In The Supreme Court of Bermuda

CIVIL JURISDICTION

2015: No. 348

BETWEEN:-

HARRY MATTHIE

(on behalf of himself, and the executive and certain other members of the Bermuda Parent Teacher Student Association)

Applicant

-and-

(1) THE MINISTER OF EDUCATION
(2) THE COMMISSIONER OF EDUCATION

Respondents

JUDGMENT

(In Court)

Application for judicial review – whether standing – whether application for leave made promptly and without undue delay – whether granting of relief sought would be likely to cause substantial hardship or substantial prejudice, or be detrimental to good administration – whether legitimate expectation of consultation – whether consultation was fair

Date of hearing: 21st – 23rd March 2016
Date of judgment: 3rd June 2016

Mr Eugene Johnston, J2 Chambers, for the Applicant

Mr Delroy Duncan, Trott & Duncan Limited, and Mr Brian Myrie, Attorney General's Chambers, for the Respondents

Introduction

1. By notice of motion dated 25th August 2015, issued pursuant to leave granted on the same date, Mr Matthie seeks judicial review of the following decisions:

   (1) The Second Respondent ("the Commissioner")'s decision, possibly made on various dates between 31st May and 30th June 2015, to transfer, move, and/or alternate various teachers and/or principals throughout the public school system for the 2015/2016 school year ("**the Transfers**");

   (2) The Minister's decision to make the Education (Parent Council) Rules 2015, on 24th July 2015 ("**the Rules**"). The Rules provide for the establishment of Provisional Parent Councils and Parent Councils. They came into force on 8th September 2015; and

   (3) The First Respondent ("the Minister")'s decision to appoint a working group known as the School Reorganisation Advisory Committee ("SCORE") to recommend which schools should be consolidated or closed for the 2016/17 academic year and beyond, as announced in a press release dated 22nd April 2015 ("**the Reorganisation**").

2. In December 2015, ie some months after the notice of motion was issued, SCORE issued a Report of Findings and Recommendations ("the SCORE Report") (which did not recommend any school closures). In February 2016 the Minister issued a consultation document inviting comments on the SCORE Report. Mr Matthie, as part of his challenge to the Reorganisation, seeks judicial review of the Minister's decision to do so. I give him leave to amend the notice of motion accordingly.

3. Mr Matthie seeks (i) declarations that all three decisions are unlawful and (ii) orders quashing the Reorganisation and the Rules. He submits that parents had a legitimate expectation that they would be properly consulted about all three decisions through their individual Parent Teacher Associations ("PTAs"), either because the Respondents were under a general obligation to consult with PTAs, or alternatively, because they undertook to consult voluntarily. He submits that insofar as the consultations took place, they were seriously flawed.

4. The Respondents do not accept that Mr Matthie has standing to bring these proceedings. They complain that, if he has, then he has unduly delayed in doing so and that the grant of relief would give rise to the various harmful consequences identified in section 68(1)(b) of the Supreme Court Act 1905 ("the 1905 Act"). The Respondents further submit that they were under no obligation to undertake any consultations, but that the consultations which they have carried out voluntarily were unimpeachable.

5. In preparing this judgment I have been greatly assisted by the very able submissions of Eugene Johnston, counsel for Mr Matthie, and Delroy Duncan, counsel for the Respondents.

Standing

6. Mr Matthie brings this application on behalf of himself, as the father of two children at St George's Preparatory School. This is an aided school within the meaning of section 2(1) of the Education Act 1996 ("the 1996 Act"). He also brings it on behalf of the executive and certain other members of the Bermuda Parent Teacher Student Association ("BPTSA"). The BPTSA is a voluntary organisation. Article 2(1) of its Constitution states that:

> "*... the paramount objective of the BPTSA shall be to optimize parental involvement in the educational process through trusting, collaborative relationships between all educational stakeholders to ensure that students achieve social, academic and vocational success*".

7. The BPTSA's members include various PTAs. Mr Matthie has given affidavit evidence that at a meeting on 2nd June 2015 the BPTSA resolved unanimously to bring these proceedings. He states that representatives from, among others, seven named middle and primary schools in the maintained sector were present, although surprisingly he has declined to produce the minutes of the meeting, even in redacted form, on the grounds that they are said to be "*privileged*". I do not know on what grounds. Had the point been argued, I should most likely have held that, to the extent that Mr Matthie relied on the contents of the minutes in his affidavit, and insofar as was necessary to give a fair picture of the contents on which he relied, any such privilege had been waived. See, eg, Brennan v Sunderland City Council [2009] ICR479 EAT *per* Elias J at para 16.

8. The Respondents' position is set out in an affidavit from the Acting Commissioner of Education, Freddie Evans. For ease of reference, I shall include him within the rubric "Commissioner". He states that the Respondents recognise that the BPTSA is a group of interested and concerned parents, whose executive are stakeholders within the public education system, and that the First Respondent has engaged in consultation and communication with them on that basis. However the Respondents do not accept that the BPTSA is the representative organisation of all or most PTAs, parents, teachers or students within the Bermuda Public School System.

9. For purposes of obtaining leave to bring judicial review proceedings, and subsequently for purposes of an interim stay application, the Court was satisfied that Mr Matthie had standing to bring this action. That finding was provisional and subject to the court hearing full argument at a later stage.

10. Applying the Overriding Objective to deal with cases justly, and in particular the requirements, so far as practicable, to save expense and to allot an appropriate share of the court's resources to the case, it was just and convenient to leave final determination of the standing point to the hearing of the application for judicial review rather than deal with it on a separate application by the Respondents to set aside leave.

11. In my judgment Mr Matthie, both on his own behalf and acting in a representative capacity for the executive and certain other members of the BPTSA, has sufficient interest to seek judicial review of the First Respondent's decisions relating to the Reorganisations and the Rules as these decisions affect the public education system generally. The courts have in appropriate case recognised the rights both of individuals and interested organisations to bring judicial review proceedings for the public benefit. Eg see R v Legal Aid Board, ex p Bateman [1992] 1 WLR 711 QB *per* Nolan LJ (as he then was) at 818B (individuals); and R v HM Inspectorate of Pollution, ex p Greenpeace Ltd [1994] 4 All ER 329 QB *per* Otton J (as he then was) at 350 c – j (organisations). This is just such a case.

12. The position regarding the Transfers is more complicated and I shall deal with it when I consider the Transfers generally.

Delay and its consequences

13. Order 53, rule 4(1) of the Rules of the Supreme Court 1985 provides that an application for leave to apply for judicial review shall be made promptly and in any event within six months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made.

14. Thus the requirement is that the application be made promptly, which means as soon as practicable, or as soon as the circumstances of the case will allow. An application that is made after six months will by definition fail to satisfy this requirement. However the requirement will not necessarily be satisfied by an application that is made within six months. See the commentary to the 1999 Edition of the White Book at para 53/14/58.

15. Section 68(1) of the 1905 Act provides that the Court may refuse to grant leave for the making of an application for judicial review, or to grant any relief sought on the application, if it considers that: (a) there has been undue delay in making the application; and (b) the granting of the relief sought

would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration. Sections 68(1)(a) and (b) are conjunctive: they must both be satisfied before the Court refuses to grant leave.

16. I would have thought, without being referred to any authority on the point, that undue delay in making the application is synonymous with not making the application promptly. This suggests that when deciding whether to refuse an application for leave for judicial review on the ground that it has not been made promptly, at any rate when the application is made within six months of the decision to which the leave application relates, the Court should apply the test in section 68(1)(b) of the 1905 Act just as it would when considering the consequences of undue delay.

17. In my judgment, whether an application for leave has been made promptly, without undue delay, depends partly on the nature of the decision which it is sought to review. Where a decision is highly time sensitive, such as the Transfers, the standard of promptness will be more exacting than where it is not.

18. In the present case, teacher transfers were concluded on 1st June 2015 and principal transfers on 27th July 2015. The Rules were published on 27th July 2015. The Minister announced the appointment of a working group to consider school reorganisation on 22nd April 2015. The working group's report was published in December 2015 (after the application for leave was issued), and a consultation based on the report commenced on 8th February 2016.

19. In my judgment Mr Matthie did not make an application for leave to apply for judicial review promptly or without undue delay in relation to the teacher transfers or the appointment of the working group. The application was made four months after the appointment of SCORE was announced and almost three months after the teacher transfers were concluded. I am not satisfied that there was any good reason for the delay.

20. However I am not persuaded that the granting of the relief sought would give rise to any of the adverse consequences identified in section 68(1)(b) of the 1905 Act. Importantly in this regard, Mr Matthie is not seeking to quash the teacher transfers. Moreover, I am satisfied that there is good reason for extending, if necessary, the period for making the application for leave for judicial review. While the delay was undue, and bearing in mind that the application was brought within six months, it was not excessive. Moreover, if the Respondents have acted unlawfully in making the decisions in question, there is a public interest in establishing that fact and thereby holding them to account.

21. I am satisfied that Mr Matthie acted promptly in relation to the other aspects of his leave application.

Consultation

22. In relation to each of the three decisions, Mr Matthie relies upon a legitimate expectation of PTAs to be consulted which, he submits, arose at common law. A decision maker may also be under a statutory duty to consult, although not in the present case. In each case the decision maker must act fairly. The requirements of fairness will be context specific and linked to the purposes of the consultation. In the case of a statutory duty, that context will include the terms of the statute. See R (Moseley) v Haringey LBC [2014] 1 WLR 3947 UKSC *per* Lord Wilson and Lord Kerr JJSC at paras 23 and 24, and Baroness Hale and Lord Clarke JJSC at para 44, as glossed by R (T) v Trafford MBC [2015] ACD 101; [2015] EWHC 369 (Admin) *per* Stewart J at para 29. Thus I reject the Respondents' submissions that the requirements of fairness are by definition less rigorous in the case of a common law duty to consult than in the case of a statutory duty.

23. There are four core components to fair consultation. They were first articulated by Stephen Sedley QC (as he then was), and accepted by Hodgson J, in R v Brent London Borough Council, Ex p Gunning (1985) 84 LGR 168 QB at 198; endorsed by the Court of Appeal of England and

Wales, eg in R v North and East Devon HA, Ex p Coughlan [2001] QB 213 EWCA *per* Lord Woolf at para 108; and in the UK Supreme Court by Lord Wilson and Lord Kerr JJSC in Moseley at para 23. Lord Woolf summarised them thus:

"*It is common ground that, whether or not a consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, [i] consultation must be undertaken at a time when proposals are still at a formative stage; [ii] it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; [iii] adequate time must be given for this purpose; and [iv] the product of consultation must be conscientiously taken into account when the ultimate decision is taken . . .*"

[Numerals in square brackets added for ease of reference.]

24. Lord Wilson identified three further points which emerged from the authorities: (i) The degree of specificity with which the decision maker conducts the consultation may be influenced by the identity of those consulted: the more expert the consultees, it may be, the less the need for specificity; (ii) the demands of fairness are likely to be higher where the decision maker contemplates depriving someone of an existing benefit or advantage than when the claimant is simply an applicant for a future benefit; and (iii) sometimes, particularly but not only when the subject of the consultation is limited to the decision maker's preferred option, fairness may require consultation about, or at least reference to, other options, even where these have been discarded. See paras 26 – 28.

25. I was referred to a number of additional authorities. I do not propose to summarise them all, but only those principles emerging from them which have assumed particular prominence in the argument before me.

26. In R (Greenpeace Ltd) v Secretary of State [2007] Env LR 29; [2007] EWHC 311 (Admin) at para 66, Sullivan J drew a distinction between consultation on an issues paper, seeking consultees' views on the issue to be addressed before a policy proposal could be formulated, and consultation upon the policy proposal itself. He held at para 116 that consultation about the former did not satisfy the claimants' legitimate expectation, based on an

express promise by the decision maker, that they would be consulted about the latter. For these reasons, among others, the consultation process was procedurally unfair and the decision which flowed from it was unlawful.

27. Sullivan J stated at para 63 that "*in reality*" a conclusion that a consultation exercise was unlawful will be based upon a finding by the court, not merely that something went wrong, but that something went "*clearly and radically*" wrong. This formulation was expressly approved by Arden LJ, giving the judgment of the Court, in R (Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts [2012] EWCA Civ 472 at para 13.

28. In R (United Co Rusal plc) v London Metal Exchange [2015] 1 WLR 1375 EWCA at para 27 Arden LJ, again giving the judgment of the Court, stated that the court should only intervene if there is a clear reason on the facts of the case for holding that the consultation is unfair. She added at para 27 that the application of the duty of fairness is intensely case-sensitive and at para 28 that the courts have to allow the consultant body a wide degree of discretion as to the options on which to consult. The authorities cited in support of the latter proposition included Vale of Glamorgan Council v Lord Chancellor [2011] EWHC 1532 (Admin). Elias LJ, giving the judgment of the Court in that case, stated at para 25 that it was for the Lord Chancellor, who was the decision maker, to determine the scope of any consultation.

29. In R (Parents for Legal Action Ltd) v Northumberland CC [2006] EWHC 1081 (Admin) Munby J (as he then was), basing his observation on Coughlan, stated at para 66 that in order for a claimant to have a legitimate expectation, the promise (or, I interpolate, representation by conduct) must have been made, or at least apply, *to him*, as must the benefit which is the subject of the promise or representation.

30. In R (Maureen Smith) v East Kent Hospital NHS Trust [2002] EWHC 2640 (Admin), the applicant sought to quash the defendants' decision to reorganise hospital services in East Kent on the ground, which was disputed, that the reorganised services were significantly different from the options for

reorganisation consulted upon. Dismissing the application, and having considered the applicable case law, Silber J held at para 45 that a balance must be struck between the obligation of the decision maker to consult and the need for decisions to be taken. He held that there need only be re-consultation if there is a fundamental difference between the proposals consulted on and those which the consulting party subsequently wishes to adopt. Although those observations were made in the context of consultation by a health authority, they are in my judgment of general application.

31. R (Elphinstone) v City of Westminster concerned consultation about a school closure. At first instance [2008] EWHC 1287 (Admin) at para 62, Kenneth Parker QC sitting as a Deputy High Court Judge found that a fundamental change requiring re-consultation was a change of such a kind that it would be conspicuously unfair for the decision maker to proceed without having given consultees a further opportunity to make representations about the proposal as so changed. This left open the question of what would be the criteria for a change that was conspicuously unfair. However Rix LJ, giving the judgment of the Court of Appeal [2008] EWCA Civ 1069, accepted instead at para 62 the test propounded by Silber J in R (Maureen Smith).

32. In R (Milton Keynes Council) v Secretary of State [2012] JPL 728; [2011] EWCA Civ 1575, the applicant councils sought to quash certain provisions relating to houses in multiple occupation contained in two statutory instruments on the grounds that fairness required that the Secretary of State should have consulted them before making the statutory instruments. Whereas a short consultation had been carried out, the applicants were not among the consultees. The Court accepted that the applicants had a right to be consulted, but held that they had been adequately consulted in a prior, more extensive consultation which had taken place the previous year, before a change in Government. There was therefore no need to consult them again. See the judgment of the Court, given by Pill LJ, at paras 32 – 33 and 38.

33. The fact that the decision to make the statutory instruments in R (Milton Keynes Council) was a political one was relevant to the Court's decision. As Laws LJ had stated in R v Secretary of State ex parte Begbie [2000] 1 WLR 1115 EWCA at 1131 C, the more the decision challenged lay in "*the macro-political field*", the less intrusive would be the court's supervision.

34. What is required is that, *per* Keene J in R v Islington LBC ex parte East [1996] ELR 74 QB at 88, those with a right to be consulted must be given an adequate opportunity to express their views and so influence the decision maker. Provided that they are given this opportunity in the consultation process considered as a whole, whether it consists of one or more stages or even more than one consultation, the fact that they are not given this opportunity at each and every stage will not in itself vitiate the fairness of the process.

35. Fairness may, therefore, require that re-consultation takes place if, in the course of decision making, the decision maker becomes aware of some internal material or a factor of potential significance to the decision to be made, or, depending on the circumstances, on the matters and issues that the initial consultation has thrown up. See the judgment of the Court of Appeal of England and Wales, given by Auld LJ, in Edwards v the Environment Agency [2007] Env LR 9; [2006] EWCA Civ 877 at para 103.

Obligation to consult

36. Mr Matthie's submission that the Respondents were obliged to consult individual PTAs focused on the decision of Kawaley CJ in TN Tatem PTA v Commissioner of Education [2012] Bda LR 48.[1] The two applicants brought judicial review proceedings on behalf of themselves, the executive members and other members of their respective PTAs. They sought and obtained orders of *certiorari* quashing the decisions of the respondents, who

[1] The decision is more commonly referred to as Ming v Commissioner of Education. However I have used the alternative name for the case adopted by the Bermuda Law Reports.

are also the Respondents in the present case, involuntarily moving the principals of the respective schools. This was because they had a legitimate expectation of being consulted by the Respondents before decisions to transfer the principals were made. That expectation had been breached.

37. Kawaley CJ traced the evolution of a legitimate expectation at paras 13 – 16 of his judgment. The root of the expectation was the May 2007 report, commissioned by the Minister and authored by Professor David Hopkins and other educational experts, titled Review of Public Education in Bermuda ("the Hopkins Report"). This stated at para 80:

"*Parents and the community are important partners in the educational process. … Much greater community engagement in school federations would be achieved through direct community involvement in school boards that are given real powers and responsibilities*."

38. The Review contained a number of recommendations. Recommendation 10 is of particular relevance.

"***Harness the power of parents, business and the community in the reform effort***

Stakeholders should have greater direct involvement in the management of schools … and have greater opportunities to support learning. The Review favours the appointment of boards, filled largely by election, to run schools or federations of schools, building on the current example of aided schools. These school boards hold have greater autonomy in the staffing of their schools and the deployment of resources as well as holding principals responsible for raising standards."

39. The mention of "*federations of schools*" was a reference to recommendation 8 in the Hopkins Report:

"*Create self-governing Federations around clusters of primary schools and each middle school.*"

40. In April 2010 the Bermuda Government released a document titled Blueprint for Reform in Education – Bermuda Public School System Strategic Plan 2010 – 2015 ("the Blueprint"). The Executive Summary stated that:

"*It will operationalise the priorities recommended in the Hopkins Report (2007) …*"

41. In a press release dated 16th September 2011 the Minister referred to the Hopkins Report and the Blueprint with approval, and gave a progress report on implementing the recommendations in each. As to recommendation 8 of the Hopkins Report, she stated:

"*From September to December 2008, public consultation on cluster boards was held. The result was that Bermuda's population was deemed too small to allow for elected Boards as envisioned. Instead, the Board of Education agreed to consult and work with school PTAs.*"

42. For Kawaley CJ, the press release was crucial. He stated at para 16 of his judgment:

"*This Ministerial statement made on September 16, 2011 must be viewed against the backdrop of the recent enactment with effect from February 18, 2011 of section 18 of the Education Act 1996 which provided: '(1) There shall be a board of governors of every maintained school.' Taking into account the narrow context of the Press Release itself and the wider context of the Blueprint and the legislative amendments designed to implement the Hopkins Report, the quoted statement appeared on its face to be an express promise to allow PTAs to perform the legislative function assigned to school boards.*"

43. Based on this finding, Kawaley CJ held at paragraph 34 that the applicants' legitimate expectation to be consulted consisted of two elements:

"*i. a substantive legitimate expectation that the PTAs would be involved in the running of schools based on an express and unambiguous Ministerial promise made on September 16, 2011 that the statutory role envisaged for school governing boards in the running of maintained schools would be played by PTAs instead. It is true that the promise in terms referred to the 'Board of Education' working with PTAs, but the operative part of the promise was that the statutory role of boards of governors would be abandoned and instead devolved upon PTAs on an ad hoc non-statutory basis. The promise was made against the background of:*

> *(a) the Education Blueprint promising increased parental involvement based on the Hopkins Report's call for increased parental and community involvement through school boards 'that are given real powers and responsibilities', and*
>
> *(b) the enactment of section 19(1)(d) of the Act empowering boards of governors (required to include at least one parent), inter alia, 'to consider and make*

recommendations in respect of the appointment of all teachers, including the principal, at the school';

ii. a procedural expectation that the Respondents would adopt and follow a procedure that was fair to enable the PTAs to play the role in the management of their children's schools which it was promised they would be allowed to play in place of boards of governors. Boards contemplated by, inter alia, sections 18 and 19 of the Act. In the context of a proposal to change the principals, fairness required at a minimum that the Respondents should have been consulted before the March 14, 2012 decisions were made by somebody acting on behalf of the Respondents and responsible for making the proposed transfer decision. Consultation means simply that. It does not mean that the relevant decision could not have been made over the PTAs objections or that the PTAs had to become formally involved in any contractual collective bargaining procedures. Rather, it required them to be involved in the decision making process in some way which was consistent with their promised role as part of the collective team responsible for managing the relevant schools."

44. Thus Kawaley CJ held that the PTAs had a substantive legitimate expectation that they would assume the role in the running of maintained schools which the 1996 Act had assigned instead to boards of governors. He further held that they had a procedural legitimate expectation that the respondents in their dealings with the schools would adopt a procedure which would allow the PTAs to carry out that role properly. Eg where it was proposed to transfer a principal, the PTA of the school from which she was to be transferred should be consulted before any final decision was made. Importantly, the procedural legitimate expectation was contingent upon the substantive legitimate expectation.

45. Later in his judgment, at paras 43 and 44, in a section dealing with whether there were any discretionary grounds for refusing an order of *certiorari*, Kawaley CJ expressed himself in more general terms:

"*On the other hand strong public policy grounds mitigate in favour of granting the relief sought. The promise to engage parents and the community in the running of public schools is based on a commitment to make a paradigm shift in the management culture of Bermuda's public education system and to make it more democratic and participatory and less authoritarian and paternalistic. The promise does not simply derive from the Hopkins Report. It has been adopted by the Education Board, the Department and the*

Minister in the Education Blueprint, given legislative force by Parliament and reaffirmed by the Minister. . . .

In granting the order of certiorari sought, the Court is giving effect to the Applicants' legitimate expectation that the Respondents should not be permitted to abuse their statutory powers by departing from the public law commitments by which they are bound. . . . it is only through granting the relief sought, however, that there is any realistic possibility that the Respondents may be stirred to honour the public law commitment which they have assumed to recognise the PTAs as partners not just in debating high policy . . . but in the process of making important managerial decisions about the schools which their children attend as well. Precisely what form this heightened involvement takes will have to be worked out in the future. But the parental right to such participation cannot lawfully be denied unless it is proposed to recast the existing legislative scheme altogether."

46. I do not take these observations, which are made in the context of explaining how Kawaley CJ would exercise his discretion, as modifying the earlier passage in his judgment in which he explained how the legitimate expectation to which that discretion relates arose. Thus the reference to the "*heightened involvement*" of the PTAs which "*will have to be worked out in the future*" is to be construed in the context of the PTAs exercising the role of *de facto* boards of governors.

47. This is apparent from para 46 of the judgment which occurs in the section headed "*Conclusion*":

"*In summary, they are entitled to this relief because they have a substantive legitimate expectation based on an express promise made by the Minister that PTAs would be utilized in place of the boards of governors contemplated by section 18 of the Education Act, as read with other related Education Ministry representations. Flowing from this the Applicants had, in relation to the impugned transfer decisions, a procedural legitimate expectation that they would be consulted before any momentous decision (such as the transfer of the Principals) was made by the Respondents.*"

48. The paragraph brings out another point. The legitimate expectations were based on the express promise made by the Minister. This promise is to be construed in the light of the Blueprint and indeed the Hopkins Report, but

these documents do not themselves contain any promises giving rise to the legitimate expectations.

49. At first sight, the breadth of the substantive legitimate expectation appears considerable. Section 19 of the 1996 Act as it stood at the date of the judgment provided that the functions of a board of governors were: (i) to advise the Minister on policy matters in respect of the school; (ii) to manage and administer the financial affairs of the school; (iii) to manage and administer the maintenance of the school premises, and to employ staff for this purpose; (iv) to consider and make recommendations in respect of the appointment of all teachers, including the principal, at the school; and (v) such other functions as the Minister may from time to time determine.

50. Section 20 of the 1996 Act provides that the board of governors is to submit to the Minister annual estimates of the school's income and expenditure. Section 21 provides that the board of governors shall each year cause its accounts for the previous year to be audited.

51. Irrespective of how the press release of 16th September 2011 should be read objectively, it is doubtful whether the Minister's subjective intention was to purport to devolve all the statutory functions of a board of governors upon PTAs. Not least because she had no power, whether under the 1996 Act, including her rule-making powers under section 8, or otherwise, to do so. She could not, or course, unilaterally amend the statute. However a legitimate expectation can only arise on the basis of a lawful promise or practice. See R v Secretary of State, Ex p Begbie [2000] 1 WLR 1115 CA *per* Gibson LJ at 1125. Moreover, the Court had no jurisdiction to interpret the 1996 Act "as if" it conferred those functions on PTAs, or permitted the Minister to do so, when in fact it did not. See Singularis Holdings Ltd v Pricewaterhouse- Coopers [2015] AC 1675 PC *per* Lord Collins at paras 78 – 83. It is in any event doubtful whether many PTAs would be willing and able to perform all the functions of a board of governors, and the Minister could not require them to do so.

52. These difficulties would disappear if the judgment was read as limiting the PTAs' substantive legitimate expectation to a *consultative* role analogous to that conferred on boards of governors by the 1996 Act. Ie in relation to their respective schools, (i) advising the Minister on policy matters; and (ii) considering and making recommendations in respect of the appointment of all teachers, including the principal. The PTAs' procedural legitimate expectation would then be that the Minister would supply them with sufficient information to allow them properly to carry out their consultative role.

53. There was nothing in the 1996 Act to preclude the Minister from consulting PTAs – or other stakeholders – in relation to these matters, whether in addition to consulting boards of governors or in the absence of such boards. Moreover, the issue before the Court, as stated at para 3 of the judgment, was whether the applicant PTAs had a legitimate expectation of being consulted by the Commissioner about the proposed transfer of the principals from their schools, not whether they had a legitimate expectation that they would have broader managerial functions in relation to those schools. The *ratio* of the case is therefore confined to the narrow question of consultation about principal transfers.

54. Differing views about the precise ambit of the legitimate expectations recognised by the Court in TN Tatem PTA were reflected in the public reception of the decision. The Minister responded to the judgment in a press release dated 22nd August 2012. Noting that the Kawaley CJ had determined that the Government and Ministry of Education had made a commitment to wider consultation ever since the adoption of the Hopkins Report through to the Blueprint, she stated:

> "*So, while the Ministry is committed to the goals stated in the Blueprint, the promise of consultation at the time of the decisions was an aspirational one, not yet grounded in a protocol or process. That process, which has now been approved by Cabinet, is due to be unveiled next month when the Ministry embarks on a course of consultation with schools, PTA's and the wider community*."

55. The Minister concluded:

"*... I believe that Chief Justice Kawaley's ruling set out important points of principle which will be honoured by the Ministry of Education ...*"

56. Thus the purpose of the press release was to explain what steps the Minister would take to give effect to the Court's decision. The Minister did not, and did not intend, by her statement to give rise to a fresh legitimate expectation.

57. The Ministry of Education ("the Ministry") did not in fact publish a consultation document until September 2013. Titled Improving Student Achievement, it noted, with a somewhat different emphasis to the Minister's 22nd August 2012 press release, that "*full implementation*" of Kawaley CJ's judgment:

"*would grant all the powers of boards of governors to PTAs of maintained schools*".

58. The BPTSA published a document titled Response to Public Consultation dated 22nd November 2013 in which they disagreed with this interpretation of the judgment, stating:

"*... the ... decision gave PTAs the right to be consulted about all matters which were originally designed as 'functions' for boards of governors pursuant to section 19 of the 1996 Act.*"

59. The BPTSA noted that there was a shortage of PTA members who could carry out the functions of boards of governors; that there would be problems with implementation; and that if PTAs were treated as *de facto* boards of governors they would be provided with sensitive information about teachers and other school personnel to which they were not entitled.

60. In my judgment, if construed narrowly, TN Tatem PTA held that, as a minimum, PTAs of maintained schools had: (i) a substantive legitimate expectation that they would advise the Minister on policy matters, in respect of their schools, and consider and make recommendations in respect of the appointment of all teachers, including the principal, at their schools; and (ii) a procedural legitimate expectation that the Minister would supply them with sufficient information to carry out these functions properly. The substantive legitimate expectation was stated to apply to PTAs in place of

boards of governors. It may be that the substantive legitimate expectation recognised by the Court was broader, but its broader ramifications, if any, are not relevant to the present case.

61. The Respondents submit that, whatever the scope of the legitimate expectations recognised by the Court in TN Tatem PTA, they have been terminated by the Education Act 2015 ("the 2015 Act"). Whereas section 18(1) of the 1996 Act provided that there shall be a board of governors of every maintained school, section 3(1) of the 2015 Act amended this provision so that it applies only to maintained schools which provide senior school education. Sections 3(2) and 6 of the 2015 Act made various consequential amendments to the 1996 Act. Section 7(3) of the 2015 Act, which came into force on 29th March 2015, provided:

> "*Any functions which, before the coming into operation of sections 3 and 6, are being or have been carried out by a Board of Governors of a maintained school which does not provide senior school education, or by any other body on behalf of, or in the absence of, a board of governors of such a school, shall be carried out by the Commissioner of Education.*"

62. These measures were part of a broader recasting of the relationship between schools and parents. Section 4 of the 2015 Act inserted into the 1996 Act a Division headed "*Parent Councils*" which applies to maintained schools which do not provide senior school or preschool education. Section 21B provides that parents at such a school may establish a Parent Council for that school in accordance with rules made by the Minister under section 21C. The purpose of the Parent Council is stated to be to foster parent and community involvement with the school for the purpose of maximising the performance of students of the school and improving the school.

63. Section 21C provides that the Minister may make rules for such purposes as may be necessary and convenient to give effect to section 21B, and provides various examples. These include rules prescribing the functions of a Parent Council related to the making of representations to the Commissioner on the desired qualities and competencies of any principal who may be appointed to

the school. There is no mention of any such rules relating to the appointment of a teacher.

64. Section 5 of the 2015 Act provides for the establishment of a national Parental Involvement Committee of from seven to 15 persons, appointed by the Minister, which would have a broader consultative role.

65. The above provisions introduced by sections 4 and 5 of the 2015 Act came into effect on 8th September 2015.

66. I agree with the Respondents that the legitimate expectations recognised by the Court in TN Tatem PTA were framed so as to apply to functions carried out by PTAs on behalf of or in the absence of boards of governors of maintained schools. Those legitimate expectations no longer apply because with effect from 29th March 2015 the relevant functions were transferred to the Commissioner. Legitimate expectations cannot override primary legislation. See R (Albert Court Residents' Association) v Westminster City Council [2011] EWCA Civ 430; [2012] PTSR 604 *per* Stanley Burnton LJ, giving the judgment of the Court, at para 35:

> "*If authority is required for the proposition that an otherwise legitimate expectation cannot require a public authority to act contrary to statute, it is to be found in the seminal judgment of this court, given by Lord Woolf MR in R v North and East Devon Health Authority, Ex p Coughlan [2001] QB 213 , para 86 and the judgment in R (Niazi) v Secretary of State for the Home Department [2008] EWCA Civ 755 at [46], stating that the claim in R v Secretary of State for Education and Employment, Ex p Begbie [2000] 1 WLR 1115 failed 'principally because to enforce the expectation would have required the Secretary of State to act contrary to statute'.*"

67. In summary, the PTAs' procedural legitimate expectation that they would be consulted by the Minister was dependent upon their substantive legitimate expectation that they would perform some or all of the functions assigned to boards of governors under the 1996 Act. When, with effect from 29th March 2015, and in relation to maintained schools which do not provide senior education, those functions were transferred to the Commissioner, the basis for the procedural legitimate expectation held by PTAs at such schools collapsed.

68. However I agree with the Applicant that, prior to 29th March 2015, and by reason of the Minister's promise contained in the press release of 16th September 2011, the Respondents were under a general duty to consult PTAs with respect to the Transfers, the Reorganisation and the Rules. They were never under any general duty to consult Mr Matthie or the BPTSA.

69. The 2015 Act did not contain any transitional provisions addressing the involvement of parents of children at maintained schools not providing senior school education in the running of their children's schools in the period beginning 29th March 2015 and ending on 8th September 2015 or as soon thereafter as it was reasonably practicable for a school which so wished to establish a Parent Council. In my judgment the effect of the 2015 Act upon the 16th September 2011 promise was to convert it into a promise that during this transitional period the Minister would consult with PTAs of affected maintained schools as if they were Parent Councils. This is consistent with the legislative intent behind the 2015 Act, which was not to remove parental involvement in the running of affected schools but to recast it. For the avoidance of doubt, this finding is limited to that transitional period: I make no finding as to whether the PTA of a school whose parents choose not to establish a Parent Council has any such legitimate expectation.

The Transfers

70. As stated above, prior to 29th March 2015 the PTAs of all maintained schools had a substantive legitimate expectation that they would have the opportunity to consider and make recommendations in respect of the appointment of all teachers, including the principal, at their schools, and a procedural legitimate expectation that they would be given sufficient information by the Minister for this purpose. This was by parity of reasoning with the functions of a board of governors of a maintained school.

71. The 1996 Act contained no express provision that a board of governors had a right to be consulted about the transfer of a principal away from the school. However in TN Tatem PTA Kawaley CJ held that PTAs did have such a

right, at any rate in the case of involuntary transfers. This was expressed to be because such a decision was "*momentous*". A legitimate expectation to be consulted about momentous decisions contemplated by the Respondents was to be implied in order to allow PTAs to discharge their gubernatorial functions properly.

72. By parity of reasoning, a PTA had a legitimate expectation that it would be consulted about a prospective decision by the Commissioner to permit the voluntary transfer of a principal away from a school. (Although the PTA would have had no legitimate expectation of a right of veto.) Such a decision would be no less momentous than an involuntary transfer. Of course the departure of a principal might involve no decision by the Commissioner, eg if the principal left to take up a position overseas. But to the extent that the departure did, eg because the principal was leaving to take up another position within the public school system, the PTA had a legitimate expectation that it would be consulted.

73. I am not persuaded that a PTA had a legitimate expectation that it would be consulted about a transfer of a teacher away from the school. Such a transfer, unlike the transfer of a principal, is not by its nature momentous, although I appreciate that on its particular facts the transfer of a particular teacher might be momentous.

74. The present case is concerned with the transfer of principals to and from eight middle and primary schools. The transfers were interrelated in that the principal of school A would move to school B, the principal of school B would move to school C, and so forth. In each case, consultation, or the offer of consultation, with the PTA took place in relation to the appointment of the incoming principal. The consultation was *ad hoc* rather than according to a standard procedure. There appears with one exception to have been no consultation about the departure of the outgoing principal. In one case the outgoing principal retired and in two cases there were existing vacancies for principal.

75. The Presidents of the PTAs of four of the schools have sworn affidavits stating that they were satisfied with the procedure adopted and that they are opposed to these judicial review proceedings. The schools are Port Royal Primary School, West End Primary School, East End Primary School and Prospect Primary School.

76. Quinton Ming, the President of the PTA of one of the schools, Dellwood Middle School, has sworn an affidavit stating that he supports these judicial review proceedings, although he does not specifically address the issue of the Transfers, focusing rather on parent councils. Thus he does not state what, if anything, concerned him about the consultations over principal transfers insofar as they related to Dellwood. Mr Matthie has exhibited correspondence from which it appears that the Commissioner and the PTA reached an impasse as to the signing of a confidentiality statement by the PTA representative in the selection process. However affidavit evidence from the Commissioner suggests that this impasse was resolved.

77. According to Mr Matthie, the President of the PTA of another of the schools, Paget Primary, was present at the 2nd June 2015 BPTSA meeting which unanimously voted to support these proceedings. As I have not seen the minutes of the meeting I am unable to verify that assertion. Eg I do not know the terms of the resolution on which the meeting voted. The incoming principal of Paget Primary School, Idonia Beckles, gave affidavit evidence that prior to her appointment, and as part of the appointment process, she spoke with the President of the Paget Primary PTA, Ms Bean, about her vision and style, and what she and the parents wanted for the school. Ms Bean has not sworn an affidavit in these proceedings. I therefore lack confirmation from her that she supports them and am unaware of the nature of her objections, if any, to the consultation process.

78. I have received no evidence from the PTA Presidents of the remaining schools: Clearwater Middle School and Heron Bay Primary School. They were not present at the BPTSA meeting of 2nd June 2015.

79. Mr Matthie is not a parent of a child at any of the schools involved in the principal transfers. He therefore has no standing to challenge them in his personal capacity. In view of this finding I need not consider the Respondents' supplementary argument that the decision in TN Tatem PTA only recognised that PTAs of maintained schools and not aided schools had a legitimate expectation to be consulted over principal transfers. Although I am not sure that I would have found that objection insurmountable.

80. The decision in TN Tatem PTA did not recognise that the BPTSA had a legitimate expectation to be consulted about principal transfers, or indeed anything else. I am not satisfied that any of the PTAs of schools affected by the principal transfers except Dellwood Middle School have authorised the BPTSA to challenge the Transfers on their behalf. The evidence relied upon by Mr Matthie to show that the PTA of Paget Primary has authorised the BPTSA to do so is not sufficient.

81. I therefore accept that Mr Matthie has sufficient interest to challenge the principal transfers relating to Dellwood Middle School on behalf of the school's PTA. His interest derives from the affidavit of Mr Ming expressing support for these proceedings. Mr Mathie does not have sufficient interest in his representative capacity to challenge any of the other principal transfers.

82. The outgoing principal, Lisa Marshall, resigned her position after applying successfully for the position of Officer for Social Studies. Although she moved from one position in government employment to another, the move was not a transfer. Thus the question of consultation with the PTA about her departure did not arise.

83. As the question of consultation with the PTA of a maintained school from which a principal was departing was canvassed in argument, I think it would be helpful to clarify the position. I shall therefore make a declaration that prior to 29th March 2015, and as a result of the legitimate expectations on the part of the PTAs of maintained schools recognised by the Court in TN Tatem PTA, the Commissioner was required to consult with the PTA of a maintained school before making a decision to transfer a principal from (or,

for the avoidance of doubt, to) that school, even where the transfer was voluntary.

84. The incoming principal, Tina Duke, was appointed internally from the position of Deputy Principal. The Commissioner gave affidavit evidence explaining the consultation with the PTA which took place regarding her appointment. In my judgment the consultation was perfectly adequate.

85. Turning to teacher transfers, these were much more numerous. I do not have a list of all the affected schools. However one of the schools affected was Victor Scott Primary School. The Vice-President of its PTA, Azuhaa Coleman, has filed an affidavit in support of these proceedings. The President of the PTA, Chesere Smith, emailed Mr Matthie on 9th June 2015 to say that the school had been assigned two incoming teachers but that the PTA had not been consulted about these transfers.

86. The Commissioner maintained on affidavit that consultations about teacher transfers fell beyond the scope of the legitimate expectations recognised in TN Tatem PTA. For the reasons given above, in relation to decisions about teacher transfers taken prior to 29th March 2015 this is not correct. PTAs of maintained schools not providing senior school education had no legitimate expectation to be consulted in relation to decisions about teacher transfers taken subsequently.

87. The Respondents argued that it was impractical to consult PTAs about teacher transfers. That argument is not sustainable. The PTAs' legitimate expectation that they would be consulted about teacher transfers was modelled on one of the statutory functions of boards of governors. The legislature having enacted that the Respondents were under an obligation to consult with boards of governors about teacher transfers, and evidently being satisfied that it was practicable for them to do so, the Respondents cannot credibly argue that they were unable to discharge an analogous obligation in relation to PTAs.

88. The position as to standing is similar to that in relation to principal transfers. Mr Matthie does not have sufficient interest to challenge the teacher transfers in his personal capacity. He does have sufficient interest to challenge the teacher transfers relating to Victor Scott Primary School on behalf of the school's PTA. Mr Matthie does not have sufficient interest in his representative capacity to challenge any of the other teacher transfers.

89. Mr Matthie's challenge to the teacher transfers relating to Victor Scott Primary School fails because by the dates of those transfers, which from Mr Smith's email appear to have taken place in or around the summer of 2015, the PTA's legitimate expectations of consultation had been terminated.

90. I shall, however, make a declaration that prior to 29th March 2015, and as a result of the legitimate expectations on the part of the PTAs of maintained schools recognised by the Court in TN Tatem PTA, the Commissioner was required to consult with the PTA of a maintained school before making a decision to transfer a teacher to that school.

91. Save as indicated above, the application for judicial review of the Transfers is dismissed.

The Rules

92. As noted above, in September 2013 the Ministry published a consultation document titled Improving Student Achievement. The document was published and disseminated to parents, other stakeholders and the public directly, and was available online via the Ministry's website.

93. The Executive Summary to the consultation document explained that, in view of the decision in TN Tatem PTA, the Minister had considered three different pathways regarding school governance: (i) implementing the decision, which would in his view involve granting all the powers of boards of governors to PTAs of maintained schools: (ii) appointing boards of governors for every maintained school, as envisioned by the 1996 Act; or (iii) considering and consulting on amending the 1996 Act to remove boards

of governors from maintained schools and either (a) establishing and implementing school advisory councils; or (b) engaging PTAs in a new relationship with principals and the Ministry, focused on student achievement and school improvement. The Executive Summary stated that pathway 3(b) was the Minister's preferred option. However, as we have seen, it was pathway 3(a) which was eventually chosen.

94. The launch of the consultation document was accompanied by a press conference on 18th September 2013 at which the Minister made a press statement and fielded questions from the press. He held three consultation meetings for parents and the community which took place on 2nd October 2013 at CedarBridge Academy; 8th October 2013 at Dalton E Tucker Primary School, and 9th October 2013 at Francis Patton Primary School. The meetings each lasted for about 1 ½ hours. Each meeting included a presentation of the proposals in the consultation document and a question and answer session, with questions fielded by the Minister, the Permanent Secretary, the Commissioner and the policy analyst for the Ministry.

95. The consultees included the BPTSA. As noted above, in November 2013 it responded with a document titled Response to Public Consultation. The BPTSA rejected both pathway 3(a) and pathway 3(b). Instead, it sought implementation of what it understood the decision in TN Tatem PTA, properly construed, to mean. Namely, a commitment from the Ministry to consult meaningfully with the BPTSA and individual PTAs with respect to all the functions of boards of governors set out in section 19 of the 1996 Act, and the implementation of binding rules setting out when the need for such consultation arose.

96. In May 2014 the Government released a further consultation document: Improving Student Achievement – The Introduction of School Community Councils: Proposed Changes to the Education Act 1996. The document was published and disseminated to parents, other stakeholders and the public directly, and was available online via the Ministry's website.

97. The consultation document explained that the Minister now proposed to introduce school community councils ("SCCs") for groups of maintained schools in place of boards of governors for each individual school. SCCs were stated to be an alternative to the options proposed in the previous consultation. They built upon the cluster boards recommended in the Hopkins Report. The document stated that both PTAs and SCCs should be regarded as sources of support for schools. As SCCs were representative of their member schools, members and other parents were encouraged to engage with one another so that the views of the parents were shared with SCC members as they carried out their functions.

98. The Minister made a statement in the House of Assembly introducing the new proposals on 23rd May 2014. He held a consultation meeting for parents and the community which took place on 29th May 2914 at CedarBridge Academy and lasted for about 1 ½ hours. It included a presentation of the proposals in the consultation document and a question and answer session, with questions fielded by the Minister, the Permanent Secretary, the Commissioner and the policy analyst for the Ministry. The Minister also met with various stakeholders, including on 3rd June 2014 the BPTSA executive. The period allowed for consultation was two weeks.

99. The response of consultees to the new proposals was strongly negative. On 4th July 2014 the Minister issued a statement noting that more discussion and outreach was needed; that he was reviewing policy proposals to better balance the concerns and interests expressed during the consultation period; and that further outreach, engagement and information sharing would take place throughout the summer and the 2014 – 2015 school year. Some 18 consultation meetings took place over the period June 2014 through October 2014 between various stakeholders and the policy analyst for the Ministry. The Permanent Secretary gave affidavit evidence that at each consultation meeting the consultees were made aware that they were being consulted on a model for parental involvement in place of boards of governors that would focus on student achievement and be advisory in nature.

100. On 14th November 2014, Cabinet approved in principle the proposed amendments to the 1996 Act which resulted in the 2015 Act. On December 15th 2014, the Acting Permanent Secretary issued drafting instructions to the Attorney General's Chambers and the drafting process commenced. On 4th March 2015 the Minister tabled the Education Amendment Bill 2015. On 11th March 2015 it had its second reading. On 20th March 2015 the Bill was taken up in the Senate. On 29th March 2015 the Bill received assent by the Governor and became the 2015 Act.

101. On 2nd April 2015 Mr Matthie, in his capacity as Chair of the BPTSA, issued a letter to member PTAs to solicit their support, inter alia, "*to end the Ministry of Education's plan to undermine parent autonomy by changing the Education Act ...*", which he complained had been rushed through its second reading as an "*add on item*" in the midst of the budget debate.

102. On 4th June 2014 the Ministry held an information session for PTA Presidents and PTA Presidents designate to provide an overview and update on the 2015 Act and the forthcoming Rules. The purpose of the meeting was to disseminate information not to consult. The BPTSA issued a press release stating that it would not be attending. The reasons for its non-attendance were stated as being that the Ministry had consistently failed to consult PTAs in accordance with the decision in TN Tatem PTA, and that the recent passage of the 2015 Act undermined the existing rights of parents to be consulted.

103. On 15th July 2015, pursuant to an invitation from the Ministry, the BPTSA executive met the Permanent Secretary, Commissioner and Ministry policy analyst. The BPTSA executive made their objections to the Rules very plain.

104. On 27th July 2015 the Rules were gazetted. As stated above, on 8th September 2015 they came into force.

105. Although I have set out in detail the consultation which preceded the 2015 Act and the Rules, it is for present purposes largely irrelevant. The subject

of the consultation was the appropriate model for parental involvement in school governance. Consultees were asked about the right model in principle, not the details of that model. The endpoint of the consultation was the 2015 Act. Irrespective of the adequacy of the consultation which preceded it, the 2015 Act is not justiciable. As Lord Sumption JSC stated in Bank Mellat v HM Treasury (No 2) [2014] 700 SC(E) at para 39:

"*Parliament is not in any event required to be fair. Even if a legitimate expectation has been created, the courts cannot, consistently with the constitutional function of Parliament, control the right of a minister, in his capacity as a member of Parliament, to introduce a bill in either house: R (Wheeler) v Office of the Prime Minister [2008] EWHC 1409 (Admin) at [49]; R (UNISON) v Secretary of State for Health [2010] EWHC 2655 (Admin).*"

106. In point of fact, the consultation which preceded the 2015 Act was sufficient to satisfy Mr Matthie's legitimate expectation of consultation to which the consultation process gave rise. The September 2013 consultation document identified amending the 1996 Act to legislate for school advisory councils, which were closely analogous to Parent Councils, as a possible option. In its November 2013 response the BPTSA availed itself of the opportunity to comment on this proposal and suggest an alternative. It is immaterial that the Minister abandoned the option of school advisory councils in the May 2014 consultation document before eventually deciding upon it, albeit under the rubric of Parent Councils.

107. It was evident from the September 2013 consultation document that it was not proposed that school advisory councils should carry out all the functions of a board of governors. As the Court held in TN Tatem PTA, the scope of consultation which PTAs had a legitimate right to expect was dependent upon the scope of their functions. Thus it was evident from the consultation document that if school advisory councils or PTAs undertook a more limited range of functions than a board of governors, then the scope of consultation with them would also be more limited. The BPTSA, by the terms of its response, appeared to appreciate that this was the Minister's view.

108. The consultation process which preceded the 2015 Act was not a consultation about the Rules. Indeed there could not have been a sensible consultation about the Rules before the Education Amendment Bill was tabled, because they fall to be considered in the context of what became the 2015 Act. There has in fact been no consultation about the Rules, nor was there any Ministerial promise of one.

109. Statutory instruments, unlike primary legislation, may be subject to judicial review. See the judgment of Lord Sumption in Bank Mellat, with whom a plurality agreed, at paras 43 – 44. They may give rise to an implied duty of consultation. But as Lord Sumption stated at para 44:

> "*…there is a very significant difference between statutory instruments which alter or supplement the operation of the Act generally, and those which are targeted at particular persons. The courts originally developed the implied duty to consult those affected by the exercise of statutory powers and receive their representations as a tool for limiting the arbitrary exercise of statutory powers for oppressive objects, normally involving the invasion of the property or personal rights of identifiable persons. … While the principle is not necessarily confined to such cases, they remain the core of it. By comparison, the courts have been reluctant to impose a duty of fairness or consultation on general legislative orders which impact on the population at large or substantial parts of it, in the absence of a legitimate expectation, generally based on a promise or established practice.*"

110. There is in my judgment no basis for implying that the Minister had a duty to consult before making the Rules. As I have stated above, there was no promise of consultation about them. Even if the consultation process which took place prior to the 2015 Act did relate to the Rules, although I am satisfied that it did not, the options about which adequate consultation took place included school advisory councils, which were closely analogous to parent Councils. Mr Matthie's principal concern about the Rules seemed to be not so much lack of consultation as the very concept of Parent Councils. But, even if Parent Councils were not enshrined in primary legislation, the Court would have had no jurisdiction to review the merits of the concept. The application for judicial review insofar as it relates to the Rules is therefore dismissed.

The Reorganisation

111. On 29th January 2015 the Premier and the Minister of Finance held a press conference at which they announced a list of proposals agreed by both the Government and the Bermuda Trade Union Congress as reductions in Government expenditure for the 2015/2015 fiscal year. These included:

"*To achieve savings of approximately $1M by consolidating schools*".

112. On 25th February 2015 the Minister sent a letter to all PTA Presidents and members of primary and middle schools explaining that the Government had directed the Ministry to save costs in running schools without compromising on the quality of education. The letter looked forward to "*positive collaboration*" with all key stakeholders, namely PTAs, unions and parents, to find an appropriate solution.

113. On 27th February 2015 the Minister made a Ministerial Statement in the House of Assembly. This provided in material part:

"*As all members of this Honourable House are aware, Bermuda continues to face significant economic challenges. The Ministry of Education faces a 5% budget reduction equivalent to approximately $5.9 million during the 2015/16 fiscal year. This coupled with continued demographic trends such as a decline in student enrolment has left us little choice but to consider restructuring the way public education is delivered. As a result of the economic challenges we face, we will have to discuss with all interested stakeholders the requirement for fewer Government Preschools and Primary Schools in the first instance, and therefore the consolidation or the closure of schools.*

. . . . .

In due course, I will ensure that PTAs, as well as other parents, principals, teachers, other school staff, Unions and community members are provided with more specific date related to:

- *past, current and projected enrolment figures;*
- *budgets for preschools and primary schools; and*
- *cost per student for preschools and primary schools.*

Qualitative information will also be provided related to safety and health concerns, the state of school facilities, the effective and efficient use of school facilities, and the

consideration of optimal preschool and primary school size for effective educational delivery."

114. On 27th February 2015 the Government published a consultation document titled Public School Reorganization: A Consultation and on 3rd March 2015 this was emailed to primary and middle school PTAs. The consultation questions were:

(1) Do the economic imperatives facing the Ministry of Education and the Bermuda Government, coupled with demographic trends such as a declining birthrate and a pattern of decline in enrolment, etc, warrant school closure?

(2) If the Minister determines that specific schools should be closed, what suggested criteria do you think should be used?

PTA members and others were encouraged to answer the consultation questions, but were also invited to provide additional feedback. The document stated that the consultation would close on 20th March 2015. The information provided in the consultation document included the information indicated by the bullet points in the Ministerial Statement but not the "*qualitative information*" mentioned in that Statement.

115. Consultation meetings took place on 5th March and 18th March 2015 for the general public and 12th March 2015 for members of the Bermuda Union of Teachers. The panel comprised the Minister, the Permanent Secretary and the Commissioner. The meetings consisted of opening remarks by the Minister, followed by a 15 minute joint presentation by the Permanent Secretary and the Commissioner, then questions from the audience, both orally and in writing, using cue cards provided to the audience.

116. On 28th March 2015, and again on 1st April 2015, the Minister met with the Permanent Secretary, Commissioner and Ministry policy analyst to consider the submissions which had been received from stakeholders. There were 36 such submissions, and they made a number of criticisms of the consultation process. Various criticisms were made before me which were in my

judgment well founded. Consultees were not given the financial information necessary to enable them to engage with the economic arguments relating to closure in any meaningful way; eg to consider whether there were alternative ways to make the required savings from the education budget. They were not provided with the qualitative information promised by the Minister in the Ministerial Statement. And the period for consultation was in the circumstances unreasonably short.

117. The response which resonated most strongly with the Minister was an email from Margaret Hallett of the Coalition of Community Activism in Bermuda ("CCAB"). She proposed the establishment of an independent task force with a time frame of six months, to finish in September 2015, composed of "*a cross-section of committed, thoughtful people*" and with the aim of finding a solution which addressed both economic realities and human sensitivities. On 20th April 2015 the Permanent Secretary and the Commissioner met with members of CCAB to discuss their proposal.

118. On 22nd April 2015 the Minister held a press conference at which he made two announcements. First, he announced that in September 2015, two preschools would be "*amalgamated*". They were St David's Preschool into St David's Primary School and St John's Preschool into Victor Scott Primary School, where it would be renamed Victor Scott Preschool. The Minister noted that the idea to "*merge*" the two St David's schools was brought to the Ministry by the preschool administrator and primary school principal.

119. This was a rather loose use of language. There was in fact no planned merger or amalgamation. What was to happen was that the two preschools were to move to the same sites as the two primary schools. However all four schools were to remain separate and distinct. The moves, which took place as planned, did not involve the closure of any of the four schools.

120. Second, the Minister announced that he had determined that further work, collaboration and consultation were necessary before a final decision was made on school reorganisation and closure. He stated that this decision had

been assisted by anticipated cost savings through the early retirement of several staff and other means. Accordingly, he would appoint a working group which would over the next four months "*review and recommend a plan to move forward*". Specifically, it would be responsible for:

(1) Recommending schools for consolidation or closure for the 2016/2017 academic year and beyond; using the initial input of decreasing the number of primary schools by one primary school per zone; ie East, West, and Central;

(2) Recommending plans for improving the quality and consistency of programming across primary schools, keeping in mind the ideal or model school (eg structured sport, music and art programming, improved therapy services, etc); and

(3) Recommending opportunities for efficiencies and cost savings (eg more effective use of human resources, reduced maintenance costs, alternative building use, rent reductions, etc).

121. I accept Mr Matthie's criticism that at this stage the consultation process was seriously flawed. The working group was tasked with recommending schools for consolidation or closure. Impliedly, therefore, the Minister had decided that some schools should be consolidated or closed. This was notwithstanding that the consultation as to whether there should be any school closures had been seriously flawed. The Minister was also introducing a new option, consolidation, upon which there had been no consultation.

122. On 29th May 2015 in a Ministerial Statement the Minister gave an update on progress towards school reorganisation in which he announced the establishment of SCORE. He stated that this decision allowed for significantly more time to extend the process of public consultation and to undertake a more thoughtful and deliberative process before he considered the possible closure of specific schools. He also stated that the terms of reference would include a step by step process that SCORE would follow:

"*to consider and make recommendations regarding which schools should be consolidated and/or closed.*"

123. However SCORE's actual terms of reference contained an important qualification:

"*[SCORE] is an independent body, made up of parents, educators and community representatives that was established to inform the Minister of Education on the issues of school reorganisation and closure. The SCORE Advisory Committee is not itself granted the authority to make decisions on behalf of the public. However it was put in place to follow a process that will allow for the presentation of findings to the Minister about the feasibility of school closures, and which schools should be closed, <u>if any</u>.*"

[Emphasis added.]

124. SCORE produced a report of its findings and recommendations, the <u>SCORE Report</u>, which the Government published in December 2015. The <u>SCORE Report</u> ran to 196 pages. SCORE presented its findings to various stakeholder groups, including parents and PTA presidents and vice-presidents. Subsequently, on 8th February 2016, the Minister called a press conference at which he presented its findings to the wider public. He summarised what the <u>SCORE Report</u> had to say about school closures and his response to its findings thus:

"*In the SCORE Report, the Advisory Committee also provided data driven scenarios as to which schools could be considered feasible for reorganisation or school closure within the context of their research. The scenarios were presented by school zones as follows:*

CENTRAL ZONE

- *Scenario 1 – Resolve overutilisation at West Pembroke Primary School*
- *Scenario 2 – Close Gilbert Institute and transition staff and students to Prospect Primary School*
- *Scenario 3 – Close Prospect Primary School and transition staff and students to Victor Scott Primary School and Paget Primary School*

EASTERN ZONE

- *Scenario 1A: Close St. David's Primary School and transition staff and students to East End Primary School and St. George's Preparatory School*

- *Scenario 1B: Resolve overutilisation at Harrington Sound Primary School and Francis Patton Primary School*

- *Scenario 2: Keep all schools open and resolve overutilisation at Harrington Sound Primary School and Francis Patton Primary School by transitioning students to East End Primary*

WESTERN ZONE

- *Scenario 1: Resolve overutilisation at Port Royal Primary School and Purvis Primary School by transitioning students to West End Primary School*

- *Scenario 2: Close Heron Bay Primary School and transition staff and students to West End Primary School*

- *Scenario 3: Resolve overutilisation at Port Royal Primary School and Purvis Primary School and transition students to Paget Primary School*

- *Scenario 4: No schools closing and reorganising.*

Let me emphasise that the SCORE Advisory Committee was mandated to collect and present the data, not to make decisions. In this regard they have offered these scenarios to engage, focus and inform decision-making.

However I encourage all parents and the general public to read the SCORE report in detail as the Ministry is interested in solutions. It is important to note that at this point I am just sharing the data findings as promised. I have not made a decision regarding school reorganization or school closures.

I am not wedded to these scenarios, and I will be seeking feedback on them and possible other alternatives. ..."

125. The Minister stated that the consultation process started that day, 8th February 2016, and would continue for four weeks, ending on 4th March 2016. There would be three public consultation meetings, details of which would be announced. The process was in fact extended to 1st April 2016.

126. To accompany the consultation process, the Government published a consultation document titled School Reorganisation: A Consultation which summarised the findings of the SCORE Report and posed the following consultation questions:

(1) Can you please provide your views on any or all of the scenarios presented in the SCORE Report?

(2) Do you have any alternative scenarios that you would like to provide? If so, be specific and provide a rationale for each alternative.

(3) The SCORE Report includes recommendations to address both overutilisation and underutilisation at schools. Do you think that addressing overutilisation and underutilisation should be a priority in school reorganisation? If so, give your suggestions to address overutilisation and underutilisation?

(4) The SCORE Report includes reference to a 40 square foot per child standard for classroom space. Can you suggest any alternatives t this standard, for example, providing shared resource space that classes can use?

(5) Are there any other comments or suggestions that you would like to make in order to assist in the Minister's decision-making on possible school reorganisation and closure?

127. Standing back and reviewing the consultation process as a whole, the option of convening a working group, ie SCORE, was not consulted upon. But this did not vitiate the fairness of the consultation as the scenarios presented by SCORE were consulted upon. In R (Royal Brompton and Harefield NHS Foundation Trust), Arden LJ noted at para 91 that any public body has a toolbox full of tools at its disposal to deal with objections that need further consideration, and that these tools included engaging in further consultation.

128. On a fair reading, the Ministerial Statement of 29th May 2015 appeared to indicate that the Minister had made up his mind that there should be school

closures or consolidations. But the terms of reference for SCORE indicated that this was not in fact the case. The SCORE Report contained various scenarios as alternatives to school closures or consolidations, and the Minister's statement at the press conference on 8th February 2016 confirmed that he had not made any decision regarding school reorganisation or closure. His statement on that point was consistent with the consultation questions arising from the SCORE Report. As Arden LJ stated in R (Royal Brompton and Harefield NHS Foundation Trust) at para 93:

"*it is inherent in the consultation process that it is capable of being self-correcting*".

129. When the consultation process was launched back in February 2015, an important driver of possible school closure and budgetary reorganisation was the need to find savings within the education budget. However SCORE's terms of reference merely stated that SCORE was required to consider the operating costs of the schools and their costs per student, and the financial costs and/or savings from closure. The Executive Summary of the SCORE Report stated in relation to these questions:

"*The SCORE committee was unable thoroughly to review financial viability, as much of the necessary metrics were unavailable … The Minister required information on possible cost savings. The Financial Subcommittee was unable to make an assessment of possible cost savings. Much of the information required was not readily available.*"

130. At the hearing of this application, Mr Duncan informed me that finding savings in the education budget would not be a material consideration for the Minister's decision on school closure and consolidation. However this change of heart was not apparent from the consultation document, or at least not unambiguously so. Moreover, budgetary savings and financial viability are separate and distinct issues, and were treated as such by SCORE. The Minister's concession related to the former rather than the latter issue. It would be premature to conclude that financial information will play no role in the Minister's decision, and perhaps surprising if it did not.

131. As at the date of the hearing, the consultation process had not yet concluded. As I write this judgment, it has yet to result in a public decision. I was

referred to para 4.7.4 of the well-known textbook, Judicial Review Handbook, Sixth Edition, by Michael Fordham QC, which digests decisions pointing both for and against the court intervening to consider the fairness of a consultation which has not yet resulted in a decision. Arden LJ summarised some of the relevant considerations in R (Royal Brompton and Harefield NHS Foundation Trust), albeit in the context of a provisional but wrong decision in relation to which the consultation was taking place:

"*89. It is of course difficult to know at the earlier stage whether the decision will be persisted in after consultation. Intervention at the earlier stage may also cause wasteful, harmful or avoidable delay, particularly where consultation is conducted on the scale on which it was conducted in this case. On the other hand, there will be cases where it is appropriate to grant some form of relief in relation to a consultation process, not least because applications for judicial review must be made promptly. Nonetheless, the judge may properly conclude that, even though there has been a public law wrong, the matter is best dealt with by refusing relief and allowing the decision-maker to consider the matter following completion of the consultation and an opportunity to take the appropriate action at that stage.*

90. A further reason for caution was suggested by [counsel for the Respondent]. The decision-maker has to balance the interests of several different groups, not simply those represented before the court. The decision-maker may be in a better position to do this effectively and in such as way as to prevent the interests of one particular group receiving inappropriate precedence over the interests of other groups."

132. Mr Matthie submits that irrespective of the Minister's decision, whatever that might be, the scenarios presented by SCORE are insufficiently specific and supported by insufficient reasoning, such that the consultation in relation to them is irremediably flawed. However these bald assertions were not developed before me in sufficient detail to carry much persuasive force. I am, however, satisfied that it would be premature to rule on the lawfulness of the consultation process prior to the Minister's decision as to closure and consolidation.

133. I therefore adjourn the hearing of the application for judicial review of the Reorganisation *sine die*, with liberty to either party to restore within 28 days after the publication of the Minister's final decision on school

reorganisation. If, within that timeframe, neither party lodges a written application to restore, the application will stand dismissed.

Summary

134. The issues before the Court are resolved as follows:

135. As to the Transfers, I shall grant a declaration that prior to 29th March 2015, and as a result of the legitimate expectations on the part of the PTAs of maintained schools recognised by the Court in TN Tatem PTA, the Commissioner was required to consult with the PTA of a maintained school before making a decision:

(1) to transfer a principal to or from that school; or

(2) to transfer a teacher to that school;

irrespective of whether the transfer was voluntary or involuntary.

136. Other than the granting of these declarations, the application for judicial review of the Transfers is dismissed.

137. The application for judicial review of the Rules is dismissed.

138. The application for judicial review of the Reorganisation is adjourned with liberty to restore on the terms stated at para 133 above.

139. I shall hear the parties as to costs.

Dated this 3rd day of June, 2016

Hellman J