OUTER HOUSE, COURT OF SESSION

[2026] CSOH 11

P564/25

OPINION OF LORD CUBIE

in Petition of

MULL CAMPUS WORKING GROUP LIMITED

Petitioner

for

Judicial Review

Petitioner: Mure KC; Balfour and Manson LLP
Respondent: Thomson KC, Blair; Brodies LLP

18 February 2026

Background

[1] Mull is an island community. The provision of education on the island is a matter of interest to the whole community. There are geographical challenges. The construction of a new school with provision for children aged 2-18 was rightly described by senior counsel for the petitioner as a once in a generation opportunity to secure adequate and efficient provision of school education on Mull; the decision challenged, it was said, defined the future of education on Mull for decades. The affidavits lodged for the petitioner make clear the strength of feeling which arises.

[2] The petitioner is a company set up by a number of individuals with an interest in the provision of education in Mull for the purpose of raising these proceedings. The respondent is the local authority responsible for the area and for the decision made about the school site.

[3] The current provision of secondary education on Mull, based as it is in Tobermory means that some secondary school students require to board on the mainland and attend school in Oban because of the travelling commitments which would otherwise arise from attending school in Tobermory. That has obvious implications for the pupils and families and for wider society and integration in Mull.

[4] It is important to indicate the limitations of the judicial review process. It is a challenge to the lawfulness of the decision, not whether the decision was right or wrong. This is not a test of whether the court agrees with the council in their decision; it is a determination of whether the decision, if challengeable, was lawfully made in accordance with their legal obligations. The decision is a discretionary one and must be based on the loss of something of substance before a remedy will be granted.

[5] This judicial review challenges a decision by the respondent on 7 March 2025 in relation to the selection of a preferred site for a new educational establishment. It is not a challenge to other decisions made, in particular it is not a challenge to the decision made in December 2024 to opt for a single campus site as opposed to splitting the provision of education facilities on Mull.

[6] The respondent, as the body having responsibility for the provision of education in Mull, adopted a learning estate strategy 2020-2030 (LES) which set suitability gradings of A or B as the minimum acceptable standard for educational establishments. The campus at Tobermory, which housed, *inter alia,* the secondary school as part of the 2-18 years single site

campus, was assessed as a C. It was the only secondary school in the respondent's estate to be rated C, meaning poor suitability.

[7] The respondent determined to address the disrepair and consequent unsuitability of the Tobermory provision. There was financial support potentially available through the Scottish Government's Learning Estate Investment Programme (LEIP) whereby the respondent could seek funding to replace the school. The LEIP scheme is managed by the Scottish Futures Trust, essentially (and at the risk of oversimplification) a body overseeing public infrastructure projects.

[8] From July 2022 the respondents, through their Executive Director, invited residents of Mull to attend pre-engagement meetings in advance of the bid process. The bid was said to benefit the entire island of Mull. There were meetings on 11 August 2022 at Tobermory and on 7 September 2022 at Bunessan. There were also a series of pupil engagements led by members of the central education team in each of the primary schools, Tobermory High School and pupils who travel to Oban High School. There were over 200 written comments and responses provided through the face to face sessions and the online platforms, with a majority confirming support for the project.

[9] There was some concern about a lack of precise information; Mull and Iona Community Council amongst other community bodies sought information about the bids before the application was submitted to LEIP. The respondent, through their Chief Executive, advised that no specific sites had been set out in the submission for funding.

[10] Any bid for funding through LEIP is subject to certain metrics, terms and conditions, and the processes of stage 3 of LEIP, which include reference to the project development process. That in turn refers to the Royal Incorporation of British Architects (RIBA) stages as a template for the progressing for the project. The RIBA stages are a way of organising the

process of briefing, design, construction and operation of building projects by division into eight stages (slightly confusingly numbered 0-7) providing guidance and explanation for each stage.

[11] Any funding in relation to the project is contingent on the successful outcome of any statutory consultation that is required; on any land purchase/site negotiation that is required for the project being concluded; and on adherence to the metrics, terms and conditions, outcomes and processes of the LEIP. This was communicated to the respondent by letter of June 2022 in advance of the bid.

[12] At a meeting on 29 September 2022 the respondent agreed to proceed with the submission of a LEIP bid as follows:

> "The Council –
>
> 1. noted that the Scottish Government had confirmed the timescales for the next round of the Learning Estate Investment Programme (LEIP) i.e. invited submissions by 31st October 2022.
>
> 2. noted a business case and application was being prepared for a submission to the LEIP process for a new Campus on Mull in line with the adopted Learning Estate Strategy;
>
> 3. noted that pre-engagement activity had been ongoing with the Mull community about the potential LEIP bid between August and 9th September with over 200 representations or feedback received. Further statutory consultation would take place if a bid was made and successfully progressed to the next stage;
>
> 4. noted the financial position and affordability of a LEIP bid as set out in Appendix B to the submitted report which was exempt from publication due to the commercially sensitive and competitive bid nature of financial forecast information contained; and
>
> 5. agreed to proceed with the submission of a LEIP bid by 31st October based on the entirety of the submitted report, priorities specified in the Learning Estate Strategy, financial context and advice from the Section 95 officer contained within Appendix B to the submitted report, pre-engagement feedback contained within Appendix C to the submitted report, and on the basis that if the bid was successful, financial provision as estimated in Appendix B to the submitted report, would require to be made from 2023/4 onwards."

[13] A LEIP bid is a competitive tendering process; there are more bids for funds than funds available. The bid was made on a like for like basis ie that the funds provided would be in relation to the same provision of facilities, including such shared facilities as, *inter alia* an assembly hall, sports facilities and a dining room. This was not expressed in terms in the bid, or the community engagement. The petitioners assert that "the community was led to believe that various options remained open". The bid was published on 22 October 2022. Although the precise details of the dissemination of the bid are not agreed, it is tolerably clear that the information about the bid was disseminated.

[14] The LEIP bid was submitted on 28 October 2022 stating, *inter alia*, that if funding was provided, then it was as a facility for the whole island; a full site selection including community engagement would be completed if the bid progressed. The result of the bid process took a year.

[15] On 30 October 2023 the SGLD advised the project would be included in the phase 3 of LEIP. The letter of 30 October 2023 concluded:

> "Any funding in relation to the project is contingent on:
>
> - The successful outcome of any statutory consultation that is required;
> - Any land purchase/site negotiation that is required for the project being concluded;
> - An expectation that the project will be open to pupils by December 2027;
> - Adherence to the metrics, terms & conditions, outcomes and processes of the LEIP, details of which can be viewed at Appendix ii) – LEIP metrics, terms & conditions and funding outcomes and Appendix iii) – project development process."

[16] The project development process included the RIBA stages.

[17] Following the success of the bid, the respondent had to consider the financial implications of the successful bid. After consideration, the respondent's officers reported on 16 April 2024 on such implications, and whether the respondent wished to proceed. On 25 August 2024, at a meeting of the council, the respondent noted the report and determined that it was affordable "at this time", and agreed to proceed to site selection for the new campus replacing on a like for like basis the existing Tobermory campus.

[18] The respondent in mid-2024 had organised a "Community Sounding Board" (CSB) to assist with engagement, which included representatives of a number of community organisations. At a meeting on 21 August 2024, members of the CSB were advised that the funding secured was on a like for like basis ie a single site campus to include an early learning centre, a primary school and a secondary school.

[19] One of the petitioner's members, Emily Greenhalgh sought advice from the Scottish Futures Trust about the possibility of a spilt site. The response from Steven Anderson of Scottish Futures Trust by email dated 29 August 2024 (number 6/32 of process) said *inter alia*…

> "'if this [split site] proposal was deemed to be the appropriate solution…we would discuss the implication …with the Council, observing 'any doubling up of facilities would add cost as the funding would remain like for like.
>
> I would note that a Campus facility has greater efficiency and affordability than separate PS and HS projects which would need two buildings with two sets of accommodation to meet LEIP requirements, such as Games Halls, Dining and kitchen facilities, admin accommodation, pitch provision, site infrastructure etc. This doubling up of facilities would add additional cost to the proposals and, as the funding position would remain 'like for like' with the existing facility, these extra spaces would not be funded by LEIP."

[20] In August and September 2024 the respondent invited site submissions to identify potential locations for the new campus.

[21] A series of drop-in public engagement sessions were held between 17-25 September 2024, as part of ongoing engagement with the communities of Mull and Iona. Sessions were held in Craignure, Tobermory, Salen, Ulva, Dervaig, Lochdonhead, Iona and Bunessan. Each session was attended by representatives from the Mull Project Team- the respondent's team charged with managing the project- as well as an engagement consultant. Attendees were given the opportunity to view information on boards, talk to the project team, and provide anonymous comments. Any comments could also be returned up until 4 October 2024 via email or an online survey.

[22] The aim was to understand what communities and individuals thought were important factors when assessing the potential sites for the campus. Feedback from these sessions was taken into consideration in finalising the site assessment criteria and the relative weightings of each.

[23] There were a total of 352 respondents contributing comments through various channels: in person (205), online (115), by email (18) and by paper response (14). The majority of respondents were from Tobermory (134), followed by Bunessan and Ross (65) and Craignure (36).

[24] Many people felt that primary and/or early learning provision must be kept in Tobermory, meaning that a split site with a more centralised high school was the most commonly requested solution to providing an equitable and accessible campus.

[25] The respondents issued a number of project updates which included one issued on 27 August 2024 as follows:

> "New Mull Campus - what that means
>
> The Community Sounding Board asked us to be clearer about what the new 2-18 campus on Mull means for education provision in the area.
>
> - The funding is for a like for like replacement 2-18 campus; which is a combined early learning centre, primary and secondary school. The funding was awarded because the existing Tobermory campus continues to deteriorate and requires investment.
>
> - Regardless of the location selected, when the new 2-18 campus opens, the existing Tobermory school buildings will no longer be used to provide education.
>
> - If the location chosen is out with Tobermory this is likely to trigger a review of school catchment areas across the islands.
>
> - There is no intention or plan to close any of the other primary schools across the islands.
>
> - None of the above will impact on a parent's entitlement to make a placing request to a school of their choice."

[26] Update number 6 included the community engagement analysis where 352 people contributed which, *inter alia,* said:

> "Many people felt that primary and / or ELC provision must be kept in Tobermory, meaning that a split site with a more centralised high school was the most commonly requested solution to providing an equitable and accessible campus."

[27] As a consequence of the information obtained from the community engagement events and on analysis of the financial implications for the respondent, a report was prepared for the council meeting on 20 December 2024 (6/33 of process). The report advised that if there were to be a split site solution then there would be additional capital costs of £11-12 million and annual costs of between £0.6 and £1 million which would need to be funded by the respondent; the report indicated that was unaffordable.

[28] The report said, *inter alia*:

> "4.4.3 Discussion has taken place with the Scottish Government LEIP team, including a joint meeting held at the request of community representatives. This confirmed that the funding metrics for LEIP are set and are on a 'like for like' basis, and no additional funding can be provided for duplicate facilities such as dining halls, gym halls and sports facilities. Furthermore, the Scottish Government have also committed to additional 'locational' uplift factors for island locations and have forecast that a 40-50% award is a fair reflection of the project funding at this stage for a campus. Any additionality would need to be fully funded by the Council. The potential increase equates to a one third increase over a campus solution and is unlikely to be affordable.
>
> 4.4.4 Aside from the cost impact, the Council's education service considers that there are significant educational benefits of a 2-18 campus model compared to separate primary and high school facilities, particularly in a rural island setting. These are outlined in more detail in Appendix 3 and include transitional benefits with a consistent approach to the child's education for the entire length of their time in education, access to specialist teaching for primary age children, sharing of resources and promotion of intergenerational learning."

[29] The report also addressed the educational benefits indicating that the educational benefits favoured a single campus; that conclusion was informed by a report from the respondent's chief education officer which said:

> "The development of a single site new campus on Mull will see children and young people benefit from a well-resourced single site which retains capacity to meet any future needs as they arise. The single site offers more effective use of resources and reduces duplication. Opportunities for senior young people to take on leadership and mentoring roles across the whole campus will be improved. The model also gives the opportunity for a culture of shared practice and collaboration which enriches both teaching quality and pupil outcomes, creating a supportive learning environment across all age groups. The advantages of this model, for pupils and parents, are clear. Children can make secure and long-lasting friendships, enjoy a familiar environment and facilities, and feel well known and supported by their teachers, as well as benefiting from a continuity of approach, ethos and community. By reducing the number of physical transitions, a 2-18 campus provides an emotionally supportive environment that allows pupils to focus on learning rather than adjusting to new systems. By providing a cohesive, consistent learning environment, a 2-18 campus helps pupils to reach their academic potential, develop social skills and maintain a strong support network. On a practical level, the morning school-run is simpler if siblings can be dropped off at the same place; there is a single school calendar to deal with rather than several sets of dates and events; and one set of teaching staff to get to know, over a longer period of time."

[30] On 20 December 2024 the respondent decided to proceed with a single site basis for delivery of a new Mull campus; the decision was as follows:

> "The Council gave consideration to a report providing an update on the Learning Estate Investment Programme (LEIP) Mull 2 – 18 campus project which was at site selection stage.
>
> Decision The Council –
>
> 1. Acknowledged the work done to date to progress this significant project which aims to deliver a new campus for Mull;
>
> 2. Welcomed the engagement that has taken place and thanks the residents and communities who have taken time to share and contribute their views;
>
> 3. Noted that the possibility of a split-site option for the Mull Campus was raised as part of the engagement work and has been explored in both educational benefit terms and the Scottish Government's Learning Estate Investment Programme (LEIP) funding metrics;
>
> 4. Having regard to the information provided in respect of educational benefits elements and funding metrics, and the advice of the Council's Chief Financial Officer that a two-site Mull Campus would not be affordable, agreed that the process would continue on a single-site basis for delivery of a new Mull Campus;
>
> 5. Noted the unanimous view of the community in Iona in relation to their removal from the scope of the project, and agreed that this is given effect to;
>
> 6. Agreed the updated timeline set out in the report in relation to a further paper with recommendations in relation to a site for the Mull Campus being brought forward for consideration by the full Council."

[31] As can be seen, the respondent determined that having considered the possibility of a spilt site, the process would continue on a single site basis, based on the educational benefits, the funding metrics and the advice of the chief financial officer.

[32] As indicated the site selection process had been ongoing since mid-2024. Having reached a conclusion about the nature of the project, a 2-18 campus, on 20 December 2024, the respondent moved to consider site selection in more detail and in the context of the

decision about the nature of the provision. By email dated 6 January 2025 the Mull Campus Project Team asked Community Sounding Board members to complete an island impact assessment pro-forma. Mull Community Council and other community groups responded that there was insufficient time and information for an informed response. The Mull Campus Project Team declined to provide further information or time.

[33] Instead of responding to the proforma, Mull Community Council organised its own survey between 31 January - 9 February, (production 6/9) reporting on its website on 14 February that one form or other of the split site was favoured by 63% of respondents; the survey reported that if a single site was to be progressed, Tobermory would be the preferred location. That survey was provided as part of the material available to the councillors in advance of the meeting on 27 February 2025. The survey was conducted using SurveyMonkey.com. 665 responses were received representing about one fifth of the population of Mull, although 10% of those responding did not live on Mull or surrounding islands.

[34] The survey had asked the respondees to select from four options for a preferred new school as follows:

> "• CENTRAL Secondary and TOBERMORY ELC/Primary - Primary would remain in Tobermory, and only the Secondary school would be located centrally
> • CENTRAL ELC/Primary and Secondary campus, plus TOBERMORY ELC / Primary - A new 2-18 campus sited centrally, but the ELC and Primary catchment would be focussed on the new school rather than serving Tobermory. Tobermory would retain its ELC and Primary, but some other existing primary and ELC provision on the island may be relocated to the new school.
> • TOBERMORY ELC / Primary and Secondary campus - A new 2-18 campus in Tobermory for Early Learning, Primary and Secondary
> • CENTRAL ELC / Primary and Secondary campus - A new 2-18 campus at a central location for Early Learning, Primary and Secondary. All schooling in Tobermory (including ELC and Primary) would move to the central site."

[35] (I pause the narrative to observe that the first two options were not realistic options. Each such option anticipated a split site. The respondent had rejected a split site for both educational and financial reasons. This had been done on 20 December 2024 and was not the subject of any challenge.)

[36] The meeting of the elected members due to proceed on 27 February 2025 was to decide on preferred site selection. The respondent had identified a long list of sites after the call for sites; this included four sites at Tobermory which were not shortlisted. There was an analysis of the four short-listed sites with a number of metrics applied. The considerations relevant to site selection were set out in a number of appendices. This was done to allow the elected members to make an informed decision.

[37] The four sites shortlisted were at the existing site of the Tobermory campus: at Tobermory South, and sites at Craignure and Garmony, both on the east coast of the island.

[38] In advance of the meeting on 27 February the elected members received, *inter alia*, a site scoring outcome sheet, comparing the short-listed sites against an objective set of criteria (production 6/6). As a consequence of the site scoring exercise, the Tobermory South site received 645 points, the site at Craignure received 628 points, the existing Tobermory site 625 points and Garmony 546 points. Garmony was regarded as not a viable option. The officials recommended, in terms of the site scoring, that the Tobermory South site be the preferred site (6/2 of process). The criteria and site scoring is not challenged other than as described in the following paragraphs.

[39] Craignure, the location of one of the short-listed sites, is a village and ferry port on the east coast of Mull; the particular site which was shortlisted was primarily owned by TSL Contractors Ltd, a company controlled by Mr Andrew Knight; other land which may

have been required was privately owned by him and his wife. (The precise dimensions of the site necessary was yet not established.) TSL owned adjacent land which had planning permission for a 97 unit housing development.

[40] On 26 February 2025 Mr Knight and his wife offered to gift the Craignure site to the respondent to construct the new school in the following terms:

> "26th February 2025
>
> Clarification of position in relation to offer of site at Craignure for the proposed Mull Campus.
>
> In our capacity as landlords for the area of ground in question, we have been feeling conflicted in relation to our personal financial gain, verses our wish to facilitate the construction of a school in a location which enhances the education experience for secondary school children residing in all areas of the island.
>
> Our conclusion is that we will offer to gift our Craignure site (Site 2) for the purpose of constructing the school. This will be offered free of charge, on the understanding that the proposed 97- unit housing project located adjacent, gains a benefit from shared infrastructure, which would also assist with the Council's declared Housing Emergency, and create a meaningful Public/private partnership to benefit the Mull community and Argyll and Bute Council.
>
> There would also be significant cost savings in undertaking a common site preparation strategy, which would be of considerable financial benefit to BOTH projects."

[41] The Mull Campus Team responded advising that elected members would be advised.

[42] At the meeting on 27 February 2025, it was agreed to defer the discussion and decision on the preferred site recommendation until 7 March 2025.

[43] In advance of the meeting due to proceed on 7 March, a supplementary paper (6/4 of process) was prepared for the elected members date 28 February 2025, making reference to both the survey by Mull Community Council and the letter from the Knights as follows:

"Mull Community Council survey

1.1 Mull Community Council advised Council Officers on 24th January 2025 that they had decided to conduct their own survey which they intended to inform Councillors' decision making.

1.2 This survey ran from 31st January to 9th February 2025 and sought community views on location options for a campus and for a split site (two new schools). The survey findings outline that 665 responses were received. The split site options are not within the agreed scope of the Mull Campus project following the decision made by the council on 20th December 2024 to progress the project on the basis of one school campus on a single site.

1.3 Members are invited to review the results of the survey - which include both qualitative and quantitative information - to inform their decision making, this is available on the Mull Community Council website: Mull Campus Survey - Summary of Findings 14th February 2025 (a hyper link to the survey was provided)

Feedback from Landowner – Site 2 Craignure

1.4 A letter dated 26th February has been received from the owners of 'Site 2 - Craignure' outlining their intention to gift the entirety of the proposed site to the Council. The offer is conditional upon the delivery of commensurate infrastructure to deliver an adjacent housing site. This aspect is already referenced to as a 'strength' of the Craignure site at Para 4.7.2 of the report and has been taken into consideration in the technical assessments. The offer must also be considered by Members in the context of Appendix 1L 'Valuation Reports' (January 2025 - Publicly Exempt) noting that detailed land purchase negotiations (if required) with landowners will be undertaken once a preferred site has been selected and Full Business Case is progressed.

1.5 Following a review of the survey and landowner letter, Council Officers advise that there is no change to the recommendations contained within the site recommendation report. Officers do draw attention to the community survey which Members have been invited to review."

[44] This was prepared without further consultation with the Knights.

[45] As a result of the offer from the Knights, a director of the petitioner, Joe Reade, recalibrated the site scoring exercise to take account, as he saw it, of the offer to donate the site. He scored the Craignure site at 649 by adjusting the scores for affordability (from 7 to 10) and for risk, in relation to wayleaves, legal restrictions and site acquisition (from 7

to 9). The re-scoring (together with a copy of the Knights' letter) was sent to all councillors and the relevant officials of the respondent by email of 6 March 2025.

[46] The email from Mr Reade, *inter alia*, said:

> "Your Officials' recommendation to proceed with the Tobermory site is no longer valid in the light of these material changes.
>
> The Mull Community Council Survey [a copy of which was attached to the email] clearly shows that only 8% of the community (from a huge sample size of 20% of the population) support what must now be officials' recommendation, according to their own criteria.
>
> The other option offered to you (a single Tobermory campus) is the second-least favoured option, with only 29% support. Councillors are being asked to make a choice between options that are their constituents' two least-popular options. An overwhelming majority (63%) favour some form of split-site solution, yet that is not even on the table. These new results demonstrate an even wider gulf between community and officialdom.
>
> The community's choice of a split campus, (with the High School on the Craignure site and Primary/ELC retained in Tobermory) has all of the benefits of what is now the top-scoring Craignure option, without most of its down-sides. A unitary Craignure 2-18 campus scores badly when considering economic impact and travel times, because it is founded on the bizarre proposition that the youngest children from age 2 through 11 would be made to travel 21 miles twice per day. In a split-site scenario it would only be Secondary-age Tobermory pupils undertaking that journey, making the social and environmental impact far far less. These results indicate that if given the opportunity to be objectively scored, a split-site could be far ahead of any other option. Councillors must surely now recognise that the split-site option must be given the same detailed examination afforded to the two deeply unpopular and divisive unitary-campus options.
>
> On top of this, the Council's fag-packet estimations of the cost of a split site do not bear scrutiny. There are choices to be made that with the benefit of thorough and sincere community consultation, would arrive at mutually agreed compromises that would achieve the greatest common good. There is no option, either on the table or imagined, that does not involve some degree of compromise for some part of our community. But unless the Council engages with the whole island in good faith to find those compromises, you will end up imposing a solution that suits only a minority. That is exactly what you risk doing by approving either of the two 'choices' your Officials have decided to offer you.
>
> The only fair, democratic and pragmatic course of action is to refuse to be corralled into making a choice between bad and awful. Please insist that the split-site option is assessed fairly, with all the same rigour and objectivity given to those currently

> in front of you. Please work with the community to engage with Scottish Government and make the LEIP funding criteria island-proof. Please insist that this project is paused, and makes a sharp course correction. Elected members and officials need to engage in good faith with the community to work though the compromises, to find the solution that delivers the greatest common benefit to the whole island."

[47] The respondents met on 7 March 2025. Mr Hendry addressed the meeting about the up to date position; saying in essence that the purported offer of Craignure for free was not "strictly accurate" - the council would require to undertake infrastructure investment and provide access to the adjacent housing development, with potential financial implications; he also said that the re-scoring provided by Mr Reade did not alter the validity of the advice or the recommendation.

[48] The minutes reflect the outcome as follows:

> "The Council - 1. noted the contents of the report and supporting Appendices;
>
> 2. endorsed the site scoring mechanism, criteria and supporting assessments which were consistent with criteria categories commonly used for site selection on previous Council school projects;
>
> 3. confirmed Site 4 - Tobermory South as the preferred site for a new Mull Campus and agreed to progress the Outline Business Case on that basis;
>
> 4. noted that as the preferred option would constitute a proposal to relocate the existing campus, a statutory consultation would be legally required under the Schools (Consultation) (Scotland) Act 2010, the outcome of which would be reported back to full Council upon completion of that process; and
>
> 5. in making their decision in accordance with recommendation (b), above, had specific regard to the detail of the Integrated Impact Assessment (Appendix 1K) on the potential impacts to the relevant groups on Mull and its surrounding islands, as detailed therein, recognising that each site presented different benefits and disbenefits to these distinct groups."

[49] It is this decision which is subject to challenge.

[50] The first issue is that of competence; the respondent argues that the petition is incompetent in that the decision is not susceptible to review.

[51] The petitioner argues that:

- The council failed to inform itself and the members about the offer to gift the Craignure site by the Knights;
- The council acted irrationally in putting to its members a choice predicated upon the closure of all education provision in Tobermory, thereby failing to adequately consult the community on Mull before it took the decision complained of; and
- The council failed to adhere to its own standing orders.

Preliminary matter - use of affidavits

[52] Both parties lodged affidavits; there was a note of objections to the affidavits lodged at the eleventh hour by the petitioner. I understood senior counsel for the respondent to conclude that it was for the court to make what it chooses of the affidavits, subject to the observation that these reflected firmly held views indicating strong disagreement, but which do not relate specifically to the unlawfulness of the decision.

[53] The respondent had to reach a decision against a background of any decision being unsatisfactory to some; certain criticisms - bad faith for example - were not pled, or purported promises made. Strong opinion, however strongly expressed, represented advocacy for the petition and not evidence. And strength of feeling does not heighten the legal obligations upon the respondent.

[54] I accept, as senior counsel for the petitioner submitted, that the affidavits did give a useful insight into the context of the decision; it was accepted for the petitioner that all of school age in Mull need to have safe and efficient school accommodation. I have read all affidavits and so far as relevant have taken these into account.

Competence

Respondent's submissions

[55] The respondents submit that the petition is incompetent. It is axiomatic that not every decision of a local authority can be challenged. There was no decision taken which was within the supervisory jurisdiction of the court. The respondent did not deprive anyone of an existing right, benefit or procedural or substantive legitimate expectation. The respondents, in applying for LEIP funding, were obliged to follow the terms and conditions of the funding which included adherence the RIBA process. That meant from the outset they were required to undertake stage 0, including identification of a preferred site. That was a bilateral agreement between the respondent and the funders, and not susceptible to review.

Petitioner's submissions

[56] The petitioner argues that the decision taken in March falls within the supervisory jurisdiction of the court; any such analysis requires the court to consider the nature and importance of the decision. The decision was made within the context of the Education (Scotland) Act 1980. That was the source of the power to build any new school on Mull.

[57] Funding was important but the petitioner submitted that the key question was where the new facility is built. If it is built in the wrong place, then the provision of school education will be inadequate and inefficient - so the importance is self-evident - and the material provided to the elected members demonstrated that. In the instant case the respondent's power as local education authority was conferred by statute; the analysis of

the tripartite relationship cannot stand in the way of the proper enforcement of the rule of law; and in any event even in contractual cases, such a decision can be amenable to review.

[58] It is the decision of the preferred site which is challenged. If the issues of the offer to gift and the consultation were held to be well made, then the rule of law dictated that the decision be susceptible to review; there will be no other opportunity to look at site selection. Any statutory consultation in terms of the Schools (Consultation) (Scotland) Act 2010 is predicated on the south Tobermory site.

[59] The invocation of RIBA cannot exclude the scrutiny of the supervisory jurisdiction of the court. The decision making in relation to the nature and location of the campus must be amenable to the court's supervisory jurisdiction.

Considerations and decision on competence

[60] I observe that despite the petitioner's submission about this decision being "in relation to the nature and location" of the campus (the same phrase was used in submissions and in the helpful speaking note prepared in advance), this decision was truly about location. The nature of the campus - a split site - was determined and does not form part of this challenge. Senior counsel for the petitioner expressly disavowed any challenge to that aspect of the process.

The law

[61] In *Stannifer Developments Ltd* v *Glasgow Development Agency* (No 2) 1998 SCLR 870 at first instance Lord McFadyen said at p 889:

> "A number of factors can, in my view, be regarded as gateways on the path leading towards the conclusion that a duty of procedural fairness was incumbent on a decision-maker in the process leading up to a particular decision. That the

decision-maker is a body constituted by statute for a public administrative purpose, as the respondents in the present case are, is in my view one such gateway, although (because of the broader basis of the supervisory jurisdiction in Scotland) there may be other parallel gateways which give admission to the same stage of the path. That the decision is one made in exercise of a statutory power, or circumscribed by a statutory duty, gains admission to a further stage of the path. As Waller J. said in *R.* v *Lord Chancellor, ex parte Hibbit and Saunders* (transcript p. 13):

> 'The fact that a body is exercising a statutory power will entitle the court to consider whether there must be implied an obligation, for example, to act fairly.'

In other words, the presence of statutory underpinning is not per se a sufficient condition for the presence of a duty to act fairly. Waller J. (earlier on the same page) made the point that the mere fact that a governmental body entered into a contract in the course of carrying out governmental functions did not necessarily give rise to obligations over and above those constituted under the contract, and added that there was no justification for distinguishing pre-contract negotiations from the contract itself."

[62] The Inner House in agreeing with Lord McFadyen said in *Stannifer Developments Ltd* v *Glasgow Development Agency (IH)* 1999 SC 156 at p 164:

> "No doubt there are cases in which it falls to a body exercising statutory powers to act fairly having regard to the interests of those affected by the exercise of those powers. An obvious example is when the body requires to reach a quasi-judicial decision as between such persons. Another may be where the exercise of the power would deprive persons of some existing right or benefit. An example of the latter situation may be found in *R v Barnet London Borough Council ex parte Varies House School Ltd*, which was concerned with consultation prior to the disposal of land held for educational purposes. There is, however, no general rule that a body seeking to exercise a statutory power is under a duty to act fairly, and accordingly that its exercise of that power is not valid unless it has done so."

[63] The Inner House looked at the matter again recently in *Redcroft Care Homes Ltd* v *Edinburgh City Council* 2025 SC 103:

> "Supervisory jurisdiction
>
> [30] In *Abundance Investment Ltd* v *Scottish Ministers*, Lord Clark carried out an extensive review of the authorities on the scope of judicial review. Under reference to *dicta* in *West* v *Secretary of State for Scotland*, *Crocket* v *Tantallon Golf*

Club and Wightman v *Secretary of State for Exiting the European Union*, Lord Clark said (para 42) that:

> '[I]t is clear that the tripartite relationship test [in West] cannot stand in the way of the proper enforcement of the rule of law. In judging whether or not the supervisory jurisdiction is competently invoked, it is necessary to examine the act or decision under challenge and the basis of that act or decision'.

The court agrees with that analysis.

[31] Specifically in relation to the situation in which a decision is made in the context of a contractual relationship, Lord Clark explored the authorities (*West* v *Secretary of State for Scotland*; *Watt* v *Strathclyde Regional Council*; *Blair* v *Lochaber District Council*; *Dryburgh* v *NHS Fife*) and determined (para 46) that:

> 'There are therefore several judgments, including from the Inner House, which support the proposition that decisions made by a contracting party in relation to rights and obligations under the contract are not, as such, amenable to judicial review by the other contracting party. If the decision could also be characterised as one taken in the exercise of a statutory power or in the implement of a statutory duty, which, by its nature, was bound to affect all of those in respect of whom the jurisdiction conferred by the statute was to be exercised, then (as observed in *West*) that is a different matter. Similarly (as also observed in *West*) if the party whose decision is challenged was, in making the decision, performing any function independent of its position as the other contracting party, that is again a different matter. Thus, decisions made by the other contracting party on these wider grounds can be amenable to judicial review.'

The court agrees with that statement. The question is how it applies in this case."

[64] In addition, reference was made to *AXA General Insurance Ltd, Petitioners* 2012 SC (UKSC) 122 where the supreme court looked at the power to challenge the Scottish Government; in analysing the supervisory jurisdiction of the court Lord Reed said at paragraph 169:

> "The essential function of the courts is however the preservation of the rule of law, which extends beyond the protection of individuals' legal rights. As Lord Hope, delivering the judgment of the court, said in *Eba* v *Advocate General for Scotland* (para 8):
>
> > '[T]he rule of law . . . is the basis on which the entire system of judicial review rests. Wherever there is an excess or abuse of power or jurisdiction which has been conferred on a decision-maker, the Court of Session has the power to correct it (*West* v *Secretary of State for Scotland*, p 395). This favours an unrestricted access to the process of judicial review where no other remedy is available.'

> There is thus a public interest involved in judicial review proceedings, whether or not private rights may also be affected. A public authority can violate the rule of law without infringing the rights of any individual: if, for example, the duty which it fails to perform is not owed to any specific person, or the powers which it exceeds do not trespass upon property or other private rights. A rights-based approach to standing is therefore incompatible with the performance of the courts' function of preserving the rule of law, so far as that function requires the court to go beyond the protection of private rights: in particular, so far as it requires the courts to exercise a supervisory jurisdiction."

[65] Having considered the submissions and the authorities, I need not go so far as to invoke the *AXA* test of this being a case where the supervisory jurisdiction be considered beyond the protection of individuals' legal rights. I am satisfied that, on the basis of *Stanniforth* and the considerations in that case, the discrete decision of the respondent on 7 March 2025 is amenable to the supervisory jurisdiction of the court. That category is not closed or tightly defined and although not all decisions are so susceptible, for the following reasons I consider that the challenge can be competently made.

[66] The decision to select a site has implications for the educational provision in the island, so flowed from the respondent's statutory powers; it is not necessary for the decision to deprive a party of a right, benefit or legitimate expectation; the respondent as local education authority has the power to decide how to meet the provision of education; that decision does or is capable of affecting all of those in respect of whom the statutory jurisdiction was to be exercised.

[67] The council's decision making in relation to the location of the campus is amenable to the supervisory jurisdiction of the court of session. The action is accordingly competent.

Challenge to the decision made on 7 March 2025

The first ground

The offer from the Knights

[68] The first argument for the petitioner relates to the purported failure of the respondent to make further enquiries about the offer from Mr and Mrs Knight to gift the site at Craignure to the respondent for the new campus to be built.

Petitioner's submissions

[69] Craignure was included in the site selection process and was on the shortlist. The Knights offered by letter of 26 February 2025 to give the land to the respondent. It was submitted that the respondent's reply demonstrated a lack of interest in the offer; it was submitted that the observations by Mr Hendry (in his report at 6/14 of process) misconstrued the offer and did not seek to clarify. Although Mr Hendry's affidavit mentioned the need for proper consideration to be given to the renewed offer, that the meeting proceeded on 7 March 2025 was irreconcilable with that position.

[70] The letter, it was said, did not mention access to the adjacent housing development; infrastructure in the context of the letter meant services - electricity, sewerage, and site preparation; it was submitted that self-evidently savings to both parties would arise; the council should have verified the terms of the offer.

[71] It was asserted that the site acquisition costs were not part of the stage 0 considerations. The RIBA argument was not persuasive; acquisition costs were relevant (affordability was a factor); it was said that the offer was of a gift, not an overture for negotiations. It was irrational for the council to ignore the material factor that the acquisition costs would be nil. If The RIBA stage 0 was about strategy, then the fact that

there were no acquisition costs were relevant. Further the excuse of RIBA was not raised at the time with the Knights, or in advice to the elected members, but in the answers for the first time some 6 months after the event. The additional report from Mr Hendry of 28 February misrepresented the offer. The offer was not "feedback"; it was not, as the report represented, conditional upon the delivery of commensurate infrastructure to deliver an adjacent housing scheme.

[72] The Knights offered savings; that was for some reason passed on to elected members as additional costs; the elected members should have been told about the proposition. The report also reiterated that one of the strengths of the site was the possibility of shared enabling works; in the context of the recognition of the potential savings, the failure to advise elected members in terms of the enhanced offer was a failure.

[73] The effect of the offer was also to skew the scoring criteria materially; if the acquisition costs were for later discussion, on what basis were the different scores being allocated to the respective sites? If acquisition costs were relevant then an offer of a free site must be material; if acquisition costs were not relevant then why have any purported analysis of such costs?

[74] The difference which it would have made, assuming that it is relevant, is shown by Joe Reade's re-scoring (compare 6/6 and 6/8 of process). The effects of this was to put Craignure ahead of Tobermory south in the weighted totals; it was not in fact necessary to show that Mr Reade's calculations were completely accurate; the very potential for a material change is enough for this argument to succeed; the council should have embarked on a proper re-consideration of the sites in the context of the offer; it was a gift, not a negotiation for the site.

[75] The respondent argued that it would not be appropriate to have separate and discrete discussions with one site owner; but the offer was clear. The respondent argued that the "desk valuations" have a levelling effect; it was not the time to engage with owners; if that was the case then all valuations may be wrong. The decision not to investigate was irrational.

[76] No delay would have been occasioned of any materiality even if the investigation could not be concluded, at least the elected members would have had an accurate account of the letter. Even if it would not necessarily have been decisive, it plainly should have been provided to the elected members; the failure to undertake such enquiry rendered the decision unlawful. In the circumstances, no reasonable council, possessed of the information the respondent had, would have failed to make further enquiries.

The respondent's submission

[77] The respondent submitted that any purported duty had to be seen in the context of the RIBA stage 0. The offer was subject to detailed considerations. In the short time available and in the context of the purpose of the meeting, and the stage in the process, the obligation on the council was not absolute. The requirement is only to take such steps to inform themselves as is reasonable; the decision-maker determines the manner and intensity of the requirement; even if such enquiries would have been preferable that does not merit the intervention by the court. Only if no reasonable local authority would have declined to enquire further can the court intervene.

[78] In the context of the RIBA stages, which had to be worked through consequentially, the decision to make no further enquiries was intelligible and lawful; the affidavits of

Ross McLaughlin and Diane Forsyth explain the rationale; the use of desk-based valuation was established procedure.

[79] The petitioner's assertion that this was some kind of unconditional offer capable of *de plano* acceptance and thus forming a basis for revisiting the valuation was simply wrong; on any view it invited negotiations. It was implicit in the offer that there would be discussion about the shared facilities costs; more detailed information in discussion would be required; such information was for RIBA stage 1 or 2; it was not unreasonable or irrational to make no further enquiry. Flowing from that was the conclusion of Mr Reade's contribution of re-scoring the site selection matrix; that added nothing, based as it was on a particular analysis of the Knights' letter.

[80] In any event, even if there was a flaw in Mr Hendry's approach and the supplementary report, it was irrelevant because it was not appropriately considered at stage 0 of the process.

Decision on the Knights' letter

[81] To a large extent the petitioner's position proceeds on the basis that the letter from the Knights was in the form of a clear, unambiguous, unconditional offer to transfer the site to the respondent with no consideration sought or expected, and that being the case the respondent's decision to not make further enquiry was irrational.

[82] But I do not read the letter quite in that way; I do not accept that a reasonable person could have looked at the words used in the letter and regarded them in that unconditional way. That might have been the position had the Knights offered a parcel of land in which no other interest arose, but the offer cannot be seen in a vacuum.

[83] Mr Knight, from the terms of his own affidavit, is plainly a successful and resourceful businessman, providing material employment on the island and having 40 years of experience in the construction industry, including work done for the respondent; indeed he and his wife had previously gifted ground for the Helipad used for Medivac. His contributions to the community have been material and his commitment to the community cannot be gainsaid.

[84] But as his own affidavit makes clear the offer was made "on the basis that there would be collaboration in terms of shared infrastructure between the school and the adjacent 97 unit housing development".

[85] He goes on to say that "there are obviously significant savings derived from cooperation".

[86] He continues

> "I have been asked to provide broadbrush figures on how the collaboration might benefit the campus project commercially, however this is difficult due to there being a number of unknowns as present".

[87] He anticipated amalgamating the projects and indicated a number of potential areas of cooperation and mutual benefit. He concludes (emphasis added) "Obviously, there was further work to be done in considering the offer…it was a statement of intent".

[88] I do not consider that Mr Hendry in his report dismissed the offer, nor was he calling the integrity of Mr Knight into question; the report reflected what Mr Knight has said himself, that further work had to be done in considering the offer. It is perfectly intelligible and not in breach of the council's obligations to make reasonable enquiries, for the council to decline to do so. As senior counsel for the respondent submitted, it was not an offer susceptible to a *de plano* acceptance.

[89] But in any event, I consider that the LEIP funding included an implicit commitment to the RIBA process and the stage reached by the respondent was stage 0. Senior counsel for the petitioner sought to characterise this as a red herring. But the use of the RIBA stages was intelligible, even if I were to accept that it was not mandated by the LEIP process. Stage 0 contained a set of metrics (informed by community engagement) for the site selection process which included acquisition costs, done by way of a desk valuation; all sites were measured against the same set of criteria before particular aspects of the site were subject to further analysis and consideration; in his affidavit Mr McLaughlin makes it clear that the RIBA stages provided at stage 0 that the respondent assessed information already available to them, to carry out the initial appraisal exercise on a desktop basis. Potential site costs were informed by an independent valuer report which was carried out for all shortlisted sites and used as a basis for assessing the potential site acquisition cost scoring criteria (paragraph 37 of his affidavit). The extent of the engagement was whether the respective landowners would be prepared to relinquish the land. The question of site procurement would arise only at stages 1 and 2.

[90] The issue is whether, in declining to investigate the offer from the Knights any further, the respondent acted irrationally.

The law

[91] In *R (on the application of Plantagenet Alliance Ltd)* v *Secretary of State for Justice and others* [2015] 3 All ER 261, the Court of Appeal considered this matter:

> "Duty to carry out sufficient inquiry/Tameside duty
>
> [99] A public body has a duty to carry out a sufficient inquiry prior to making its decision. This is sometimes known as the Tameside duty since the principle derives from Lord Diplock's speech in *Secretary of State for*

Education and Science v *Metropolitan Borough of Tameside* [1976] 3 All ER 665 at 696, [1977] AC 1014 at 1065, where he said: '[T]he question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?'

[100] The following principles can be gleaned from the authorities:

(1) The obligation upon the decision-maker is only to take such steps to inform himself as are reasonable.
(2) Subject to a *Wednesbury* challenge (see *Associated Provincial Picture Houses Ltd* v *Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223), it is for the public body, and not the court to decide upon the manner and intensity of inquiry to be undertaken *(R (on the application of Khatun)* v *Newham London BC* (Office of Fair Trading, interested party) [2004] EWCA Civ 55, [2004] LGR 696, [2005] QB 37 at [35] per Laws LJ).
(3) The court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision (*R* v *Kensington and Chelsea Royal London BC, ex p Bayani* (1990) 22 HLR 406 at 415 per Neill LJ).
(4) The court should establish what material was before the authority and should only strike down a decision by the authority not to make further inquiries if no reasonable council possessed of that material could suppose that the inquiries they had made were sufficient (per Schiemann J in *R* v *Nottingham City Council, ex p Costello* (1989) 21 HLR 301; cited with approval by Laws LJ in (*R* (*on the application of Khatun)* v *Newham London BC* at [35]).
(5) The principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant, but from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion (*R* v *Secretary of State for Education*, *ex p Southwark London BC* [1995] ELR 308 at 323 per Laws J).
(6) The wider the discretion conferred on the Secretary of State, the more important it must be that he has all relevant material to enable him properly to exercise it (*R* v *Secretary of State for the Home Dept*, *ex p Venables, R* v *Secretary of State for the Home Dept, ex p Thompson* [1997] 1 All ER 327 at 378, [1998] AC 407 at 466)."

[92] The petitioner submitted that no reasonable council possessed of the information from the Knights would have failed to make further enquiry even if a delay had been

required. I do not agree with that conclusion. There was no obligation to make further enquiries in the context in which a late, unilateral, qualified approach was made.

[93] The legal test provides that the enquiries made need only be reasonable, and it is for the respondent to determine the nature and intensity of the inquiry; the test was not the desirability or usefulness or sense of the inquiry; on the material before the respondent, a court should only intervene if no reasonable council possessed of that material could suppose that the inquiries they had made were sufficient.

[94] As I have explained, the respondents were following a mandated, or at least intelligible process; that involved measuring each prospective site against the other on the basis of available material on an identical basis; there was no engagement in the procuring of the land. The precise terms of any such contract was for a later stage; and in any event, the letter opened a negotiation; it did not determine the precise terms of an acquisition. There was no failure in the respondent's actions in declining to undertake further inquiry in response to the Knights' letter. The challenge in that respect fails.

[95] I am fortified in the conclusion by the decision in *Ibrahimi* v *GCC* 2026 CSIH 4 where the Inner House said:

> "[41] Finally, the reclaimer argued, in reliance on *Education Secretary* v *Tameside BC* [1977] AC 1014 at 1065, that the respondent failed to take reasonable steps to acquaint itself with the relevant information to enable it to assess the reclaimer's age as accurately as possible. This contention cannot succeed. As the Lord Ordinary noted, the court will only intervene if no reasonable decision-maker would have been satisfied, on the basis of the inquiries made, that it possessed the information necessary for the decision."

Second ground

Irrational decision based on a failure to consult

[96] The petitioner addressed the second and third grounds of review in the same submission, in effect that the lack of consultation meant that the nature of the final site selection was rendered irrational by the failure to consult.

Petitioner's submissions

[97] The petitioner contended that the failure to adequately consult made the decision unlawful and reducible. The petitioner accepted that the Schools (Consultation) (Scotland) Act 2010 requires consultation on a relevant proposal. Given that the schools on Mull are rural schools, the proposal is a relevant proposal because it anticipates a closure. There will be consultation in terms of that Act.

[98] But it was submitted that the statutory consultees are restricted to "any affected school" - the affected schools are Tobermory schools, excluding the wider community on Mull; so such consultation will not give a voice to that wider community; similarly, the planning procedure would not include the wider community.

[99] The respondent denies any consultation (answer 21); that was described as "startling". Given the importance of the decision as a once in a generation provision of secure and efficient educational provision; that decision defined the future of education for generations; if any decision required consultation it was this decision.

[100] The respondent had spent some time and resources formulating the proposal to replace the existing Tobermory schools. But despite that there was no systematic and wide-ranging consultation; there was nothing which could constitute consultation despite the speaking notes of Kirsty Flanagan, Executive Director of the respondent, who said "We

have heard from officers on the thorough process and consultation that has been carried out".

[101] The petitioner denied that there had been any process and that any purported promise of consultation (for example given to Susan Penney affidavit number 38 of process) only made mention of the statutory consultation which would be under the 2010 Act. This would not be a pan-island consultation.

[102] The petitioner also denied there had been community engagement. The respondent explained this occurred in summer/autumn 2024 (production 6/56 of process). This was on a like for like basis, so the council had decided to proceed with one campus and called for sites. The petitioner submits that there was a lack of clarity for the respondees. A number of the affidavits expressed dissatisfaction at the information provided by the respondent.

[103] The petitioner maintains that there has been no consultation in relation to where the new campus would be and that whatever engagement there was fell short of the consultation appropriate to the importance of the project.

[104] Moreover, any purported engagement was inadequate. The island community impact assessment was trailed by a single page document from the Mull Campus Team; again the document (production 6/66 of process) showed that the respondent had reached the point of providing a new 2-18 school and community campus on a single site on Mull, part funded by the Scottish Government. The final decision on the site was to be taken in February 2025, and groups were being asked about the potential impact of sites in Tobermory or central Mull. It was not made explicit that if a Tobermory site were not selected, early ie presecondary education in Tobermory, would not continue. The proper conclusion to draw was that the respondent had set its face against proper consultation.

The treatment of the Mull Community Council survey showed a failure to give due regard to the views of the community.

[105] The law was clear and not in dispute between parties - it was the application where parties differed. However the respondent characterised the process, it was a consultation albeit inadequately carried out. The use of the word "consultation" cannot be overlooked (indeed the Integrated Impact Assessment Report used the word consultation).

[106] Even when there was a substantive response, in the form of the Mull Campus Survey, the respondent downplayed the relevance of the material. If the responses could be criticised, then that was the responsibility of the respondent for not providing enough information for informed representations to be made. It was unfair for the respondent to criticise the survey for failing to have regard to the complex assessment criteria, because they had not been shared.

[107] It was clear that the respondent chose not to include islanders in the actual decision making, despite the purported commitment to engagement. This was, it was submitted, despite the strength of feeling about the proposal, the concerns expressed during the engagement exercise about location, the need for an equitable solution and the irrationality of posing a choice that would strip all education provision from Tobermory. The community engagement analysis in November 2024 had 352 responses, as against the Mull Campus Survey at 665.

[108] It is submitted that the respondent had a duty to consult; if it did consult, then it was inadequate. Paragraph 60 of Ross McLaughlin's affidavit number 15 of process makes clear the inadequacy of the material provided to consult.

Respondent's submissions

[109] There is no general common law entitlement to consultation. However phrased, and it was acknowledged that the word consultation appeared, the process was one of engagement; it was not in the circumstances of the case conspicuously unfair not to consult. Opportunities were afforded to the community to be heard in person and online to express concerns; these were a precursor to the statutory consultation; but even if there was to be consultation, the respondent can determine the nature and extent of the consultation, subject only to review on conventional judicial review grounds.

[110] The petitioner argues that in the need to consult on location and site selection, the *Gunning* criteria were engaged (from *R* v *Brent London Borough Council, Ex p Gunning* (1985) 84 LGR 168 at 189); but it was not enough to elevate the seeking of views into a consultation process susceptible to review. There was pre-engagement, recognising that community support might strengthen the submission. But the respondent was bound by the LEIP criteria, meaning that less weight could be afforded to any responses from consultees. Similarly, the Community Sounding Board exercise was not a consultation (6/33 at paragraph 4.3.1) The Ryder review and the exercises undertaken by the respondent to obtain community views informed the decision on 7 March.

[111] After LEIP funding was achieved and the respondent had determined that it was affordable, the respondent then undertook further engagement. This was a function of the funding process and the RIBA stages that the site selection process required to be performed before such a proposal could emerge. It was not intended to discover and then promote the most popular outcome - it was done to shape community criteria for location and site selection. That process did not engage *Gunning*; there was no preferred site. The community engagement carried out afforded the opportunity to express views on relevant

matters. It was premature to consider any consultation on the precise site, as none had been selected. The elected members were aware of and had access to the Mull Campus Survey.

[112] The duty to consult arises if there is a statutory duty, a promise to consult, an established practice or, in exceptional cases, where a failure to consult would give rise to conspicuous unfairness; only the last was pled. At best the petitioner could point to a failure to consult but no conspicuous unfairness.

[113] The respondent submitted that it came to this - what were the positioners saying that the respondent should have obtained community views about? On any view, by the end of 2024, the community knew that the council had rejected a spilt site solution. It was unaffordable (a decision not challenged) and not the best educational outcome (again a matter not challenged). The reality was that even if there should have been some theoretical consultation, it would have made no difference, given the December 2024 decision.

Decision

[114] The law is tolerably clear, as parties agreed. *Plantagenet* provides a useful analysis of the duty to consult as follows:

> "Duty to consult
>
> [97] A duty to consult may arise by statute or at common law. When a statute imposes a duty to consult, the statute tends to define precisely the subject matter of the consultation and the group(s) to be consulted. The common law recognises a duty to consult, but only in certain circumstances.
>
> [98] The following general principles can be derived from the authorities:
> (1) There is no general duty to consult at common law. The government of the country would grind to a halt if every decision-maker were required in every case to consult everyone who might be affected by his decision *(R (on the application of Harrow Community Support Unit)* v *Secretary of State for Defence* [2012] EWHC 1921 (Admin), [2012] All ER (D) 96 (Jul), [2012] NLJR 962 at [29] per Haddon-Cave J).

(2) There are four main circumstances where a duty to consult may arise. First, where there is a statutory duty to consult. Second, where there has been a promise to consult. Third, where there has been an established practice of consultation. Fourth, where, in exceptional cases, a failure to consult would lead to conspicuous unfairness. Absent these factors, there will be no obligation on a public body to consult *(R (on the application of Cheshire East BC)* v *Secretary of State for Environment Food and Rural Affairs* [2011] EWHC 1975 (Admin), [2011] All ER (D) 80 (Aug) at [68]–[82], especially at [72]).

(3) The common law will be slow to require a public body to engage in consultation where there has been no assurance, either of consultation (procedural expectation), or as to the continuance of a policy to consult (substantive expectation) *(R (on the application of Bhatt Murphy (a firm)* v *Independent Assessor R (on the application of Niazi)* v *Secretary of State for the Home Dept* [2008] EWCA Civ 755, [2008] All ER (D) 127 (Jul), (2008) Times, 21 July at [41] and [48] per Laws LJ).

(4) A duty to consult, ie in relation to measures which may adversely affect an identified interest group or sector of society, is not open-ended. The duty must have defined limits which hold good for all such measures *(R (on the application of BAPIO Action Ltd*) v *Secretary of State for the Home Dept* [2007] EWCA Civ 1139, [2007] All ER (D) 172 (Nov) at [43]–[44] per Sedley LJ).

(5) The common law will not require consultation as a condition of the exercise of a statutory function where a duty to consult would require a specificity which the courts cannot furnish without assuming the role of a legislator *(R (on the application of BAPIO Action Ltd)* v *Secretary of State for the Home Dept* at [47] per Sedley LJ).

(6) The courts should not add a burden of consultation which the democratically elected body decided not to impose *(R (on the application of Hillingdon London BC)* v *Lord Chancellor (Law Society intervening)* [2008] EWHC 2683 (Admin), [2009] LGR 554).

(7) The common law will, however, supply the omissions of the legislature by importing common law principles of fairness, good faith and consultation where it is necessary to do so, eg in sparse Victorian statutes *(Board of Education* v *Rice* [1911] AC 179 at 182, [1911-13] All ER Rep 36 at 38 per Lord Loreburn LC) (see further at [87], above).

(8) Where a public authority charged with a duty of making a decision promises to follow a certain procedure before reaching that decision, good administration requires that it should be bound by its undertaking as to procedure provided that this does not conflict with the authority's statutory duty *(A-G of Hong Kong* v *Ng Yuen Shiu* [1983] 2 All ER 346 especially at 351, [1983] 2 AC 629 especially at 639).

(9) The doctrine of legitimate expectation does not embrace expectations arising (merely) from the scale or context of particular decisions, since

otherwise the duty of consultation would be entirely open-ended and no public authority could tell with any confidence in which circumstances a duty of consultation was to be cast upon them *(Westminster City Council* v *Greater London Council* [1986] 2 All ER 278 at 288, [1986] AC 668 at 692 per Lord Bridge).

(10) A legitimate expectation may be created by an express representation that there will be consultation *(R (on the application of Nadarajah)* v *Secretary of State for the Home Dept, R (on the application of Amirthanathan)* v *Secretary of State for the Home Dept* [2003] EWCA Civ 1768, [2003] All ER (D) 129 (Dec), 148 Sol Jo LB 24), or a practice of the requisite clarity, unequivocality and unconditionality *(R (on the application of Davies)* v *Revenue and Customs Comrs, R (on the application of Gaines-Cooper)* v *Revenue and Customs Comrs* [2011] UKSC 47, [2012] 1 All ER 1048, [2011] 1 WLR 2625 at [49] and [58] per Lord Wilson).

(11) Even where a requisite legitimate expectation is created, it must further be shown that there would be unfairness amounting to an abuse of power for the public authority not to be held to its promise *(R* v *North and East Devon Health Authority, ex p Coughlan (Secretary of State for Health intervening)* [2000] 3 All ER 850 at 883, [2001] QB 213 at 254 (para 89) per Lord Woolf MR)."

[115] The law, if there is to be consultation, is encapsuled in the *Sedley* criteria as followed in *R* v *Brent London Borough Council, Ex p Gunning* (1985) 84 LGR 168 at p 189 (endorsed in terms by the UK Supreme Court at para [25] in *R (Moseley)* v *Haringey London Borough Council* [2014] UKSC 56, [2014] 1 WLR 3947 at para [25]:

> "Mr Sedley submits that these basic requirements are essential if the consultation process is to have a sensible content. First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third . . . that adequate time must be given for consideration and response and, finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals."

[116] I recognise that the level of consultation will differ depending upon the circumstances; the issue is what fairness requires; it may require consultation upon arguable yet discarded options (*R (Medway Council)* v *Secretary of State for Transport Local Government and the Regions* [2003] JPL 583). Or if requisite consultation is limited to

preferred options, fairness may require passing reference to arguable yet discarded alternative options (*Moseley* para [28]).

[117] The observations from *Plantagenet* relevant to this case can be distilled as follows:

- There is no general duty to consult at common law.
- Such a duty may arise, in exceptional cases, where a failure to consult would lead to conspicuous unfairness.
- The courts should not add a burden of consultation which the democratically elected body decided not to impose.
- The common law will be slow to require a public body to engage in consultation where there has been no assurance, either of consultation or as to the continuance of a policy to consult.
- The doctrine of legitimate expectation does not embrace expectations arising only from the scale or context of particular decisions.
- Even where a requisite legitimate expectation for consultation is created, it must further be shown that there would be unfairness amounting to an abuse of power for the public authority not to be held to its promise.

[118] Having considered the authorities so far as they affect this process, along with the factual circumstances in this case, and doing so through the prism of an alleged lack of conspicuous fairness, I find that there was no obligation to consult in relation to the site selection process, the only aspect of the decision with which this application for judicial review relates.

[119] I say this because the duty to consult is not absolute; the respondent has a discretion; despite the unfortunate use of the word "consult" or "consultation" from time to time, that vocabulary is not determinative. I consider that the respondent's commitment to obtaining

views did not rise above engagement. No promise to consult arises and there is no legitimate expectation of consultation arising simply from the scale or context of the decision. As I said earlier, strength of feeling does not heighten the legal obligations upon the respondent. There was no exceptional circumstance giving rise to conspicuous unfairness in a failure to consult in terms, or in more detail, about the specific short-listed sites.

[120] If I am wrong about that, and some obligation to consult can be constructed, the matter turns to what senior counsel for the respondent asked - what further matters should the respondent have obtained community views about? On any view, by the end of 2024, the community knew that the respondent had rejected a spilt site solution. It was unaffordable and not the best educational outcome; the stark reality was that even if there should have been some theoretical consultation, it would have made no difference given the December 2024 decision.

[121] I have related the various engagement steps which were undertaken in relation to the LEIP application and thereafter, the limitation imposed by funding which provided for a like for like replacement (a single campus), the unchallenged conclusion that both financial realties and educational benefits fortified the respondent's view that a single campus and not a split site was the viable option, and the respondents move to consider site selection subject to these various matters and the results of the engagement.

[122] There was ongoing engagement from 2022 until January 2025. As Diane Forsyth reflects in her affidavit number 16 of process, the precise identity of the short-listed sites was not required to make the engagement meaningful. The significant impacts - travel time, island infrastructure, economic prosperity and the ability to attend school on the island - were determined by the geography and the distance between a Tobermory location

and a central location. The precise sites were secondary; the responses would not have been likely to be significantly different; the respondents were looking for feedback in relation to the most important factors (paragraph 36 of her affidavit).

[123] The Mull Community Council survey also has to be seen in that context; while recognising the considerable effort made by those organising and collating the responses, the difficulty for the survey is that the realistic choices were limited. To use a clumsy metaphor, this was not an a la carte menu but a table d'hote consisting of a choice between a site in Tobermory and a more central site (Craignure or Garmony).

[124] Profoundly disappointing as that conclusion may be to those challenging the decision, I consider that even if there were some obligation to consult, all of the issues which might have been said to inform the decision were part of the process of engagement. Accordingly the second basis for challenge fails.

[125] I make two further observations; in the first place it seems tolerably clear that if the site selection were to lead to the end of early and primary education in Tobermory then the preference, even in the Mull Community Council survey, was for a single campus to remain in Tobermory.

[126] And secondly, I note that in 6/2 of process, the Report to the Council Members dated 6 February 2025, at paragraph 5.4, the author said:

> "It must also be noted that as the project progresses through the RIBA design stages and more detailed information becomes available, there may be a requirement for the Council to review their position on the preferred site."

Third ground

Procedural flaw

[127] The final point made related to the procedure on the day; this was said to raise a short but important point about local democracy and the respondent's standing orders in accordance with their constitution. The purpose of the constitution is to enable decisions to be taken efficiently and effectively, with accountability and reasons explained.

Petitioner's submission

[128] The constitution provides how votes are taken, that is by a majority of the councillors present and voting on that question, except where the law or the standing orders say something different.

[129] There was plainly a question before the council - the elected representatives had to make an informed decision on the Mull 2-18 campus. Site selection was the first key decision milestone for the project. The question for the elected members was for them to confirm their preferred site for the new campus and agree to progress the outline business case. The respondent seemed to suggest that there had been no "decision" despite the clear commitment made to Tobermory south.

[130] The depute provost observed that "this is purely a recommendation and as there is no competent amendment to that there is nothing for us to vote on" (production 7/10 at page 55). It was plainly an important and controversial matter; it was the only occasion on which the elected members could have their positions recorded. The standing orders had not been complied with; in the petitioner's submission, the decision was vitiated by that failure to comply.

Respondent's submissions

[131] The respondent referred to the affidavits of Douglas Hendry and David Logan numbers 17 and 18 of process respectively. There required to be a valid proposition to decide, which will be by way of motion. As the affidavits make clear, for a dissent to be registered there must be a competent motion or at least an amendment.

[132] As Mr Hendry says:

> "The only competent mechanism for an individual Councillor to have their dissent recorded, is in terms of SO 10.5 which provides that motion 'sic' or amendments which are not seconded will not be discussed or recorded in the minutes. The same provision specifies that any Member who has moved a motion or amendment and who is in a minority of one will, if she or he ask, have their dissent recorded in the minutes. The webcast shows that a number of Members asked for their dissent to be noted. No Councillor who asked for their dissent to be noted had moved any competent motion or amendment, although it was open to them to do that at any point in the discussion on this item on the agenda. If any Member wishes to give their dissent any effect, it is clear they must at least try to move an amendment to the motion they dissent from. The requests for dissent to be recorded could be regarded as a political mechanism for Members to distance themselves from the motion before the Council notwithstanding their inability or unwillingness to put forward an alternative proposition (that is an amendment)."

[133] He goes on to say:

> "If no alternative proposition is put forward by a Member as an amendment then de facto the only proposition in front of the members is the officer's recommendation and that becomes the decision. As I understand matters that has always been practice in the Council. I also understand that it is the practice in other local authorities."

[134] On 7 March, there was no alternative motion or amendment. The sole proposition was the officer recommendation of Tobermory south. The recommendation was moved by the council leader and seconded by the deputy leader. The council were asked if they agreed to the recommendation; no competent alternative was moved. The recommendation was held to be agreed. There was no serious basis on which it can be asserted that the decision did not reflect the will of the council.

Decision on the vote

[135] I proceed on the basis of the material provided by the respondent in relation to the standing orders, the procedure followed and the absence of an alternative motion or amendment, when of course those expressing at least informal dissent were afforded the opportunity to make such a formal intervention and chose not to. The notion that unless there is a formal roll call and a note made of each discrete vote by each councillor in relation to this matter, the vote or decision is thereby vitiated is not an attractive proposition. It cannot be asserted that the decision did not reflect the will of the council. There is no procedural irregularity vitiating the decision of 7 March 2025. This challenge also fails.

Conclusion

[136] In his concluding remarks senior counsel for the petitioner submitted that the decision in March had to be reached using lawful process. It was the decision of the preferred site which was challenged; if the court was with the petitioner in relation to the Knights' letter and/or the consultation deficit, then the respondent could retake the decision in a lawful manner - the respondent could then undertake the appropriate inquiry. There was insufficient information to allow informed response about the site. I accept that analysis; that is why I regarded the decision as challengeable.

[137] He emphasised that the petitioners were not challenging the educational benefits or financial considerations, making it all the more important to consult properly. He characterised the respondent's view that it could not be a referendum as tantamount to saying the community could not be trusted.

[138] Despite senior counsel's focus on the site selection, I found myself, increasingly, in preparing for the this hearing, presiding over the hearing and in preparing this decision, identifying the decision of 20 December 2024 as the decision against which the petitioner truly took issue in relation to the determination that there should be one "like for like" campus for 2-18 education, a decision which had been justified by the respondent in relation to financial considerations and educational considerations. That rendered any discussion about the possibility of a split site redundant.

[139] I therefore conclude:

- The decision is challengeable.
- There was no challengeable failure to undertake further enquiry about the Knights' offer.
- There was no obligation to consult; such failure would not give rise to conspicuous unfairness but even if there was such an obligation, the consultation was adequate.
- There was no procedural unfairness in the vote of 7 March 2025.

[140] I accordingly:

- Sustain the respondent's pleas in law numbers 4, 5 and 6 and repel pleas in law numbers 1, 2 and 3;
- Repel the petitioner's pleas in law; and
- Dismiss the petition.

[141] If agreement cannot be reached in relation to expenses, parties can enrol if so advised.