d) Furthermore, the Ministerial statement contained a series of implied qualifications pertaining to subsequent requirements and conditions which would have been well known to all members of the target audience and those advising them.
- (e) Insofar as the question of public interest justification arises, three explanations, or justifications are proffered for the non-fulfilment of the Ministerial commitment of April 2004: the unavailability of PPP, the advent of the "Lisanelly option" and the change in the economic climate.

Mr. McMillen's submissions also highlight the evidence that in Northern Ireland there exists at present a substantial number of schools suffering from poor and inadequate accommodation, in circumstances where compliant school rebuilding projects are dependent upon the availability of scarce public resources.

[89] As already noted, the primary riposte made by Mr. McMillen on behalf of the Department was to the effect that no final decision has been made by the Minister or her officials. The second argument developed by Mr. McMillen, in the alternative, was that the substantive legitimate expectation asserted by the Governors has no adequate foundation. It was submitted that their expectation was confined to an acknowledgement that Minister Gardiner's statement of April 2004 simply represented the then current *bona fide* intentions of the Department and/or that this statement signalled an intention to develop a new Loreto School with public funding, *subject to* any relevant subsequent developments. These submissions highlighted that when Minister Gardiner made his statement, neither the Feasibility Study nor the Economic Appraisal relating to the new project had been completed. Thus, it was argued, the legitimacy of the substantive expectation asserted by the Governors was not established. Alternatively, Mr McMillen submitted that any legitimate expectation entertained by the Governors was qualified and that the

current state of affairs reflects the relevant qualifications. Mr. McMillen submitted finally that, in any event, there exists sufficient public interest justification for a departure from earlier commitments and representations, in the more recent course which has been charted by the Minister and the Department. This aspect of Mr. McMillen's submissions highlighted the factors of scarce public resources, non-fettering of Ministerial discretions and the so-called "*macro-political*" field.

[90] Mr. McMillen countered the challenge to the second impugned determination on two main bases. Firstly, it was argued that the failure of the consultants to adequately assess the "Lisanelly option" in the draft revised Economic Appraisal effectively condemned the school to a non-compliant determination, as this failure was in contravention of the criteria governing the capital projects review. Two of these criteria, it was argued, were relevant to this failure. Secondly, it was submitted that the negative LTE "score" was based on the simple fact that the school's LTE had not been agreed with the Department at the material time. On these grounds, Mr. McMillen submitted that the threshold for a finding of irrationality was not overcome.

[91] This focussed résumé does not attempt to reproduce comprehensively the carefully composed written and oral submissions of both counsel, for which I am grateful. I have considered their arguments fully.

IV SUBSTANTIVE LEGITIMATE EXPECTATIONS: GOVERNING PRINCIPLES

[92] While *R -v- North and East Devon Health Authority, ex party Coughlan* [2001] QB 231 undoubtedly remains the *locus classicus* in this field, this landmark decision has been subject to some refinement and elaboration in the jurisprudence of the ensuing decade. The doctrine of substantive legitimate expectations is judge made and may be considered a paradigm illustration of the enduring dynamic power and organic quality of the common law. At this stage of the evolution of this doctrine, the judgment in *Coughlan*, repays careful reading. In marked contrast with the present case, it had a quintessentially simple factual framework. This entailed the court's adjudication of an asserted promise by the health authority concerned that Mardon House, a residential facility, would be the home for the life of Mrs. Coughlan, a severely disabled lady who had resided there for some years. On the evidence, the promise was clearly established. This gave rise to a relatively narrow focus in the judgment of the court:

"[52] *It has been common ground throughout these proceedings that in public law the Health Authority could break its promise to Miss Coughlan that Mardon House would be her home for life if, and only if, an overriding public interest required it. Both Mr. Goudie and Mr. Gordon adopted the position that, while the initial judgment on this question has to be made by the Health Authority, it can be impugned if improperly reached. We consider that it*

is for the court to decide in an arguable case whether such a judgment, albeit properly arrived at, strikes a proper balance between the public and the private interest."

Next, the judgment examines the role of the court in circumstances where the parties were in dispute about the *legitimate expectation* of the Applicant:

*"[56] Where there is a dispute as to this, the dispute has to be determined by the court, as happened in **Findlay**. This can involve a detailed examination of the precise terms of the promise or representation made, the circumstances in which the promise was made and the nature of the statutory or other discretion."*

In the following paragraph, it is acknowledged that there are at least three possible outcomes. The third of these is germane in the present context:

*"[57] ... (c) Where the court considers that a lawful promise or practice has induced a legitimate expectation of a **benefit which is substantive**, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy."*

In other words, it falls to the court to strike the balance, in circumstances where the legitimacy of the expectation has been established and the contest becomes one between the fairness of requiring the public authority concerned to give effect thereto and the justification for declining to do so, based on a clearly established competing public interest. The judgment adds:

"[58] ... In the case of the third, the court has when necessary to determine whether there is a sufficient overriding interest to justify a departure from what has been previously promised."

Next, the threshold for judicial intervention is considered:

"[65] The court's task in all these cases is not to impede executive activity but to reconcile its continuing need to initiate or respond to change with the legitimate interests or expectations of citizens or strangers who have relied, and have been justified in relying, on a current policy or an

extant promise. The critical question is by what standard the court is to resolve such conflicts."

[93] The following paragraph in the *Coughlan* judgment develops the topic of the threshold for judicial intervention in cases of this kind. It contains a powerful statement about the doctrine in play in the present case:

*"[66] In the ordinary case there is no space for intervention on grounds of abuse of power once a rational decision directed to a proper purpose has been reached by lawful process. The present class of case is visibly different. It involves not one but two lawful exercises of power (the promise and the policy change) by the same public authority, with consequences for individuals trapped between the two. The policy decision may well, and often does, make as many exceptions as are proper and feasible to protect individual expectations. The Departmental decision in **Hamble Fisheries** is a good example. If it does not, as in the **Unilever** case, the court is there to ensure that the power to make and alter policy has not been abused by unfairly frustrating legitimate individual expectations. In such a situation a bare rationality test would constitute the public authority judge in its own cause, for a decision to prioritise a policy change over legitimate expectations will almost always be rational from where the authority stands, even if objectively it is arbitrary or unfair. It is in response to this dilemma that two distinct but related approaches have developed in the modern cases."*

The next section of the judgment concentrates on the concept of the lawful exercise of power vested in public authorities. This concept undoubtedly lies at the heart of the doctrine of substantive legitimate expectations (and, indeed, the subject of judicial review generally). Furthermore, thus formulated, it has the advantage of avoiding the possible pitfalls of the terminology of "*abuse of power*" which, given its emotive and dramatic content, can sometimes be misunderstood and, indeed, resented. The misuse of power, as the judgment acknowledges, can in some cases take the form of:

*"...reneging without adequate justification, by an otherwise lawful decision, on a lawful promise or practice adopted towards a limited number of individuals. There is no suggestion in **Preston** or elsewhere that the final arbiter of justification, rationality apart, is the decision-maker rather than the court."*

[See paragraph 69].

In the court's view, this approach has the twofold merit of recognising the primacy of the public authority in both administration and policy development, while simultaneously giving effect to the role of the court to ensure fairness to the individual where tension exists: see paragraph [70]. The judgment continues:

"Fairness in such a situation, if it is to mean anything, must for the reasons we have considered include fairness of outcome. This in turn is why the doctrine of legitimate expectation has emerged as a distinct application of the concept of abuse of power in relation to substantive as well as procedural benefits, representing a second approach to the same problem."

In the final passages of its judgment, the court highlighted:

*"[81] For our part, in relation to this category of legitimate expectation, we do not consider it necessary to explain the modern doctrine in **Wednesbury** terms, helpful though this is in terms of received jurisprudence ... We would prefer to regard the **Wednesbury** categories themselves as the major instances (not necessarily the sole ones ...) of how public power may be misused. Once it is recognised that conduct which is an abuse of power is contrary to law its existence must be for the court to determine.*

*[82] The fact that the court will only give effect to a legitimate expectation within the statutory context in which it has arisen should avoid jeopardising the important principle that the executive's policy-making powers should not be trammelled by the courts ... Policy being (within the law) for the public authority alone, both it and the reasons for adopting or changing it will be accepted by the courts as part of the factual data – in other words, as not ordinarily open to judicial review. **The court's task – and this is not always understood – is then limited to asking whether the application of the policy to an individual who has been led to expect something different is a just exercise of power.** In many cases the authority will already have considered this and made appropriate exceptions ... or resolved to pay compensation where money alone will suffice. But where no such accommodation is made, **it is for the court to say whether the consequent frustration of the individual's expectation is so unfair as to be a misuse of the authority's power.**"*

[My emphasis].

[94] The final feature of *Coughlan* worthy of note is a factual one. As recorded above, the fact of the health authority's promise to Mrs. Coughlan was clearly established. *Pace* the promise, the authority determined to close Mardon House. The judgment notes:

"[83] ... What matters is that, having taken it all into account, the Health Authority voted for closure in spite of the promise. The propriety of such an exercise of power should be tested by asking whether the need which the Health Authority judged to exist to move Miss Coughlan to a local authority facility was such as to outweigh its promise that Mardon House would be her home for life."

The judgment then records that the health authority treated the promise as the "starting point" for the consultation process and ensuing deliberations, a factor to be accorded "considerable weight", but capable of being overridden by compelling reasons: see paragraph [87]. Having considered the authority's evaluation of the public interest, the court concluded:

"[89] We have no hesitation in concluding that the decision to move Miss Coughlan against her will and in breach of the Health Authority's own promise was in the circumstances unfair. It was unfair because it frustrated her legitimate expectation of having a home for life in Mardon House. There was no overriding public interest which justified it. In drawing the balance of conflicting interests the court will not only accept the policy change without demur but will pay the closest attention to the assessment made by the public body itself. Here, however, as we have already indicated, the Health Authority failed to weigh the conflicting interests correctly. Furthermore, we do not know (for reasons we will explain later) the quality of the alternative accommodation and services which will be offered to Miss Coughlan. We cannot prejudge what would be the result if there was on offer accommodation which could be said to be reasonably equivalent to Mardon House and the Health Authority made a properly considered decision in favour of closure in the light of that offer. However, absent such an offer, here there was unfairness amounting to an abuse of power by the Health Authority."

I consider it appropriate to reflect on the approach which the court adopted in reaching its conclusion and the terms in which it expressed the latter, in considering the correct application of the legal principles to the present matrix. Furthermore, the court's omnibus conclusion on this aspect of Mrs. Coughlan's challenge is worthy of note:

"[117] ...

(c) ...*The decision was an unjustified breach of a clear promise given by the health authority's predecessor to Miss Coughlan that she should have a home for life at Mardon House. This constituted unfairness amounting to an abuse of power by the health authority.*"

Finally, I draw attention to the relief granted. In *Coughlan* this was a relatively straightforward issue, since the health authority had determined to close Mardon House and Mrs. Coughlan sought an order quashing this decision. This was the relief granted at first instance (and, presumably, on appeal).

[95] While *Coughlan* remains the leading authority in this sphere, the common law has not been in a state of paralysis during the decade which has elapsed since it was decided. The outworkings and evolution of *Coughlan* are found in a number of decided cases. Bearing in mind that much judicial ink has already been spilled on this subject, and taking into account the contours of the present challenge, I shall confine myself to a relatively brief *tour d'horizon*. In Administrative Law (Wade and Forsyth, 10th Edition) there is a thoughtful exposition of the doctrine of legitimate expectations. The authors take as their starting point the standard of good administration and, in this context, they speak of citizens who have placed their trust in the promises of some official (p. 446). They describe the doctrine of legitimate expectations as "*a welcome addition to the armoury of the courts in ensuring that discretions are exercised fairly*" (p. 447). Simultaneously, they emphasize the importance of understanding the true character and limits of the doctrine, cautioning that it "... *must not be allowed to collapse into an inchoate justification for judicial intervention*" (p. 447). The authors expound the doctrine in the following terms:

"Good government depends upon trust between the governed and the governor. Unless that trust is sustained and protected officials will not be believed and the government becomes a choice between chaos and coercion".

[p. 447].

From the ensuing passages emerges the proposition that where the evidence establishes a promise by an official in which the citizen reposes trust, the basic two ingredients of what the law recognises as a substantive legitimate expectation are established. I characterise with care these ingredients as "*basic*", rather than exhaustive. This approach accommodates the case where the evidence establishes a promise and an ensuing expectation based on trust which, notwithstanding these ingredients, might not be deemed worthy of protection by the court: in short, an expectation of this kind would not have the character of a *legitimate* expectation in law. Examples of cases where there is an official promise, engendering trust and an

ensuing expectation on the part of the citizen which was deemed not to constitute a *legitimate* expectation are provided by *R -v- Secretary of State for Education, ex parte Begbie* [2000] 1 WLR 1115 (where an election promise made by a shadow minister was held not to bind the appointed minister following a change of government) and *R (Bloggs 61) -v- Secretary of State for the Home Department* [2003] 1 WLR 2724 (where the public authority concerned, the police, made a promise to a prisoner about future prison conditions which lay outwith their ostensible authority and could not bind the public agency concerned, the Prison Service). Decisions of this kind illustrate the boundaries of the doctrine.

[96] The orthodox view is that the doctrine of legitimate expectations is rooted in the principles of fairness, good administration, legal certainty and the proper exercise of power. Analytically, the overarching doctrine of the rule of law is readily identified. Any attempt to delimit prescriptively the boundaries of the doctrine of legitimate expectations is, in my view, inappropriate. The limits are determined on a case by case basis, giving due effect to the root principles and, typically (but not invariably or exhaustively), balancing arguments based on the non-fettering of the discretions conferred on public authorities, changing circumstances, the macro-political field and the demands of the public interest. I consider that many of the notable contributions to the ever expanding jurisprudence in this field during the past decade should be properly viewed through this lens. Furthermore, as in any field, temptations to isolate judicial pronouncements from their particular context must be firmly resisted. Many such pronouncements, whilst couched in attractive and sometimes highbrow language, are not, properly analysed, formulations of legal principle. Thus, to take an example, while it is not difficult to find references in some of the decided cases to the notions of trust, decency, consistency and forthright and straightforward dealings with citizens, all of these concepts are readily assigned to the core principles of fairness and the legitimate use of power. As observed by Schiemann LJ in *R -v- London Borough of Newham, ex parte Bibi* [2001] EWCA. Civ 607:

“Several attempts have been made to find a formulation which will provide a test for all cases. However, history shows that wide ranging formulations, while capable of producing a just result in the individual case, are later seen to have needlessly constricted the development of the law”.

This observation reflects the essential characteristics of the common law: it is fair, flexible, adaptable and responsive to new experiences and conditions.

[97] The essential elements of the contemporary doctrine of substantive legitimate expectations are captured in a notable passage in the judgment of Laws LJ in *Abdi -v- Secretary of State for the Home Department* [2005] EWCA. Civ 163:

“[68] The search for principle surely starts with the theme that is current through the legitimate expectation cases. It

may be expressed thus. Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so. What is the principle behind this proposition? It is not far to seek. It is said to be grounded in fairness, and no doubt in general terms that is so. I would prefer to express it rather more broadly as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public. In my judgment this is a legal standard which, although not found in terms in the European Convention on Human Rights, takes its place alongside such rights as fair trial, and no punishment without law. That being so there is every reason to articulate the limits of this requirement – to describe what may count as good reason to depart from it – as we have come to articulate the limits of other constitutional principles overtly found in the European Convention. Accordingly a public body's promise or practice as to future conduct may only be denied, and thus the standard I have expressed may only be departed from, in circumstances where to do so is the public body's legal duty, or is otherwise, to use a now familiar vocabulary, a proportionate response (of which the court is the judge, or the last judge) having regard to a legitimate aim pursued by the public body in the public interest. The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances."

More recently, in **R (Bhatt Murphy and Others) -v- The Independent Assessor and Others** [2008] EWCA. Civ 755, Laws LJ stated, in pithy terms:

"[32] A substantive legitimate expectation arises where the court allows a claim to enforce the continued enjoyment of the content – the substance – of an existing practice or policy, in the face of the decision maker's ambition to change or abolish it. Thus it is to be distinguished from a merely procedural right ...

*[33] ... In the substantive case we have a promise or practice of present and future **substantive policy**. This difference is at the core of the distinction between procedural and substantive legitimate expectation"* .

In succeeding passages, Laws LJ distinguishes between *ordinary expectations* and *substantive legitimate expectations*. In the case of the former, the actual or proposed introduction of a new or substitute policy by the public authority concerned is subject to review on *Wednesbury* principles. Here, on his Lordship's analysis, an important distinction arises:

"[35] ... *But a claim that a substitute policy has been established in breach of a substantive legitimate expectation engages a much more rigorous standard.*"

As Laws LJ further observes, cases in which the court concludes that the public authority concerned must give effect to a legitimate expectation of a substantive benefit will, by definition, be exceptional, for the following reason:

"[41] ... *Public authorities typically, and central government par excellence, enjoy wide discretions which it is their duty to exercise in the public interest. They have to decide the content and the pace of change. Often they must balance different, indeed opposing, interests across a wide spectrum. Generally they must be the masters of procedure as well as substance ...*

This entitlement – in truth, a duty – is ordinarily repugnant to any requirement to bow to another's will, albeit in the name of a substantive legitimate expectation."

[98] Accordingly, what is the threshold for intervention by the court?

"[42] *But the court will (subject to the overriding public interest) insist on such a requirement, and enforce such an obligation, where the decision-maker's proposed action would otherwise be so unfair as to amount to an abuse of power, by reason of the way in which it has earlier conducted itself...*

What is fair or unfair is of course notoriously sensitive to factual nuance. In applying the discipline of authority, therefore, it is as well to bear in mind the observation of Sir Thomas Bingham MR as he then was in Ex p Unilever at 690f, that '[t]he categories of unfairness are not closed, and precedent should act as a guide not a cage'."

What distinguishes ordinary expectations from substantive legitimate expectations? Laws LJ supplies the following answer:

"[43] *Authority shows that where a substantive expectation is to run the promise or practice which is its genesis is not*

merely a reflection of the ordinary fact (as I have put it) that a policy with no terminal date or terminating event will continue in effect until rational grounds for its cessation arise. Rather it must constitute a specific undertaking, directed at a particular individual or group, by which the relevant policy's continuance is assured...

[Having considered the decisions in *Khan* and *Coughlan*] ...

[46] *These cases illustrate the pressing and focussed nature of the kind of assurance required if a substantive legitimate expectation is to be upheld and enforced. I should add this. Though in theory there may be no limit to the number of beneficiaries of a promise for the purpose of such an expectation, in reality it is likely to be small, if the court is to make the expectation good. There are two reasons for this, and they march together. First, it is difficult to imagine a case in which government will be held legally bound by a representation or undertaking made generally or to a diverse class...*

The second reason is that the broader the class claiming the expectation's benefit, the more likely it is that a supervening public interest will be held to justify the change of position complained of."

This penetrating doctrinal analysis of Laws LJ culminates in the following omnibus conclusion:

“[50] *A very broad summary of the place of legitimate expectations in public law might be expressed as follows. The power of public authorities to change policy is constrained by the legal duty to be fair (and other constraints which the law imposes). A change of policy which would otherwise be legally unexceptionable may be held unfair by reason of prior action, or inaction, by the authority. If it has distinctly promised to consult those affected or potentially affected, then ordinarily it must consult (the paradigm case of procedural expectation). If it has distinctly promised to preserve existing policy for a specific person or group who would be substantially affected by the change, then ordinarily it must keep its promise (substantive expectation). If, without any promise, it has established a policy distinctly and substantially affecting a specific person or group who in the circumstances was in reason entitled to rely on its continuance and did so, then ordinarily it must consult*

before effecting any change (the secondary case of procedural expectation). To do otherwise, in any of these instances, would be to act so unfairly as to perpetrate an abuse of power."

The final contribution of Laws LJ in this erudite judgment is to rank the rights which a substantive legitimate expectation may induce alongside rights which have long been considered fundamental:

*"[51] ...I would only draw from **Nadarajah** [i.e. **Abdi**] the idea that the underlying principle of good administration which requires public bodies to deal straightforwardly and consistently with the public, and by that token commends the doctrine of legitimate expectation, should be treated as a legal standard which, although not found in terms in the European Convention on Human Rights, takes its place alongside such rights as fair trial, and no punishment without law. Any departure from it must therefore be justified by reference among other things to the requirement of proportionality (see *Ex p Nadarajah*, paragraph 68)."*

This doctrinal characterisation of the overarching principle of good administration is controversial, as noted in Administrative Law (op. cit, pp. 456-457).

[99] Where the evidence establishes a legitimate expectation of a substantive benefit or advantage which has not been fulfilled, a scenario which will not infrequently entail the assertion of some public interest justification, what is the role of the court? Or, otherwise stated, what is the threshold for judicial intervention? There is no shortage of guidance on the correct answer to this question. Moreover, in my view, such guidance contains consistent threads. In *Coughlan*, the court observed that in cases of this kind it may be necessary for the court to conduct "*a detailed examination of the precise terms of the promise or representation made, the circumstances in which the promise was made and the nature of the statutory or otherwise discretion*": paragraph [56]. In cases where the court concludes that a substantive legitimate expectation exists –

"... the court will have the task of weighing the requirements of fairness against any over-riding interest relied upon for the change of policy".

[Paragraph 57].

As the conclusions in *Coughlan* make clear, paragraph [117] – the court will determine whether any breach of a clear promise given by the public authority concerned is justified. I would merely add that, in performing this function, the court will always have to bear in mind the supreme importance of *context*. This

requirement emerges with particular clarity. In *R (Rashid) -v- Secretary of State for the Home Department* [2005] EWCA. Civ 744, where Dyson LJ observed:

*"[49] As Laws LJ said in R v Secretary of State for Education and Employment ex parte Begbie [2000] 1 WLR 1115, 1130, the facts of the case, viewed always in their statutory context, will steer the court to a more or less intrusive quality of review. In some cases, a change of tack by a public authority, though unfair from the applicant's stance, may involve questions of general policy affecting the public at large: in such cases the judges may not be in a position to adjudicate save at most on a bare **Wednesbury** basis "without themselves donning the garb of policy-maker, which they cannot wear." In other cases, where, for example, there are no wide-ranging policy issues, the court may be able to apply a more intrusive form of review to the decision. The more the decision which is challenged lies in the field of pure policy, particularly in relation to issues which the court is ill-equipped to judge, the less likely it is that true abuse of power will be found."*

It follows, therefore, that where a substantive legitimate expectation is established, the question of whether its frustration is justified will, inevitably, entail close scrutiny of the nature of the original promise or representation, the character of any subsequent frustrating decision and the context and circumstances surrounding both. In this respect, I would highlight the approach adopted at the outset of this judgment: see paragraph [10], *supra*. The nature of the conclusion reached in *Rashid* is worthy of note:

"[53] In the absence of any explanation, I consider that the court is entitled at the very least to infer that there has been flagrant and prolonged incompetence in this case. This is a far cry from the case of a mistake which is short-lived and the reasons for which are fully explained. The unfairness in this case has been aggravated by the fact that, as explained by Pill LJ, the claimant was not treated in the same way as M and A, with whose cases his case had been linked procedurally. Had he been so treated, he would have had the benefit of the policy and been accorded full refugee status."

*[54] Accordingly, the answer to the second of the three questions identified in **Bibi** is that the Secretary of State acted unlawfully in choosing to ignore his policy. In so doing, he acted with conspicuous unfairness amounting to an abuse of power."*

[100] The Privy Council has made a recent and notable contribution to the jurisprudence in this field, which illustrates the organic nature of the common law doctrine of substantive legitimate expectations. In *Paponette -v- Attorney General of Trinidad and Tobago* [2010] UKPC 32, the Appellants, who were members of a taxi owners association, based their case on a contention that the introduction by the state of a new fee paying requirement frustrated their legitimate expectations of a substantive benefit in a manner affecting their constitutionally protected property rights and in breach of their constitutional rights to equal treatment: see paragraph [12]. The judgment of the Board is particularly noteworthy for its consideration and analysis of the question of *burden of proof* within the framework of the doctrine of substantive legitimate expectations. Sir John Dyson SCJ, delivering the judgment of the Board, identified two separate burdens of proof:

“[36] The critical question in this part of the case is whether there was a sufficient public interest to override the legitimate expectation to which the representations had given rise. This raises the further question as to the burden of proof in cases of frustration of a legitimate expectation.

[37] The initial burden lies on an applicant to prove the legitimacy of his expectation. This means that in a claim based on a promise, the applicant must prove the promise and that it was clear and unambiguous and devoid of relevant qualification. If he wishes to reinforce his case by saying that he relied on the promise to his detriment, then obviously he must prove that too. Once these elements have been proved by the applicant, however, the onus shifts to the authority to justify the frustration of the legitimate expectation. It is for the authority to identify any overriding interest on which it relies to justify the frustration of the expectation. It will then be a matter for the court to weigh the requirements of fairness against that interest.

*[38] If the authority does not place material before the court to justify its frustration of the expectation, it runs the risk that the court will conclude that there is no sufficient public interest and that in consequence its conduct is so unfair as to amount to an abuse of power. The Board agrees with the observation of Laws LJ in *Nadarajah v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at para 68: ‘The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances.’ It is for the authority to prove that its failure or refusal to honour its promises was*

justified in the public interest. There is no burden on the applicant to prove that the failure or refusal was not justified."

The impact of the burden of proof imposed on the public authority emerges starkly in later passage of the judgment:

"[41] ...The Board rejects the proposition that the court can (still less, should) infer from the bare fact that a public body has acted in breach of a legitimate expectation that it must have done so to further some overriding public interest. So expressed, this proposition would destroy the doctrine of substantive legitimate expectation altogether, since it would always be an answer to a claim that an act was in breach of a legitimate expectation that the act must have been in furtherance of an overriding public interest. "

This, in turn, stimulated the following proposition:

*"[42] It follows that, unless an authority provides evidence to explain why it has acted in breach of a representation or promise made to an applicant, it is unlikely to be able to establish any overriding public interest to defeat the applicant's legitimate expectation. Without evidence, the court is unlikely to be willing to draw an inference in favour of the authority. This is no mere technical point. The breach of a representation or promise on which an applicant has relied often, though not necessarily, to his detriment is a serious matter. Fairness, as well as the principle of good administration, demands that it needs to be justified. Often, it is only the authority that knows why it has gone back on its promise. At the very least, the authority will always be better placed than the applicant to give the reasons for its change of position. If it wishes to justify its act by reference to some overriding public interest, it must provide the material on which it relies. In particular, it must give details of the public interest so that the court can decide how to strike the balance of fairness between the interest of the applicant and the overriding interest relied on by the authority. As Schiemann LJ put it in **R (Bibi) v Newham London Borough Council** [2001] EWCA Civ 607, [2002] 1 WLR 237, at para 59, where an authority decides not to give effect to a legitimate expectation, it must 'articulate its reasons so that their propriety may be tested by the court'."*

Further, as paragraph [43] of the judgment makes clear, in a litigation context which is constituted by the two principal factors of a substantive legitimate expectation and

a competing public interest justification, a balancing exercise falls to be performed and it is for the court to decide how the balance should be struck.

[101] There are two further discrete aspects of the doctrine of substantive legitimate expectations worthy of highlighting. The first concerns the duty of the public authority to actively acknowledge and consider the earlier representation or promise at the later stage when it is contemplating a course which would extinguish the expectation and benefit in play. This is illustrated with particular clarity in *In R (Bibi) -v- London Borough of Newham* [2001] EWCA. Civ 607, where the context was one of asserted promises to provide accommodation to two homeless families, Schiemann LJ stated:

“[49] Whereas in Coughlan it was common ground that the authority had given consideration to the promises it had made, in the present cases that is not so. The Authority in its decision making process has simply not acknowledged that the promises were a relevant consideration in coming to a conclusion as to whether they should be honoured and if not what, if anything, should be done to assuage the disappointed expectations. In our judgment that is an error of law.

[50] The Authority should when considering the position of the applicants have borne in mind that a promise was made to each of them that they would be given secure tenancies and that these promises have to this day, many years after they were made, not been fulfilled. There is no indication that the Authority has ever come to a judgment as to what weight should be given to the fact that the promises were made. There is no reason why the applicants should be disadvantaged by the fact that the promises were made as a result of the Authority's misunderstanding of the law.

[51] The law requires that any legitimate expectation be properly taken into account in the decision making process. It has not been in the present case and therefore the Authority has acted unlawfully.”

The analysis was a conspicuously simple one: the failure of the public authority concerned to properly take into account the legitimate expectation in play vitiated the impugned decision. On one view, this is an uncontroversial application of the well established principle of public law whereby every public authority must take into account considerations of an obligatory character (see Wade and Forsyth, *op.cit.*, pp. 321-323): pure orthodoxy. In *Paponette*, the Privy Council endorsed the approach taken in *Bibi*. Sir John Dyson SCJ stated:

“[46] Where an authority is considering whether to act inconsistently with a representation or promise which it has made and which has given rise to a legitimate expectation, good administration as well as elementary fairness demands that it takes into account the fact that the proposed act will amount to a breach of the promise. Put in public law terms, the promise and the fact that the proposed act will amount to a breach of it are relevant factors which must be taken into account.”

Notably, where this doctrine is engaged, the Board was of the view that the onus rests on the public authority concerned to demonstrate that it has taken into account the earlier promise, the legitimate expectation thereby engendered and the potential frustration thereof:

“[47] It was, therefore, incumbent on the government to show that it had taken into account the fact that the effect of the 1997 Regulations was to breach the earlier promises. This it has signally failed to do.”

[102] The second discrete feature of the doctrine of substantive legitimate expectations which it is appropriate to highlight is that of so-called detrimental reliance. In *R (Bancoult) -v- Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61, which concerned the rights of the former inhabitants of the Chagos Islands, the right in play was the common law right of abode, the right not to be expelled from one’s country. As Lord Hoffmann observed, the subtext in the litigation was funding. The Chagossians had shown no inclination to return to their barren and asset deprived islands. They could not realistically do so without substantial governmental funding. One of the grounds of challenge was that the Foreign Secretary had made a promise inducing a legitimate expectation that the islanders would be free to return to the islands without immigration controls. This prompted Lord Hoffmann to observe:

*“[60] The relevant principles of administrative law were not in dispute between the parties and I do not think that this is an occasion on which to re-examine the jurisprudence. It is clear that in a case such as the present, a claim to a legitimate expectation can be based only upon a promise which is ‘clear, unambiguous and devoid of relevant qualification’: see Bingham LJ in *R v Inland Revenue Commissioners, Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, 1569. It is not essential that the applicant should have relied upon the promise to his detriment, although this is a relevant consideration in deciding whether the adoption of a policy in conflict with the promise would be an abuse of power and such a change of*

*policy may be justified in the public interest, particularly in the area of what Laws LJ called 'the macro-political field': see **R v Secretary of State for Education and Employment, Ex p Begbie** [2000] 1 WLR 1115, 1131."*

In *Bibi*, the court expressly rejected the argument that it could enforce a substantive legitimate expectation only where either an improper motive for resiling therefrom or detrimental reliance thereon had been established: see paragraph [26]. The court approved certain passages in Administrative Law (Craig) p. 619, which include the following proposition:

"Where an agency seeks to depart from an established policy in relation to a particular person detrimental reliance should not be required. Consistency of treatment and equality are at stake in such cases, and these values should be protected irrespective of whether there has been any reliance as such."

Having cited this passage, Schiemann LJ observed:

*"[31] In our judgment the significance of reliance and of consequent detriment is factual, not legal. In **Begbie** both aspects were in the event critical: there had been no true reliance on the misrepresentation of policy and therefore no detriment suffered specifically in consequence of it. In a strong case, no doubt, there will be both reliance and detriment; but it does not follow that reliance (that is, credence) without measurable detriment cannot render it unfair to thwart a legitimate expectation."*

[103] As appears from all of these formulations, including the more conservative approach of Peter Gibson LJ in *Begbie* (at p. 1124), the issue of detrimental reliance is inextricably linked to the core principles by which the doctrine of substantive legitimate expectations is constituted – fairness, trust, legal certainty, good administration and the proper exercise of power. As stated succinctly in De Smith's Judicial Review (6th Edition), paragraph 12-041:

*"Although detrimental reliance should not therefore be a condition precedent to the protection of a substantive legitimate expectation, it may be relevant in two situations: first, it might provide **evidence** of the existence or extent of an expectation ...*

Secondly, detrimental reliance may affect the weight of the expectation and the issue of the fairness of disappointing the expectation".

[My emphasis].

In my opinion, the balance of current authority supports the proposition that detrimental reliance by the promisee is not an essential ingredient of an enforceable legitimate expectation. Rather, it is to be evaluated in the manner advocated by the authors of De Smith.

[104] I consider that this analysis finds support in the comprehensive test formulated by Lightman J in *Rowland -v- Environment Agency* [2005] Ch 1, cited with approval by the Court of Appeal in paragraph [67]:

“At the end of the day the court must decide whether having regard to all the relevant circumstances including the reliance by the citizen, the impact on the interests on the citizen and the public and considerations of proportionality for the public body to resile would in all the circumstances and applying the criteria referred to be so unfair as to constitute an abuse of power”.

This passage serves as a reminder that fairness lies at the heart of this doctrine. Finally, I was helpfully reminded by counsel of a very recent addition to the jurisprudence in this sphere in the decision of *The Queen (Luton Borough Council and Others) -v- Secretary of State for Education* [2011] EWHC. 217 (Admin). This is a first instance decision which is properly viewed as an application of the principles considered extensively above to a particular factual matrix. In passing, I empathise with the lament contained in paragraph [7] of the judgment of Holman J: vast quantities of evidence, increasingly colossal “core” bundles and copious and unbridled citation of “authority” – a sadly misunderstood term – are regrettable phenomena of contemporary litigation not confined to the jurisdiction of England and Wales. Little wonder that the learned judge leaned in favour of what he termed an “impressionistic approach”. These reprehensible practices have also been strongly deprecated by the English Court of Appeal: see *Midgulf International Limited -v- Groupe Chimique Tunisien* [2010] EWCA. Civ 66 and [2010] 1 CLC 113, paragraphs [71] – [75] (per Toulson LJ). I would add that, to the credit of both parties’ legal representatives, these infirmities did not pervade the present proceedings.

V CONCLUSIONS

The Challenge to the First Impugned Decision

[105] The first question to be addressed is that of *the expectation* held by the Governors at all material times. It is incumbent on the court to determine the content and contours of the relevant expectation. This exercise, in my view, behoves the court to review all available evidence carefully and objectively. The objective dimension of this exercise is a reflection of the fundamental requirement of *legitimacy*: plainly, a merely fanciful or incoherent or otherwise unsustainable expectation will be shorn of legitimacy. All such unworthy expectations will fall at the first hurdle. In such cases, it will be unnecessary for the court to explore in

depth issues bearing on relevant qualifications or public interest justification. However, this is plainly not such a case. On behalf of the Department, it cannot be plausibly contended that, beginning with Minister Gardiner's statement, *no expectation* was aroused in the Governors and those whom they serve and represent. I do not understand either the Department's affidavits or Mr. McMillen's submissions to espouse this contention. In my view, it is not disputed that, as a minimum, the Ministerial statement aroused a basic, or elementary, expectation on the part of the Governors and those whom they represent. In the particular circumstances of this case, I consider it appropriate to focus on the following main questions:

- (a) What was the content of the Governors' expectation?
- (b) Was the representation, or commitment, engendering the Governors' expectation unambiguous and devoid of any relevant qualification?
- (c) Has the Governors' expectation, as ascertained by the court, been fulfilled?
- (d) If not, is this non-fulfilment legally sustainable?

This is the *broad* approach which I consider appropriate in these proceedings. It is not designed as a rigid or exhaustive template, not least because one can readily identify a number of ancillary questions and issues arising under the banner of each of the main questions.

[106] The first conclusion on the part of the court is easily made. Plainly, it cannot be plausibly contended that the Governors entertained an expectation that the Department would fund a newly constructed Loreto Grammar School in Omagh come what may and in all eventualities. In my view, at all material times the Governors had actual, or constructive, knowledge that in the wake of the Ministerial statement, their project would have to fulfil certain requirements and overcome certain further hurdles. However, this must be evaluated in its full and true context: the Ministerial announcement of April 2004 was a landmark event, a significant breakthrough for the Governors, following years of struggle and disappointment. It cannot, in my view, be relegated to the status of a mere starting point. Its implications and outworkings were altogether more profound than this. Furthermore, Minister Gardiner's public statement did not broadcast some vague governmental aspiration for the future. Rather, in its carefully crafted and selected words, it truly had the character and status of a commitment, or pledge, in ordinary parlance. It was unambiguous, forthright and devoid of any express qualification. I also consider that this statement was directed to a small, specific and select audience whose members had successfully overcome a series of significant anterior hurdles. Furthermore, taking into account the context, which was of course at all times overlaid by well established principles of public law, the Governors' expectation was *not* qualified by any condition or contemplation that the Department could,

whimsically or summarily or without good and substantial reason, reject the feasibility study and economic appraisal to be prepared and submitted subsequently, thereby frustrating their legitimate expectation. The principles of public law in general and the doctrine of legitimate expectations in particular combine to reject any such proposition. Furthermore, by well established principle, the expectation aroused by Minister Gardiner's statement and certain ensuing representations and events required the Department, in all of its subsequent dealings with the Governors, to behave fairly, transparently and in the fullest good faith.

[107] I conclude that, in the wake of the Ministerial statement of May 2004, the Governors and those whom they represent had a substantive legitimate expectation that a new Loreto School would be developed with public funding on the existing site by 2010 at latest. Both the terms and the strength of this legitimate expectation were fortified by subsequent projections, in which the Department participated actively, that the completion date would be September 2008 (initially) and (subsequently) June 2009 approximately. This was the state of play in late 2005, approximately one and a half years after Minister Gardiner's representation. Following the path of the four main questions posed in paragraph [105] above, it is now incumbent upon the court to consider the issues of non- fulfilment, explanation and justification.

[108] Thus gives rise to consideration of the protracted background to the Ministerial statement of April 2004; the terms of the statement itself; the Department's interaction with the Governors thereafter; the representations made, or adopted, by the Department concerning the timetable for and projected completion of the new school project; any relevant representations made by the Department to the Governors regarding compliance with procedural and other requirements; the Governors' objectively reasonable understanding of such representations; the delays which materialised and the reasons why these occurred; the frequent protestations of the Governors and trustees to the Department and the responses thereby elicited; the contents of the final feasibility study and economic appraisal submitted by the Governors to the Department; the ensuing events and delay; and the reasons proffered by the Department for rejecting both reports.

[109] The fundamental, and unassailable, reality is that at the time of writing this judgment, the relevant governmental commitment has not been fulfilled. The initial envisaged completion date of September 2008, represented by the Department to the Governors in May 2004, elapsed long ago. Similarly, the modified completion dates which followed this have also been overtaken by the effluxion of time. In my view, properly analysed, the argument on behalf of the Department entails the proposition that the Governors' expectation was not finally, or permanently, frustrated by the Departmental letters of February and March 2010. I consider that, in the particular circumstances of these proceedings, this argument provides no answer to the Governors' challenge. While the first impugned decision bears many of the hallmarks of finality, it may be technically or theoretically correct to contend that it

is not irredeemable or irrevocable. However, in my opinion, the fallacy in this approach is that it neglects the simple question of whether the Governors' expectation has been fulfilled. The inescapable answer is that it has not. I consider that, as a matter of principle, a so-called "final decision" is not a pre-requisite to the frustration of a substantive legitimate expectation. Everything will depend on the context. Plainly, frustration can, in principle, be brought about by inaction and/or delay, a mere state of affairs. Thus analysed, I consider that frustration of the Governors' expectation has occurred in the present case.

[110] The discrete findings embodied in the foregoing paragraphs are that there was an unambiguous commitment giving rise to a substantive legitimate expectation which has not been fulfilled. At this juncture, I propose to consider the question of whether any relevant qualifications attached to the Ministerial commitment. The starting point is uncomplicated: the terms of the commitment contained no express qualification - and none was advanced in argument. Properly analysed, the qualifications advanced in the Department's main affidavit and in argument are of the *implied* variety. I shall examine these presently. To begin with, it is not difficult to conceive immediately of certain, relatively obvious implied qualifications. Enrolment is a prime example: the Governors could not claim to have possessed a legitimate expectation that the new school would be developed in the face of a serious decline in enrolment. Similarly, their legitimate expectation would be qualified by, for example, the possibility of a subsequent *bona fide* moratorium on all new school development for a specified period of years, stimulated by serious funding shortages. Another example is provided by relevant permits and licences: the Governors' legitimate expectation would have been qualified by the requirement to secure Building Control approval, planning permission and approval to de-register the listed Convent building. In short, the need to comply with all relevant statutory requirements would constitute a significant and substantial implied qualification. Based on my assessment of the evidence and my understanding of the Department's submissions, none of these implied qualifications is in play in this litigation.

[111] As this analysis advances, it becomes progressively clear that the issues of relevant qualifications, non-fulfilment, explanation and justification do not belong to hermetically sealed compartments. In one way or another, all of these issues surface in the reasons proffered by the Department for the non-fulfilment of the Governors' legitimate expectation. Fundamentally, the Department advances a single reason for its non-acceptance of the revised feasibility study and economic appraisal submitted on behalf of the Governors: each, the Department protests, has not adequately assessed the so-called "Lisanelly option". This emerges clearly from the series of Departmental letters dated 8th February, 3rd March, 23rd March and 29th June 2010 respectively. Mr. McMillen, on behalf of the Department, accepted (correctly, in my view) that each of these letters identifies this single infirmity. The Department does not rely on any other failing or defect. Thus it is incumbent on the court to scrutinise the sole shortcoming in play. This exercise will include an assessment of whether this can be related to a relevant qualification.

[112] In conducting this exercise, the focus of the court's gaze becomes the case explicitly made by the Department. In the main affidavit sworn on behalf of the Department, the following material averments are made:

"Clearly Ministers may make public statements for a variety of reasons and in a wide variety of situations. It is the Respondent's position that the Minister's statement in this case could not and did not raise a legitimate expectation such as the Applicant seeks to suggest. The purpose of the Minister's statement was to set out the Government's plans at that time. Indeed, this is precisely what the statement did. It was issued in good faith as an accurate representation of the Government's plans in relation to Loreto School. The Respondent is of the view that a fair minded person could not take such a statement as representing a guarantee (or raising a legitimate expectation) that the Government would make available the funding indicated come what may. Anyone reading that statement, particularly with the knowledge that the Applicant had of the background to the detailed requirements attached to school building and the time it takes to get from planning to completion, was bound to know that the plan as set out was subject to a large number of variables. These include:

(a) An up to date feasibility study that considered all the options available at the time it was drawn up.

(b) An up to date economic assessment that considered all the options that were available at the time it was drawn up.

(c) The availability of funding at the time it is required including the Government's view on the allocation of financial resources between competing needs. This, of course, is a matter of particular significance in the current economic climate.

(d) The appropriate mode of funding i.e. by direct government provision or by PPP.

(e) The wishes of the Government of the day which will also take into consideration the history of the matter.

(f) Factual changes of circumstances, for example, in this case the availability of the Lisanelly site."

Subsequent averments elaborate on factor (c) in the following terms:

“Obviously at the current time the economic outlook is uncertain ...

No one yet knows precisely how Northern Ireland Departments will be affected and how this will filter down in terms of individual capital projects. However, I believe that it is fair to say that the expectation is that it may be widespread ...

Much of Northern Ireland’s economy is based on the public sector (I believe that this is in the region of 60%). Therefore cuts in public expenditure will have a greater effect in Northern Ireland than in any other region of the United Kingdom. The outworking of the Chancellor’s statement is anxiously awaited but the expectation is that it will involve some cut in public expenditure for DE ...

I would suggest that it is reasonable to expect that the areas most likely to be subject to any cuts are areas of discretionary spending such as new building projects ...

The consideration above, which clearly contains many variables and indeed imponderables, I would respectfully suggest, serves to underscore the fact that Ministerial statements which set out Government plans must fairly be read in the light of the fact that everyone reading the same would be aware that such plans are subject to the vagaries of the future”.

Some further averments are also noteworthy:

“The Minister’s statement in April 2004 ... was nothing more or less than a good faith statement of the then Government’s position at that time. It is submitted that a fair reading of the same is not such as to suggest a guarantee of funding for a rebuild on the existing site or to raise any legitimate expectation other than that which was the policy at that time ...

The Respondent submits that whatever legitimate expectation that could be engendered by the Minister’s statement, if any, that expectation was overtaken or overborne by the factors that occurred since the statement was made. As stated above, these include the unavailability of PPP, the introduction of the “Lisanelly option” and the change in the economic climate.”

[113] The second of the Department's affidavits revisits the issue of available funding, in the following terms:

"Clearly the demand for new buildings far outstripped the availability of the funding available and historically this has been the position and indeed it continues to the present time. The underlying reality is that there are simply not enough funds in the capital allocation budget to pay for all required school redevelopments ...

Of course it was anticipated that by the time this and the other projects had been advanced to a stage whereby they would require a capital allocation, such funding would be available. However, it is incumbent on any Government Department to effectively manage within the budget allocated from year to year ...

The announcement in 2004 was made on the basis that the Department expected that the funding would be available when required. It does not mean that funding is present in the budget or has been ring fenced for any project...

At the time the 2004 announcement was made budgets for Northern Ireland Departments were fixed on a three year basis. Bids were prepared by each Department on the basis of their expectations of capital (and other) expenditure...

The totals contained in the 2004 announcement were based on figures that the Department expected to be able to obtain from central funds for those projects ...

The original intention was to fund this school project through the PPP process. Obviously this would not require an initial capital allocation from the public purse as the building would be funded by a private partner who would receive an annual unitary payment when the project was complete. Thus at its height the £14.6 million ... was an estimate of the funding that would be required from the private sector using the PPP route ...

The school is now being considered for conventional funding. The only reason that it is in that position is that the Minister has decided to transfer it from PPP funding to conventional funding."

Later averments in the same affidavit appear to suggest that the envisaged new Loreto School was not a suitable PPP candidate in any event. The affidavit continues:

“The UK Spending Review outcome resulted in a 40% real terms reduction in the total capital funding provided to the Executive for the period 2011/2015. The draft budget proposes substantial reductions in the capital allocation for DE ... [and] falls short of the levels needed to maintain progress on delivering projects in the Investment delivering plan ...

The Department of Education will have £738 million less capital funding to invest over the next four years than had been planned for. The level of funding provided is only sufficient to deliver on existing contractual commitments, invest moderately in minor works and maintain smaller but important budgets. The budget allocation cannot support the planned ‘new build’ programme and any investment in this area, if at all possible, is likely to be sporadic and limited until 2014/2015. This will mean delay and disappointment for many schools, children, parents and local communities.”

Finally, the affidavit confirms that the Department’s current four year budget includes *some* funds (unspecified) for capital projects.

[114] In reviewing the evidence relating to certain key events belonging to the period November 2008 to June 2010, I have made certain observations, where appropriate and I have also made occasional findings: I refer particularly to the relevant passages in paragraphs [44] – [84] above. Without prejudice thereto and focussing particularly on the period 2008 – 2010, I make the following findings in particular:

- (a) In November 2008, senior Departmental officials represented to the Governors that the Department recognised the needs of the Loreto School.
- (b) During the same meeting, the same officials represented that in the revised feasibility study/economic appraisal, the “Lisanelly option” could be addressed by “*a form of words*”.
- (c) The officials further represented that the “Lisanelly option” “*... was never going to trip Loreto up*”.
- (d) If the PPP funding mechanism were to be confirmed as unsuitable, conventional funding was available and would be provided.

- (e) Within weeks of this meeting, the PPP funding model was finally abandoned and the Minister approved the alternative mechanism of alternative funding.
- (f) During a further meeting of the parties in July 2009, the Departmental officials, for the second time, subscribed to the deployment of “*an agreed form of words*” to address the “Lisanelly option” in the forthcoming revised feasibility study and economic appraisal.
- (g) To address the “Lisanelly option” in this manner would be acceptable to the Department.
- (h) To reflect this agreement between the parties, the revised reports would be submitted to the Department *in draft* and would receive Departmental comments in response. This was part of the arrangement to ensure that the reports would be formulated in acceptable terms.
- (i) In particular, the submission of the draft revised reports to the Department would be followed by further *inter-partes* communications and meetings, involving the school’s consultants (KPMG).
- (j) In breach of the mutually agreed arrangements, the Department failed to engage further with either the Governors or their consultants following receipt of the revised reports: in context, the meeting held in November 2009 was the antithesis of the engagement mutually contemplated and agreed only four months previously.
- (k) The terms in which Minister Ruane expressed herself in October 2009 were clearly indicative of a closed mind and an inflexible policy: the Minister would countenance the possibility of a new Loreto School on the Lisanelly site and nowhere else. The correctness of this finding is confirmed by the uncompromising statements made by the Department’s Under Secretary in December 2009 (paragraph [67] *supra*).

[115] Bearing in mind the court’s assessment of the evidence and the findings rehearsed in summary form above, I return at this juncture to the Department’s averments that such legitimate expectation as was engendered by Minister Gardiner’s statement in April 2004 was subject to six specific qualifications. My findings and conclusions in relation to the six qualifying factors canvassed in the Department’s affidavit evidence are as follows:

- (a) The updated feasibility study submitted to the Department by the school’s consultants in September 2009 accorded with the requirements previously agreed between the parties.

- (b) Ditto the updated Economic Assessment.
- (c) The Department has not made the case that there is absolutely no prospect of public funding being committed to a new Loreto. There is no averment to this effect. The Department's affidavits acknowledge that there is some available funding for capital projects. Accordingly, the non-fulfilment of the Governors' legitimate expectation is not justified on the basis of unavailable funding.
- (d) The decision ultimately made by the Department that the PPP funding model would be unsuitable for the new build Loreto project is of little moment, given the clear representations made by the Department to the School's representatives that, as a substitute, conventional funding would be provided. Thus the decision by the Department to retreat from the PPP funding model provides no justification for the non-fulfilment of the Governors' legitimate expectation and cannot be regarded as a relevant qualification.
- (e) The Department is adamant that the new build Loreto project remains "on the books". Moreover, it is abundantly clear that the "Lisanelly option" is still at a very embryonic stage and has a highly uncertain future. Thus the factor of "*the wishes of the Government of the day*" does not appear to me to constitute a qualification of substance. In the alternative, given the court's assessment of the evidence and the findings and conclusions set out in this judgment, touching on this discrete issue, I would hold that the "Lisanelly option" falls far short of constituting a relevant qualification.
- (f) Properly analysed, this is really a duplication of factor (e). In both its affidavits and the submissions advanced on its behalf, the Department has studiously avoided making the case that the "Lisanelly option" sounds the death knell for the new build Loreto project on its existing site. This is unsurprising, given the uncertainty and speculation which I have highlighted. Accordingly, this cannot rank as a qualifying factor of any substance.

[116] While the Department's submissions relied heavily on the relevant DFP guidance (paragraph [79] *supra*), this does not, in my view, undermine the court's conclusions in respect of factors (a) and (b). In my opinion, the relevant requirements of this guidance were effectively waived, given my earlier finding that clear representations were made by Departmental officials to the Governors that the limited treatment of the "Lisanelly option" which duly materialised in the revised Economic Appraisal and Feasibility Study would be acceptable. I conclude that this suffices to dispose of this discrete argument. I would add that the DFP guidance, as analysed earlier in this judgment, is not couched in rigid and exhaustive terms in

any event. In this respect, I refer to, but do not repeat, my earlier analysis in paragraph [80]. Moreover, the statutory context must be carefully borne in mind. I consider that the activities in which the Governors and the Department were engaged belonged to the domain of Regulation 4 of the 1993 Regulations, which specifically empowers the Department to specify the “*particulars and information*” that it requires. In my view, the Department did precisely that, in the course of the three *inter-partes* meetings conducted in November 2008 and July 2009 and the Governors complied accordingly.

First Impugned Decision: Conclusion

[117] My overall conclusion is that the conduct, delay and inactivity of the Minister and the Departmental officials concerned have frustrated the substantive legitimate expectation of the Governors and those whom they represent that a new Loreto Grammar School, financed by public funding, would be constructed on the existing site by 2010 at latest. To borrow from the language consistently employed in the relevant decided cases, the conduct of the Minister and the Department gives rise to conspicuous unfairness, amounting to an abuse of power. In my view, the unfairness to the Governors and those whom they represent – pupils, teachers and trustees alike – is profound and palpable. An unjustifiable breach of trust has occurred. I further conclude that the frustration of the Governors’ legitimate expectation cannot be attributed to, or justified on the basis of, any of the qualifying factors advanced by the Department and it not justified by any ascertainable public interest. Giving effect to the decision in *Paponette*, the Minister and the Department have failed to discharge the burden of justifying the frustration of this legitimate expectation.

[118] I further find that no proper consideration was given to the Governors’ legitimate expectation when relevant Ministerial decisions were made and at the time of making the decisions communicated in the Department’s letters of 8th February and 23rd March 2010. I am mindful that, in the evidential matrix which ultimately materialised before the court, some reference is made to the expectations engendered by Minister Gardiner’s statement in April 2004. However, I find that these references were at most brief and fleeting and fail to establish that anything other than the most perfunctory consideration *might* have been given to the legitimate expectation of the Governors and those whom they represent. I consider that the careful, thoughtful and conscientious consideration which was required of the Minister and Departmental officials concerned was manifestly absent and has not been demonstrated. Applying the template of public law, this represents a clear failure to take properly into account a material consideration and constitutes a further, freestanding misdemeanour of substance.

Second Impugned Decision: Conclusion

[119] The Governors' case is that this decision is vitiated by irrationality. Given the totality of the evidence ultimately adduced, I am satisfied that this was a freestanding decision, the culmination of a discrete and structured process. As I have already observed, it is unexplained and unparticularised in the letter in which it is expressed. Thus one must have resort to the third of the Department's affidavits in order to ascertain the underlying reasoning. This affidavit explains that the capital projects review was conducted on the basis of Ministerially approved terms of reference based on the six criteria enshrined in the "Sustainable Schools" policy (discussed in paragraphs [76] - [78] above). The burden of the Department's final affidavit is that this decision had two basic pillars. The first was the failure of the draft revised Economic Appraisal to fully assess the "Lisanelly option". The second was the absence of agreement between the Governors and the Department about the school's revised/updated long term enrolment. Having regard to the court's findings and conclusions above, the first of these grounds is plainly unsustainable. This *per se* is sufficient to vitiate the decision.

[120] The second pillar on which this decision is based seems highly questionable, on three main counts. The first is that I have been unable to clearly identify any policy requirement or rule that a school's long term enrolment had to be agreed with the Department as a precondition to a successful outcome in this review. Secondly, there is no evidence of any engagement between the Department and the school's representatives with a view to remedying this relatively simple shortcoming. Thirdly and finally, I have no reason for rejecting the contents of the final affidavit filed on behalf of the Governors (sworn by the school principal), which recounts the "enrolments story" in some little detail. This evidence was, ultimately, unchallenged and, in my view, its effect is to strip this aspect of the second impugned decision of any discernible rational basis. I would add that the last of the Department's affidavits makes clear that its assessment of the LTE issue was a material consideration, albeit one attracting lesser weight than the "Lisanelly option" issue.

[121] For the reasons elaborated above, I conclude that the challenge to the second impugned decision must succeed.

Remedy

[122] Accordingly, the Governors' challenge succeeds on both counts. To give effect to the court's conclusions on the first limb of the challenge, a suitably crafted declaration would seem appropriate. The court's conclusions in relation to the second aspect of the challenge would probably be most efficaciously reflected in a quashing order. I refrain from expressing a concluded view and both parties will have the opportunity to address the court further on the issue of remedy.

Costs

[123] While the proposition that costs should follow the event seems incontestable, there will also be an opportunity for further argument on this issue, if desired.

Postscript

[124] Finally, I should observe that the conduct of these proceedings by both parties and their legal representatives has greatly facilitated the court's challenging task of determining the voluminous and complex factual and legal issues raised.