Appeal Nos: C1/2020/1780 and C1/2020/1783
Case No: TC/2016/00963

Neutral Citation: [2020] EWCA Civ 1759
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT IN WALES
The Honourable Mr Justice Fraser

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

Date: 21/12/2020

Before:
SIR GEOFFREY VOS, CHANCELLOR OF THE HIGH COURT
LADY JUSTICE NICOLA DAVIES
and
LORD JUSTICE LEWIS

BETWEEN **The Queen on the application of ANNE-MARIE DRIVER**

Claimant/Respondent

-and-

RHONDDA CYNON TAF COUNTY BOROUGH COUNCIL

Defendant/Appellant

-and-

(1) THE WELSH LANGUAGE COMMISSIONER
(2) THE WELSH MINISTERS

Interveners

- -

Mr Julian Milford QC and **Ms Katherine Eddy** (instructed by the **Director of Legal Services of Rhondda Cynon Taf**) appeared for the **Appellant**

Mr Rhodri Williams QC and **Ms Nia Gowman** (instructed by **Watkins & Gunn**) appeared for the **Respondent**

Mr Owain Rhys James (instructed by **Capital Law**) appeared for the **Welsh Language Commissioner**

Mr Gwion Lewis (instructed by **Director of Legal Services, Welsh Government**) made written submissions for the **Welsh Ministers**

Hearing dates: 8-9 December 2020

- -

JUDGMENT

Sir Geoffrey Vos, Chancellor of the High Court, giving the judgment of the court:

Introduction

1. This is an appeal from a decision of Mr Justice Fraser ("the judge") sitting in the Administrative Court in Wales, quashing a decision of the Appellant, Rhondda Cynon Taf County Borough Council ("Rhondda Cynon Taf"), taken on 18 July 2019, to implement three proposals proposing the closure of certain schools and the establishment of new schools.

2. The central issue in this case is as to the proper construction of a statute passed by the Senedd Cymru in both Welsh and English texts in 2013. The judge determined the meaning of the statute by reference to both the Welsh and English texts. Rhondda Cynon Taf challenges the construction he adopted. The claimant, Ms Marie-Anne Driver ("Ms Driver" or the "claimant"), supports the judge's construction. The Welsh Language Commissioner and the Welsh Ministers made submissions to this court (but not to the judge) as to the proper approach to the construction of a statute in both English and Welsh.

3. In the English language, the School Standards and Organisation (Wales) Act 2013 provided that certain proposals for school reorganisations require the approval of the Welsh Ministers. Section 50(1) provided that those proposals which "affect sixth form education" require such approval. Section 50(2) provided that "[p]roposals affect sixth form education if - (a) they are proposals to establish or discontinue a school providing education suitable only to the requirements of persons above compulsory school age".

4. In the Welsh language, section 50(1) of Deddf Safonau a Threfniadaeth Ysgolion (Cymru) 2013 provided that "cynigion yn effeithio ar addysg chweched dosbarth" require approval from the Welsh Ministers. Section 50(2) provided that "[m]ae cynigion yn effeithio ar addysg chweched dosbarth - (a) os ydynt yn gynigion i sefydlu neu derfynu ysgol sy'n darparu addysg sy'n addas at anghenion personau sydd dros oedran ysgol gorfodol yn unig".

5. The judge decided that the words "proposals to establish or discontinue a school providing education suitable only to the requirements of persons above compulsory school age" and "yn gynigion i sefydlu neu derfynu ysgol sy'n darparu addysg sy'n addas at anghenion personau sydd dros oedran ysgol gorfodol yn unig" encompassed proposals to close a school that provided sixth form education, whether or not that school also provided education to other age groups.

6. Rhondda Cynon Taf and the Welsh Ministers contend that these words refer to proposals to close schools that provide solely sixth form education.

7. Ms Driver accepts that the meaning the judge adopted would have been the same even if the word "only" and the phrase "yn unig" respectively were removed from the English and Welsh texts respectively. She submits, however, that "only" and "yn unig" emphasise that meaning. They qualify "education" and "addysg" respectively, rather than "school" and "ysgol" respectively. Moreover, syntactically, the phrase "yn unig" generally qualifies what is immediately before it. In this case, that is the clause "sy'n addas at anghenion personau sydd dros oedran ysgol gorfodol": i.e. only suitable for over 16s.

8. Before dealing with this construction question and the other issues in the appeal, we should say something about the proper approach that a court should take to construing a statute that is passed in both English and Welsh.

The legislative background as to language

9. When the 2013 Act/Deddf was passed, section 156 of the Government of Wales Act 2006 provided by section 156(1) that "[t]he English and Welsh texts of – (a) any [Senedd] Measure or Act of the [Senedd] which is in both English and Welsh when it is enacted … are to be treated for all purposes as being of equal standing".

10. In addition, section 1 of the Welsh Language (Wales) Measure 2011 provided that "[t]he Welsh language has official status in Wales", and that that status was given legal effect by the enactments about "the treatment of the Welsh language no less favourably than the English language", and that "[t]hose enactments include (but are not limited to) the enactments which … (c) give equal standing to the Welsh and English texts of … (i) Measures and Acts of the [Senedd]".

The process of interpreting legislation enacted by the Senedd

11. We have had regard to the Law Commission's Final Report on the *Form and accessibility of the law applicable in Wales* 2016. It concluded, and we agree, that the best approach to the interpretation of bilingual legislation, where different language texts bear different meanings, and where it is not possible to reach an interpretation consistent with the literal meaning of both language versions, is to discern the legislative intention by reference to the purposes or objects of the legislation as they appear from the texts, rather than by searching for a shared meaning.[1] The court should, we think, apply normal principles of statutory interpretation to its analysis of the meaning of both texts equally. There should be no special rule about the admissibility of pre-legislative material and legislative history, but the court should always be astute to the possibility that such materials may favour one language version.

12. The aim of interpreting legislation is to determine the intention of the legislature. Where legislation is enacted in two languages of equal standing, and the parties submit that there is, or may be, a conflict, difference or distinction between the two language versions, detailed analysis of each version may be necessary. Where it is not suggested that the different language versions differ in meaning, the court can be sure that either version reflects the intention of the legislature. Counsel for the Welsh Language Commissioner accepted that this was the position. The approach is also consistent with the principle of ensuring equal standing for both languages, and accords with the position adopted by the Law Commission.[2]

13. Finally, in this connection, each of Ms Driver, the Welsh Language Commissioner, and the Welsh Ministers submitted that at least one judge competent in the Welsh language

---

1 See paragraph 12.40 of the Law Commission report.

2 See paragraphs 12.5-12.8 and 12.17-12.20. Paragraph 12.20 expresses the view that "it is only in circumstances where there is a concern that there is a difference in meaning between the English and Welsh texts that detailed analysis of the two texts will need to take place". See the observations of the Law Commission on article 33 of the Vienna Convention on the Law of Treaties in paragraphs 12.5 to 12.8 of the Law Commission's Report.

should sit on cases where the proper construction of the Welsh text is in issue. All sides, however, accepted that there may be practical limitations on such a course if no such judges are available.

14. We accept that there may be cases where it would be highly desirable for the court to have Welsh language expertise. In this case, however, we did not feel we were handicapped in deciding the question of construction that arose. The court was able to engage in oral debate with counsel about the proper meaning of the Welsh text. The questions of interpretation of the Welsh text of section 50 that arose were accessible to non-Welsh speakers, as the judge's judgment at first instance amply demonstrated. We agree that the use of expert evidence or translations of the Welsh language is inadequate. The court must engage with the Welsh text and Welsh rules of syntax. But we believe, as this judgment will demonstrate, that we have been able to do so fully and competently in this case.

15. As we have said, we do not rule out the possibility that there may be other cases where greater levels of Welsh language expertise within the court would be desirable. But there will also be many cases where it is not imperative. There will be a spectrum from the simple construction of one word or a short sub-section or phrase on the one hand, to the need to delve into an entire Welsh language statutory regime on the other hand. This case is at one end of that spectrum and we have felt confident that the comprehensive submissions we received as to the proper construction of the Welsh text have enabled us to apply the rules we have set out, and reach an appropriate conclusion, according equal status to both texts as the legislation requires.

Factual background

16. Ms Driver is a member of a campaign group called "Our Children First – Ein Plant yn Gyntaf". She is the mother of four children aged, at the time of the judgment below, 14, 6, 3 and 2, three of whom are educated at different schools affected by the proposals at issue in this case.

17. Rhondda Cynon Taf undertook a programme, and consulted upon, proposals to reorganise primary schools, secondary schools, and sixth form provision in the Pontypridd area of its borough. On 21 March 2019, Rhondda Cynon Taf decided to publish four statutory notices making four proposals for the discontinuance of certain schools and the establishment of new schools. The four proposals were:

> (1) The alteration of the age range of pupils at the Cardinal Newman Roman Catholic Comprehensive School, from the ages 11 – 19 years currently educated there, to an age range of 11 – 16 years, resulting in the removal of the sixth form provision by September 2022 ("proposal 1"). This was referred to the Welsh Ministers for approval and was not the subject of a decision to implement the proposal on 18 July 2019;
>
> (2) The closure of Pontypridd High School (which currently provides education for children aged from 11 to 19) and Cilfynydd Primary School, and the creation of a new school on the site of the existing Pontypridd High School. The proposed new school would educate children aged 3 – 16, but would have no sixth form provision ("proposal 2").

(3) The closure of Hawthorn High School (which provides education for ages 11 - 19) and Hawthorn Primary School and the creation of a new school on the site of the existing Hawthorn High and Hawthorn Primary Schools. There would be no sixth form provision at the proposed new school ("proposal 3").

(4) The closure of Ysgol Gynradd Gymraeg Pont Sion Norton ("Pont Sion Norton") which provides primary education through the medium of Welsh, and Heol y Celyn Primary School (which is a dual medium school, providing education for some pupils through the medium of Welsh and for others through the medium of English) and the opening of a new Welsh medium Primary School on the site of the current Heol y Celyn Primary School ("proposal 4").

The judgment below

18. On 18 July 2019, Rhondda Cynon Taf decided to implement proposals 2 to 4. The judge granted judicial review on two grounds, namely (i) that on a proper construction of the 2013 Act/Deddf, proposals 2 and 3 should have been referred to the Welsh Ministers for approval, and (ii) in relation to proposal 4, Rhondda Cynon Taf had failed to comply with relevant provisions of the School Organisation Code (the "Code"). He quashed the decision of 18 July 2019.

19. The reasoning of the judge was essentially as follows. In relation to the interpretation of section 50 of the 2013 Act/Deddf, he held that:

(1) proposals 2 and 3 affected sixth form education within the meaning of section 50(2)(a) of the 2013 Act/Deddf as they involved schools (Pontypridd High School and Hawthorn High School) at which sixth form education was provided;

(2) section 50(2) did not "specify the *only* ways in which proposals could "affect sixth form education"" (see paragraph 77); and

(3) in any event, the word "only" in section 50(2) qualified "education" and not "school", and proposals affected sixth form education if they affected a school which provided sixth form education (whether or not it also provided education for those in other age groups); section 50(2) was not limited to proposals affecting schools providing solely sixth form education. That was made apparent by the Welsh language text which placed "yn unig" at the end of the sub-section (see paragraphs 74 to 80 of the judgment).

20. In relation to what was ground 2(g) and which was referred to as the Welsh language ground, the judge held:

(1) In relation to proposal 4, the closure of Pont Sion Norton and Heol y Celyn Primary School, Rhondda Cynon Taf failed to comply with paragraph 1.9 of the Code as it failed to take into account a specific factor, namely how those proposals might affect the sustainability of Welsh medium provision in the regional 14-19 network and promote access to the provision of Welsh medium courses in post-16 education (paragraph 118 of the judgment). In addition, proposal 4 failed to take account of the impact of proposal 4 on Welsh medium

secondary education generally and the Welsh language (see paragraphs 123 and 125 of the judgment).

The present appeal

21. The judge gave Rhondda Cynon Taf permission to appeal on two grounds concerning the interpretation of section 50 of the 2013 Act/Deddf. Lewis LJ gave Rhondda Cynon Taf permission to appeal on three other grounds relating to the finding that Rhondda Cynon Taf had failed to comply with relevant provisions of the Code or to have regard to the impact of proposal 4 on Welsh medium secondary education. The Welsh Language Commissioner was granted permission to intervene in relation to all grounds by way of oral and written submissions in Welsh and English, which were duly made. The Welsh Ministers were granted permission by the Chancellor to make written and oral submissions in Welsh and English on the grounds concerning the proper interpretation of section 50 of the 2013 Act/Deddf. They made written submissions but did not appear and did not make oral submissions at the hearing. We are grateful to all counsel for their assistance.

The 2013 Act/Deddf

22. The relevant provisions of the legislative framework can be summarised briefly. Proposals to discontinue or establish particular types of school, or to make regulated alterations to such schools, may only be made in accordance with Part 3 of the 2013 Act/Deddf: see section 40. There are provisions for local authorities to make such proposals. Proposals must be published but, before doing so, local authorities must consult on them in accordance with the Code. Once proposals are published, any person may object in writing within 28 days: see sections 48 and 49 of the 2013 Act/Deddf.

23. Section 50 of the 2013 Act/Deddf provides that certain proposals require the approval of the Welsh Ministers. Section 50(1) and (2) provide in the English text:

> "**Approval by Welsh Ministers**
>
> (1) Proposals published under section 48 require approval under this section if—
>
> (a) the proposals affect sixth form education, or
>
> (b) the proposals have been made by a proposer other than the relevant local authority and an objection has been made by that authority in accordance with section 49(2) and has not been withdrawn in writing before the end of 28 days beginning with the end of the objection period.
>
> (2) Proposals affect sixth form education if—
>
> (a) they are proposals to establish or discontinue a school providing education suitable only to the requirements of persons above compulsory school age, or
>
> (b) they are proposals to make a regulated alteration to a school, the effect of which would be that provision of

> education suitable to the requirements of persons above compulsory school age at the school increases or decreases."

24. Section 50(1) and (2) provide in the Welsh text:

> "**Eu cymeradwyo gan Weinidogion Cymru**
>
> (1) Mae'n ofynnol i gynigion a gyhoeddir o dan adran 48 gael eu cymeradwyo o dan yr adran hon –
>
> (a) os yw'r cynigion yn effeithio ar addysg chweched dosbarth, neu
>
> (b) os yw'r cynigion wedi eu gwneud gan gynigydd ac eithrio'r awdurdod lleol perthnasol ac os yw gwrthwynebiad wedi ei wneud gan yr awdurdod hwnnw yn unol ag adran 49(2) ac os nad yw wedi ei dynnu yn ôl yn ysgrifenedig cyn diwedd 28 o ddiwrnodau gan ddechrau ar ddiwedd y cyfnod gwrthwynebu.
>
> (2) Mae cynigion yn effeithio ar addysg chweched dosbarth -
>
> (a) os ydynt yn gynigion i sefydlu neu derfynu ysgol sy'n darparu addysg sy'n addas at anghenion personau sydd dros oedran ysgol gorfodol yn unig, neu
>
> (b) os ydynt yn gynigion i wneud newid rheoleiddiedig i ysgol, y byddai ei effaith yn golygu bod darparu addysg sy'n addas i anghenion personau sydd dros oedran ysgol gorfodol yn yr ysgol yn cynyddu neu'n lleihau."

25. Where proposals do not require approval under section 50, the proposer (here Rhondda Cynon Taf) must determine whether the proposals should be implemented: see section 53 of the 2013 Act/Deddf.

26. Section 71 of the 2013 Act/Deddf provides powers for the Welsh Ministers to make proposals for the establishment or discontinuance by a local authority of certain schools providing "secondary education suitable to the requirement of sixth formers (and no other secondary education)" in the English text, and "i darparu addysg uwchradd sy'n addas at anghenion disgyblion chweched dosbarth ("ac nid unrhyw addysg unwchradd arall)" in the Welsh text.

The Code

27. The Welsh Ministers must issue a code on school organisation. That may impose requirements and may include guidelines setting out aims, objectives and other matters: see section 38 of the 2013 Act/Deddf. That distinction is reflected in the present Code which uses the words "must" to indicate a requirement which has to be followed and "should" to indicate a guideline which should be followed unless there is a good reason for departing from it.

28. Paragraph 1.4 of the Code is headed "Need for places and the impact on accessibility of schools". It provides that a local authority must ensure that there are sufficient

schools providing primary and secondary education for their area. Paragraph 1.4 also provides that:

> "Where a school closure, reduction in capacity or age range contraction is proposed: …
>
> - with reference to the nature of the schools subject to proposals, whether the alternative school-based provision is sufficient to meet existing and projected demand for schools of the same:
>
> a. language category …
>
> *Proposals **should** ensure that the balance of school provision reflects the balance of demand. This means that where school provision is being reduced or removed, alternative school provision of the same nature (language category or, if relevant, religious character), wherever possible, **should** remain available and accessible to pupils in the local area.*
>
> *However in some areas it may not be compatible with the cost effective provision of education to continue to maintain access to schools of the same nature.*
>
> *In all cases, existing pupils at a school where provision is being reduced or removed **must** be able to continue receiving an education that provides at least equivalent standards and opportunities for progression in their current language medium. Specific transition arrangements may be necessary in order to achieve this.*
>
> *Where proposals affect schools where Welsh is a medium of instruction (for subjects other than Welsh) for some or all of the time, local authorities should carry out a Welsh Language Impact Assessment."*

29. Paragraph 1.9 of the Code is headed "Specific factors to be taken into account for proposals to reorganise secondary schools or to add or remove sixth forms". It provides that "Relevant bodies **should** take into account the following specific factors: … how proposals might affect the sustainability or enhancement of Welsh medium provision in the local 14-19 network and wider area and promote access to availability of Welsh medium courses in post-16 education".

30. We were not taken to the Welsh text of the Code and there was no suggestion that there was any relevant or material difference between the Welsh and English versions.

The Grounds of Appeal

31. There are five grounds of appeal which, in summary, are as follows:

(1) The judge was wrong to hold that section 50(2) of the 2013 Act/Deddf did not specify the only ways in which proposals could affect sixth form education (ground 1);

(2) The judge was wrong to hold that the word "only" and the phrase "yn unig" in the English and Welsh texts of section 50(2)(a) did not qualify what a school provides (that is, sixth form education only) (ground 2);

(3) The judge was wrong to find that Rhondda Cynon Taf breached paragraph 1.9 of the Code in relation to proposal 4, as that paragraph applies to the reorganisation of secondary education, not primary education (ground 3);

(4) To the extent that the judge found a breach of paragraph 1.4 of the Code, that finding was (a) vitiated by a serious error, as there was no allegation of a breach of paragraph 1.4 and Rhondda Cynon Taf had no opportunity to address the issue in its pleadings, evidence, or submissions and (b) wrong (ground 4); and

(5) The judge was wrong to find that Rhondda Cynon Taf had failed to consider how its proposals for Welsh medium education would impact upon Welsh medium secondary education (ground 5).

The first issue: Grounds 1 and 2: the proper construction of section 50 of the 2013 Act/Deddf

32. It is convenient to take grounds 1 and 2 together as they concern the proper construction of the relevant provisions of the statute.

Submissions

33. Mr Julian Milford Q.C. and Ms Katherine Eddy, for Rhondda Cynon Taf, submitted that section 50(2) of the 2013 Act/Deddf provides an exhaustive list of the ways in which proposals could affect sixth form education. They submitted that, properly interpreted, a proposal fell within section 50(2)(a) where the school provided education suitable to sixth formers only. It did not include proposals for schools which provided sixth form education alongside other secondary education for those aged 16 and below. To interpret section 50(2)(a) in that way would render the inclusion of the word "only" in the English text and the phrase "yn unig" in the Welsh text redundant. Mr Milford submitted that that was consistent with the White Paper which preceded the legislation, and the Explanatory Memorandum which accompanied it, both of which are permissible aids in the interpretation of legislation enacted by the Senedd.

34. Mr Rhodri Williams Q.C. and Ms Nia Gowman, for Ms Driver, submitted that the judge was not wrong in concluding that section 50(2) did not provide an exhaustive list of the proposals which might affect sixth form education and which would need to be referred to the Welsh Ministers for approval. In any event, the judge was correct to conclude that section 50(2) applied to proposals where a school provided education suitable only to sixth formers whether or not it also provided education suitable to other year groups. That, they submitted, was clear from the Welsh text. Grammatically, "yn unig" could only qualify the clause which preceded it, namely "sy'n addas at anghenion personau sydd dros oedran ysgol gorfodol". In other words, the phrase "yn unig" was qualifying the suitability of the education and not the "ysgol" (school). Similarly, "only" in the English text, qualified the education, not the school. Provided that the school provided

education suitable only to sixth formers, it was irrelevant that it also provided education suitable to other year groups.

35. Mr Williams accepted that, on that approach, the subsection would mean the same if the words "only" and "yn unig" were omitted. The subsection would have applied in that event as the school provided education suitable to the requirements of those above school age. He submitted, however, that the purpose of the inclusion of those words in the respective texts was to emphasise that the proposals applied where the school was providing sixth form education. Mr Williams accepted that, strictly, the final clause before "yn unig" was "sydd personau dros oedran ysgol gorfodol" and qualified those persons, in English, above compulsory school age. He submitted that the phrase read more naturally as part of the clause beginning "sy'n addas". Further, when the legislative drafters intended to make it clear that a provision applied to a school which provided sixth form education only and no other, it said so in clear terms as was the case, for example, in section 71.

36. Mr Williams submitted that that interpretation was consistent with the White Paper and the Explanatory Memorandum because the concern that the legislation was addressing was that, previously, a proposal had to be referred to the Welsh Ministers for approval if only one person objected to it. The purpose underlying the 2013 Act/Deddf was to prevent proposals being referred in those circumstances. Further, the Welsh Ministers funded sixth form education and had an interest in proposals affecting such education (whether the school provided that education alone, or together with education for those below compulsory school age).

37. In written submissions on behalf of the Welsh Ministers, Mr Gwion Lewis submitted that section 50(2) of the 2013 Act/Deddf did provide an exhaustive definition of proposals which affect sixth form education. Further, he submitted that it was clear from the Welsh and English texts of the legislation that the intention underlying the section was that approval was needed for the closure of schools providing sixth form education only. Otherwise the phrase "yn unig" and the word "only" would be redundant. That reflected the context and structure of the legislation as a whole. Further, the Welsh Ministers had an interest in sixth form education as they have a duty to secure the provision of proper facilities for the education of and training of persons aged 16 to 19 (see section 31 of the Learning and Skills Act 2000). The Welsh Ministers therefore had an interest in sixth form schools which they did not have in relation to schools which include sixth form education as one component of a wider provision of education. That was further confirmed by the Explanatory Memorandum which, he submitted, was a permissible aid to interpretation.

Discussion

38. This is, of course, a case where the court does need to look at the texts of the legislation in Welsh and in English, because it has been suggested that there is a conflict, difference or distinction between the two. We, therefore, adopt the approach we have set out above at paragraphs 11 and 12. That involves ascertaining what the Senedd intended when it enacted those provisions in Welsh and English. The court must first consider the meaning of the words used, having regard to the particular context in which they are used, and having regard to permissible aids to construction including relevant presumptions, the legislative history, and other background material such as White Papers, explanatory memoranda or reports of the Law Commission of England and

Wales, which assist in identifying the purpose that the legislation was intended to address (bearing in mind always the need to be aware that a document in one language only may not be an accurate indication of the meaning of legislation enacted in both languages).

39. On ground 1, in our judgment, the judge wrongly construed section 50 of the 2013 Act/Deddf. It is clear from the structure and words of section 50 that it is defining the circumstances when a proposal requires the approval of the Welsh Ministers. Approval is required "if" the proposals fall within one of the two situations in section 50(1)(a) or (b), that is they affect sixth form education or the proposals were made by someone other than a local authority and the authority objects. Section 50(2) then defines when a proposal affects sixth form education. A proposal will do so "if" it falls within (a) or (b). The use of the word "if" is conditional: where the proposal falls within section 50(2)(a) or (b), it is a proposal affecting sixth form education. Put differently, the section identifies the two sets of proposals which require approval. It is not intended to be an illustrative list of proposals which fall within section 50. Further, the construction favoured by the judge is not consistent with the overall purpose of the statutory provisions. The legislative changes were intended to reduce the number of proposals referred to the Welsh Ministers for approval. A construction which regarded the proposals listed in section 50(2) as non-exhaustive, or illustrative, would create uncertainty as to whether a proposal did, or might, affect sixth form education and would be likely to lead to a greater number of proposals being referred. That would run counter to the aim of reducing the number of proposals referred.

40. On ground 2, we think that the essential question is what the Senedd intended in enacting section 50(2)(a) of the 2013 Act/Deddf. The issue is whether the Senedd intended proposals for schools solely providing sixth form education to be referred to the Welsh Ministers for approval or whether, as the judge found, proposals to close a school that provided sixth form education should be referred for approval whether or not the school also provided education to other age groups.

41. First, as a matter of the language of the section, the intention was, in our view, to require that proposals to close schools providing solely sixth form education be referred for approval. The inclusion of the word "only" and the phrase "yn unig" must have been intended by the Senedd to have some meaning. The only sensible meaning that those words can have is that proposals for establishing or closing schools providing a particular type of education – and only that education – should be referred for approval. Section 50(2)(a), read as a whole, describes or qualifies the types of schools where proposals for closure must be referred. These are "proposals to discontinue or establish a school" or "yn gynigion i sefydlu neu derfynu ysgol". The words that follow "school" and "ysgol" are intended, progressively, to describe or narrow the types of school to which the subsection applies. Put simply, they describe what the school must be doing and for whom. In English, the schools must be "providing education" and that education must be "suitable only" to meet the requirements of "persons above compulsory school age". In Welsh, "yr ysgol" must be one which "darparu addysg", the type of "addysg" is that "addas at angehnion" of a particular group of persons namely those "dros oedran ysgol gorfodol yn unig". In each case, the clause is seeking to define what types of school fall within section 50(2)(a), namely those providing sixth from education only.

42. On the interpretation accepted by the judge, as Mr Williams accepted, the subsection would have the same meaning whether or not the word "only" or the phrase "yn unig"

were included. The subsection would apply to a school providing sixth form education (whether or not it also provided education for other age groups). That result could be achieved by providing that the school is "providing education suitable to the requirements of persons above compulsory school age" (with "only" omitted) or the "ysgol sy'n darparu addysg sy'n addas at anghenion personau dros oedran ysgol gorfodol" (with "yn unig" omitted). We do not consider that the Senedd would have included words which had no purpose and conveyed no meaning. Nor do we consider that questions of syntax compel the conclusion that the legislature included words that had no meaning.

43. Secondly, that conclusion is reinforced by the following considerations. The provisions of this Part of the 2013 Act/Deddf read as a whole make it clear that the interest of the Welsh Ministers lies with the establishment and closure of sixth form schools, not schools which provide sixth form education as one component of the provision of education to a wider age range. Section 71 provides that the Welsh Ministers may make proposals to establish or discontinue a school providing secondary education to sixth formers (and makes that clear by the use of the words "and no other"). The same is true of the Welsh language text. The language is clear in section 71 – it has to be education suitable "for sixth formers" and "no other"; in Welsh "disgyblion chweched dosbarth (ac nid unrhyw addysg uwchradd arall)". But the section serves to emphasise that the interest of the Welsh Ministers is in sixth form education only. That is reflected in section 50(2) which is similarly concerned "only" or "yn unig" with the provision of education for those above compulsory school age.

44. Thirdly, that interpretation is consistent with the White Paper which preceded the legislation, and the Explanatory Memorandum which accompanied the Bill/Bil which became the 2013 Act/Deddf. We considered the Welsh and English versions of the White Paper, even though it was not suggested that there was any material difference between them. The White Paper provides that as responsibility for school places rests with local education authorities, rather than the Welsh Government, decisions should in the vast majority of cases be made at local level. It sets out a series of additional concerns such as the delays in approval or the fact that an objection by a single objector triggered a referral. It stated that the intention was:

> "that the Welsh Ministers will determine all proposals concerning the removal of 6th forms, or the addition of 6th forms, including the closure of sixth form only schools."

45. The natural reading of that passage is that the Welsh Ministers will be concerned with proposals that affect sixth forms only. The language of "removal" or "addition" of a sixth form is consistent with a situation where a sixth form is taken out of a school or put into a school (that is, the school provides education for other age groups). It is that situation, or the closure of a sixth form school, that is intended to be the subject of a requirement for approval. The language does not indicate that proposals for the closure of a school (which provides education for those below and above compulsory school age) require approval.

46. The matter is made clearer by the Explanatory Memorandum/Memorandwm Esboniadol. We considered the Welsh and English versions although, again, it was not suggested that there was any material difference between them. Paragraph 3.56 provides that the legislative changes to school reorganisation proposals "will ensure

that the vast majority of proposals are determined at local level". It explains at paragraph 3.57 how that will work. "Instead of" a situation where all proposals which receive objections being referred to the Welsh Ministers:

> "only those proposals which receive an objection from a local authority (or in the case of a school with a religious character, the relevant religious body) or which are connected solely with the removal or establishment of sixth form provision (in the light of the Welsh Ministers' statutory responsibilities in relation to post-16 educational provision and funding) will be referred to the Welsh Ministers."

47. The description of the changes as affecting the vast majority of objections indicate that it is unlikely that the changes were not intended to affect schools which provided education for sixth formers and other age groups. We were told that, as at 2020, there were 182 secondary schools of which 126 had sixth forms, and 23 middle schools, 12 of which had sixth forms. If proposals for schools with sixth forms were to be referred to the Welsh Ministers, it is unlikely that the vast majority of proposals for secondary schools would be determined by local education authorities rather than the Welsh Ministers. We accept, however, that the position might be different if primary schools were included in the figures. The use, in paragraph 3.57, of the words "only" and "solely with the removal or establishment of sixth form provision" are also important. That usage is consistent with changes being intended to require the referral of proposals for the establishment or closure solely of sixth form schools. For completeness, we do not accept Mr Williams's submission that the pre-legislative material shows that the only, or principal, object underlying the legislation was to address the situation where a referral of a proposal to the Welsh Ministers could be triggered by a single objector. That was one of the concerns but only one of the concerns.

48. We were referred to statements made (in English) by the then Education Minister in response to questions during a debate on the Bill/Bil. Mr Milford submitted that such statements were not admissible or, at least, were not admissible unless they satisfied conditions similar to those set out in *Pepper v Hart* [1993] AC 593 in relation to the Westminster Parliament. We did not receive full submissions on this issue. We would want to consider carefully the nature of debates and statements in the Senedd and how to address the question of statements or answers given in one language but not the other before expressing a concluded view on whether or not statements, and if so what statements and subject to what conditions, made during the course of debates in the Senedd were admissible to assist in the construction of legislation enacted by the Senedd. For present purposes, the answers given by the then Education Minister, even if admissible, would not shed light on the meaning of section 50 of the 2013 Act/Deddf.

49. In these circumstances, we have formed the clear view that the judge wrongly construed section 50(2) of the 2013 Act/Deddf. A proposal for the establishment or closure of a school falls within that subjection, and requires the approval of the Welsh Ministers, if the school only provides education for those above compulsory school age. Proposals to establish or close a school which provides education for those above, and those below, compulsory school age, do not fall within section 50(2)(a) and do not need to be approved by the Welsh Ministers. Proposals 2 and 3 in this case, affecting Pontypridd High School and Hawthorn High School, did not provide education for sixth formers

only and did not have to be referred to the Welsh Ministers. The appeal will, therefore, be allowed on grounds 1 and 2 so far as proposals 2 and 3 are concerned.

The second issue: ground 3: Paragraph 1.9 of the Code

Submissions

50. Mr Milford submitted that the judge was wrong to conclude that Rhondda Cynon Taf had failed to comply with paragraph 1.9 of the Code when it approved proposal 4. Paragraph 1.9 sets out specific factors to be taken into account in relation to the reorganisation of secondary schools or sixth form colleges. They did not apply to proposals, such as proposal 4, which involved primary schools only.

51. Mr Williams accepted that, if proposal 4 had stood alone, paragraph 1.9 of the Code would not apply to it. That proposal was, however, interlinked or connected to the other proposals which did involve the reorganisation of secondary schools, so that paragraph 1.9 applied.

Discussion

52. The provisions of the Code have to be read in the light of the 2013 Act/Deddf. That Act provides a mechanism for making a proposal in relation to a school, consulting on that proposal, publishing the proposal, receiving objections to the proposal and then determining whether to implement it. The proposals are as a matter of law separate acts. In the present case, there were four separate proposals.

53. Paragraph 1.9 of the Code identifies specific factors to be taken into account when considering "proposals to reorganise secondary schools or to add or remove sixth form schools". That must be a reference to a proposal published in accordance with section 48 of the 2013 Act/Deddf. As indicated, separate proposals (proposals 1, 2 and 3) were made for schools which involved the removal of a sixth form or the reorganisation of secondary schools. Proposal 4 involved two primary schools only. In terms, therefore, paragraph 1.9 does not apply to that proposal.

54. The fact that a number of proposals were made as part of a programme of school re-organisation within the borough, or that some of the proposals may relate to, or be connected with, other proposals does not alter the ambit of paragraph 1.9. It applies to proposals to reorganise secondary schools or to add or remove sixth forms – not proposals for primary schools which are linked or connected, or emerging at the same time as, proposals to which paragraph 1.9 of the Code applies. The judge was, therefore, wrong to conclude that, in approving proposal 4, Rhondda Cynon Taf had failed to comply with paragraph 1.9 of the Code. Ground 3 of the appeal therefore succeeds.

The third issue: grounds 4 and 5: the wider issue of the impact of proposal 4 on Welsh medium education

55. It is convenient to deal with grounds 4 and 5 together. In essence, these grounds concern the question of whether Rhondda Cynon Taf failed to comply with paragraph 1.4 of the Code and, more generally, failed to have regard to the impact of the closure of Pont Sion Norton, a Welsh medium primary school, on Welsh medium education generally.

Submissions

56. Mr Milford submitted that the claimant's amended statement of facts and grounds did not include any allegation of a breach of paragraph 1.4 of the Code. Rhondda Cynon Taf did not appreciate that the judge was proposing to deal with that issue. Indeed, whilst the judgment refers to paragraph 1.4 at paragraph 104, there is no clear finding that that paragraph has been breached. The judge referred to Rhondda Cynon Taf failing to take the requirement under paragraph 1.9 of the Code into account (paragraphs 118 and 123 of the judgment). The judgment says that accordingly the Council is in breach of its duties under the Code. It was only when the judge provided written reasons for refusing permission to appeal that he stated that he had found Rhondda Cynon Taf to be in breach of paragraph 1.4 of the Code. In those circumstances, Mr Milford submitted, there had been a serious procedural error as Rhondda Cynon Taf had been deprived of the opportunity to respond to the unpleaded allegations of a breach of paragraph 1.4 of the Code.

57. Mr Williams accepted that the principal breach of the Code alleged by Ms Driver was a breach of paragraph 1.9. Nonetheless, Rhondda Cynon Taf, in its detailed statement of grounds for resisting the claim, itself asserted that it had complied with paragraph 1.4. The claimant adduced evidence dealing with the consequences for Welsh medium education if Pont Sion Norton were closed, and Rhondda Cynon Taf adduced evidence in reply. In the circumstances, the judge was entitled to deal with paragraph 1.4 of the Code. He was entitled to find that Rhondda Cynon Taf had not complied with paragraph 1.4 for the reasons given in the judgment.

58. Mr Owain James, for the Welsh Language Commissioner, submitted that the closure of a Welsh medium primary school and the opening of a new primary school some two miles away could impact on the number of parents who chose a Welsh medium primary school for their children. The material showed that 70% of pupils were provided with free school transport in order to enable them to attend Pont Sion Norton (as they lived more than 1.5 miles from the school and Rhondda Cynon Taf provided transport in those circumstances). 100% of the pupils in the Pont Sion Norton catchment area would need transport to the proposed new Welsh medium primary school. That could deter parents from choosing that school for their children and opting instead for a closer, English medium, school. Those children would be less likely to move to a Welsh medium secondary school. Further, there may be difficulties in attending pre-school and after-school activities which might act as a further deterrence to choosing to attend the proposed new Welsh medium school. In addition, the Welsh Language Commissioner had found that the consultation documents prepared by Rhondda Cynon Taf did not comply with relevant Welsh language standards and that was evidence of a failure to have regard to the impact of the proposal on the Welsh language.

Discussion

59. We accept that there may have been a lack of clarity about the nature of the allegations that Rhondda Cynon Taf had to face. The relevant ground in the amended grounds of claim is entitled "Failure to take into account how the proposals might affect Welsh medium education". It refers to the report issued by the Welsh Language Commissioner which it alleged was evidence of a breach of the Code and then reproduces part of the text of paragraph 1.9 of the Code. Rhondda Cynon Taf's detailed grounds, however, summarise its position and themselves refers to paragraph 1.4 of the Code. The

evidence adduced on behalf of Rhondda Cynon Taf did deal with paragraph 1.4 of the Code and the impact of the proposal on Welsh medium education in particular. We do not consider, therefore, that there has been a serious procedural error in the way in which this ground of claim was dealt with, as alleged in ground 4. The confusion does, however, underline the importance of the statement of grounds clearly and concisely identifying the specific grounds of challenge, and the specific legal provisions or principles that are said to have been breached.

60. The real issue here, in our view, is whether the judge wrongly concluded that there had been a failure by Rhondda Cynon Taf to comply with the Code or to take account of the impact of the proposals on Welsh medium education. In that regard, the critical factual issue was whether Rhondda Cynon Taf had taken account of the impact of the proposal for the closure of Point Sion Norton, and the opening of a new Welsh medium primary school 2 miles away. That, in essence, required consideration of three matters: the effect on existing pupils, the availability of places to meet demand for Welsh medium primary education and the likelihood of parents in future opting for a closer English medium primary schools for their children rather than sending them to the proposed new Welsh medium school. It is accepted that if the proposal results in fewer pupils attending a Welsh medium primary school, that is likely to have an effect on Welsh medium secondary school, because children are less likely to attend such schools if their primary education was delivered through the medium of English.

61. After careful consideration of the evidence, we have concluded that the judge was wrong to find that Rhondda Cynon Taf had failed to take into account relevant factors when deciding to implement proposal 4. First, the judge was heavily influenced by the fact that he considered Rhondda Cynon Taf had failed to comply with paragraph 1.9 of the Code. He equated failure to consider the matters specifically referred to in that paragraph with a failure to consider Welsh medium education more generally. By way of example, he analysed the documentation by reference to the matters referred to in paragraph 1.9 and how the proposal would affect the sustainability or enhancement of Welsh medium provision in the local 14-19 network and promote access to Welsh medium courses in post-16 education. He appears to have been influenced by the fact that paragraph 1.9 was not taken into account and the matters specifically referred to in that paragraph were not addressed (see paragraphs 117 and 118 of the judgment). Paragraph 1.9 of the Code does not, however, apply as we have said. It is not correct, therefore, to draw any inference from the absence of any reference to the matters referred to in the text of that paragraph in deciding whether Rhondda Cynon Taf had failed to comply with the applicable paragraph (1.4). That error alone would mean that the judge's finding would need to be set aside and we would need to consider afresh whether there had been a breach of paragraph 1.4 or a failure to consider more generally the impact of proposal 4 on Welsh medium education.

62. Furthermore, however, the judge considered that Rhondda Cynon Taf relied upon the fact that it had decided not to reorganise Welsh medium secondary education as the justification for considering that proposals did not affect Welsh medium secondary education. He considered that that approach would not address the question of the potential impact of proposal 4 on the take up of Welsh medium primary education which, in turn, could have an effect on those proceeding to Welsh medium secondary education. We accept Mr Milford's submission that confusion has emerged as Rhondda Cynon Taf thought it was addressing the question of paragraph 1.9 and why the

proposals about English medium secondary education did not affect Welsh medium secondary education. It was not seeking to address the separate question of the effect of proposal 4 on the take up of Welsh medium places and the consequential effect on the number of pupils proceeding to Welsh medium secondary education. As a result, and whatever the cause of the confusion, the judge has not properly considered or assessed the relevant issues.

63. For those reasons, we consider afresh the underlying documentation. It is helpful to bear in mind that paragraph 1.4 of the Code specifically deals with the need for places and the impact on accessibility of schools. Where a school closure is proposed, the alternative school provision should be sufficient to meet existing and projected demand for the same language category. That is explained further. The proposals should ensure that the school places available reflect the balance of demand and that school provision should remain "available and accessible to pupils in the local area" and "existing pupils must" be able to continue receiving education through the same language medium.

64. In the present case, the documentation makes it clear that the proposed new Welsh medium primary school would have an increased number of places. There would be 93 more Welsh medium primary education places as compared with the current provision at Pont Sion Norton and the Welsh medium pupils at Heol y Celyn. Further, the provision would provide sufficient places for anticipated demand over the coming years. Secondly, the proposed catchment area for the new primary school would include the catchment area of the existing Pont Sion Norton (and would be built on the site of the current Heol y Celyn school). All existing pupils at Pont Sion Norton (and Welsh medium pupils at Heol y Celyn) would be able to attend the proposed new school.

65. Next, the documentation does consider the question of whether the proposed new school would be accessible, or whether issues, in particular distances and the need for transport, would present barriers to pupils attending the proposed new school. In that regard, these issues were addressed in the Welsh language assessment and the community impact assessment which were annexed to the report to the Cabinet which took the decision to implement the proposals. The Welsh language assessment noted that 70% of pupils currently attending Pont Sion Norton had access to free school transport and the location of the new school would enable 100% of those pupils currently within the catchment area of Pont Sion Norton to qualify for free school transport. The community impact assessment explained that the proposed new school was more than 1.5 miles from the homes of those children expected to attend and so free school transport would be provided. It said that it "is not considered that distance to school will be a barrier to any child who wishes to participate in the pre and after school provision". We accept that the analysis of the issues is relatively limited. But the question is whether Rhondda Cynon Taf considered and took into account the relevant factors. If so, its decision on those factors are matters for Rhondda Cynon Taf not the court. The Senedd has entrusted the decision on those matters to the elected local authority. The role of the court is to ensure that the local authority has followed the correct legal process and taken the relevant factors into account. It is not for the court to assess those factors and decide whether or not to implement the proposals. We are satisfied that the matters referred to in paragraph 1.4, and in particular the ability to meet demand for places for Welsh medium primary education, the ability of existing pupils to continue their education through the medium of Welsh, and whether the proposed new school would be sufficiently accessible and would not place a barrier to

the take up of Welsh medium primary education, were considered by Rhondda Cynon Taf.

66. Finally, we consider the fact that the Welsh Language Commissioner has found that the consultation documents prepared by Rhondda Cynon Taf failed to meet relevant Welsh language standards. As Mr James accepts, the question of whether particular documents meet Welsh language standards is a different one from the one that this court has to consider, namely whether Rhondda Cynon Taf acted unlawfully. Further, the Welsh Language Commissioner was, it seems, dealing with the adequacy of the consultation documents prepared before publication of the proposals. No challenge has been made to the lawfulness of the consultation exercise. This case concerns a different question, namely whether the decision on 18 July 2019 to implement three of the proposals is unlawful. The findings of the Welsh Language Commissioner do not assist in considering that issue.

67. For those reasons, whilst ground 4(a) fails, the appeal must be allowed on grounds 4(b) and 5. The decision to implement proposal 4 was lawful.

Conclusions

68. The appeal will be allowed on grounds 1, 2, 3, 4(b) and 5.

69. Proposal 2 involving the closure of Pontypridd High School, and proposal 3 involving the closure of Hawthorn High School did not have to be referred to the Welsh Ministers for approval as they did not involve the closure of schools providing only sixth form education. A proposal for the establishment or closure of a school only falls within Section 50(2) of the 2013 Act/Deddf, and requires the approval of the Welsh Ministers, if the school provides education only for those above compulsory school age.

70. Rhondda Cynon Taf did not act unlawfully in deciding to implement proposal 4 to close Pont Sion Norton and Heol y Celyn primary schools. Paragraph 1.9 of the Code does not apply to proposals to re-organise primary schools. Rhondda Cynon Taf did comply with paragraph 1.4 of the Code and did have regard to the need for places for Welsh medium primary education to meet anticipated demand, that existing pupils be able to continue their education through the medium of Welsh and that the proposed new Welsh medium primary school would be accessible.