

1 of 1 DOCUMENT

Coney v Choyce and others, Ludden v Choyce and others

CHANCERY DIVISION

[1975] 1 All ER 979, [1975] 1 WLR 422

HEARING-DATES: 26, 29, 30, 31 JULY 1974

31 JULY 1974

CATCHWORDS:

Education - School - Establishment or discontinuance of school - Proposals - Public - notice - Manner of giving notice - Procedural requirements - Failure to comply with requirements - Effect - Substantial compliance - Information concerning proposals brought to attention of those affected by proposals - No prejudice caused by failure to comply with regulations - Failure to post notice at or near any main entrance to school - Whether procedural requirements directory or mandatory - Whether failure to comply with requirements rendering Secretary of State's approval of proposals invalid - Education Act 1944, ss 13(3), 99 - County and Voluntary Schools (Notices) Regulations 1968 (SI 1968 No 615), reg 2.

HEADNOTE:

Following much discussion by the education authorities, proposals were put forward to reorganise the Roman Catholic Schools in a number of neighbouring towns on a single 'three-tier' basis. Those proposals were discussed at public meetings, in newsletters and in churches over a period of three years. Letters were sent by the education authorities explaining the proposals. The defendants, who were the managers and governors of the schools affected, submitted the proposals to the Secretary of State in accordance with s 13(2) a of the Education Act 1944 and took steps to give the requisite public notice under s 13(3) b of the 1944 Act, as amended by the Education (Miscellaneous Provisions) Act 1953, s 16, in accordance with the requirements of reg 2 c of the County and Voluntary Schools (Notices) Regulations 1968, by publishing notices in a newspaper circulating in the area served by the schools, by posting it in conspicuous places within that area and by posting it at or near the main entrance to the schools in question. In consequence of those steps information concerning the proposals, and what was to be done by those who wished to object, was widely circulated in the area. However in the case of two schools the regulations were not fully complied with in that no notice was posted at or near the main entrance to either of those schools. Within the time limit of two months prescribed by s 13(3), a petition signed by about 287 people was presented setting out five grounds of objection to the proposals. The Secretary of State, having received the petition, considered the proposals and purported to approve them. C, the parent of a child affected by the proposals, subsequently realised that the technical requirements of the 1968 regulations might not have been complied with and so made representations to the Secretary of State claiming that, because of the non-compliance, the proposals should not

be allowed to go forward. The Secretary of State, however, came to the conclusion that enough had been done to publicise the proposals and that, in those circumstances, there was no reason why they should not go ahead. C and D, as parents of children affected by the proposals, brought actions against the defendants claiming a declaration that the Secretary of State's approval was invalid, and an injunction restraining the defendants from carrying out the proposals. The defendants contended, inter alia, that, even if there had been breaches of the 1968 regulations, the plaintiffs' only remedy was by way of a complaint to the Secretary of State under s 99(1) d of the 1944 Act.

a Section 13(2), as amended and so far as material, is set out at p 982 d, post

b Section 13(3), as amended and so far as material, is set out at p 982 e, post

c Regulation 2, so far as material, is set out at p 982 j to 983 a, post

d Section 99(1), as amended and so far as material, is set out at p 989, f, post

Held - Considering the general object of the procedural requirements prescribed by reg 2 of the 1968 regulations, i e that notice should be given to a representative number of people of what their rights were, those requirements were to be treated as directory rather than mandatory. Since there had been no substantial prejudice suffered by those for whose benefit the requirements had been introduced, the breach was to be treated as a mere irregularity which has not had the effect of rendering the Minister's approval of the proposals invalid. In the alternative the Minister was entitled, on complaint being made under s 99 of the 1944 Act, to take the view that there had been substantial compliance with the regulations and therefore that no declaration of default under s 99 should be made. It followed that, on either ground, the action should be dismissed (see p 989 a to e g and h and p 990 d and e, post).

NOTES:

For proposals for the establishment and discontinuance of schools, see 13 Halsbury's Laws (3rd Edn) 606, 607, paras 1265-1267.

For the Education Act 1944, ss 13, 99, see 11 Halsbury's Statutes (3rd Edn) 169, 248.

CASES-REF-TO:

Bradbury v London Borough of Enfield [1967] 3 All ER 434, [1967] 1 WLR 1311, 132 JP 15, 66 LGR 115, CA, Digest (Cont Vol C) 312, 103a.

CASES-CITED:

Buckoke v Greater London Council [1971] 2 All ER 254, [1971] Ch 655, CA.
 Byrne v Herbert [1965] 3 All ER 705, [1966] 2 QB 121.
 Clark v Epsom Rural District Council [1929] 1 Ch 287.
 Cumings v Birkenhead Corpn [1971] 2 All ER 881, [1972] Ch 12, CA.
 Glynn v Keele University [1971] 2 All ER 89, [1971] 1 WLR 487.
 Herring v Templeman [1973] 2 All ER 581.

Legg v Inner London Education Authority [1972] 3 All ER 177, [1972] 1 WLR 1245.
London Passenger Transport Board v Moscrop [1942] 1 All ER 97, [1942] AC 332,
HL.

Padfield v Minister of Agriculture, Fisheries and Food [1968] 1 All ER 694,
[1968] AC 997, HL.

Pasmore v The Oswaldtwistle Urban District Council [1898] AC 387, [1895-9] All
ER Rep 191, HL.

R v Senate of the University of Aston, ex parte Roffey [1969] 2 All ER 964,
[1969] 2 QB 538, DC.

R v Westminster Betting Licensing Committee, ex parte Peabody Donation Fund
(Governors) [1963] 2 All ER 544, [1963] 2 QB 750, DC.

Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd
[1921] 2 AC 438, [1921] All ER Rep 329, HL.

Thorne Rural District Council v Bunting [1972] 1 All ER 439, [1972] Ch 470.

Watt v Kesteven County Council [1955] 1 All ER 473, [1955] 1 QB 408, CA.

Wood v London Borough of Ealing [1966] 3 All ER 514, [1967] Ch 364.

INTRODUCTION:

Motion. By a writ issued on 29th October 1973, the first plaintiff, Francis Coney, brought an action against the Rev Benjamin Choyce, the Rev James McGhie, the Rev Christopher O'Brien, the Rev Joseph Wakefield, Alfred John Burton, Hubert Joseph Bell, Cecil V Berry, Muriel Fielding, Madeline Grunnill, James W Maloney, Robert Joseph Torton, Joseph Sydney Warden and Albert Wheat (governors of the Worksop Robert Ludlam Roman Catholic Secondary School), and the Rev Benjamin Choyce, the Rev Joseph Wakefield, Raymond Christian, Charles Frederick Cooly, Muriel Maloney, and Eileen Phipps (managers of the Worksop St Mary's Roman Catholic Primary School). By notice of motion dated 8th March 1974 the first plaintiff sought an order that, until trial or further order, the defendants whether by themselves, their officers, servants or agents or otherwise howsoever, might be restrained from altering the age range of the Worksop Robert Ludlam Roman Catholic Secondary School and from altering the age range of the Worksop St Mary's Roman Catholic Primary School and from doing any other act or thing in furtherance of their proposals for altering the age range of those schools or otherwise for the purpose of making any such alteration.

By a writ issued on 29th October 1973 the second plaintiff, Bernard Francis Ludden, brought a similar action against the defendants, the governors of the Worksop Robert Ludlam Roman Catholic Secondary School, and against the Rev James McGhie, the Rev Mother Carmel, Sydney Fowler, Michael McShary, Jessie Parker and Stella Smedley (managers of the Boughton St Joseph's Roman Catholic Primary School). By notice of motion dated 8th March 1974 the second plaintiff sought orders similar to those claimed by the first plaintiff in the case of Boughton St Joseph's Roman Catholic Primary School and the Worksop Robert Ludlam Roman Catholic Secondary School.

The plaintiffs were parents of children affected by the proposals with regard to the three schools. The motions were heard together and, by consent, the hearing was treated as the trial of the respective actions. The facts are set out in the judgment.

COUNSEL:

Jack Hames QC and Charles Fay for the plaintiffs. R J Harve QC, Roger Shawcross and Andrew Mier for the defendants.

PANEL: TEMPLEMAN J

JUDGMENTBY-1: TEMPLEMAN J.

JUDGMENT-1:

TEMPLEMAN J. This, as counsel for the plaintiffs said, is an important case and I would have preferred to reserved my judgment but, because of the present state of the term and because the parties must know where they stand, I am obliged to give judgment straight away.

The present dispute arises out of proposals to reorganise Roman Catholic schools in Mansfield, Worksop, Newark and Boughton in Nottinghamshire, on comprehensive lines and on a three tier basis. Roman Catholic children in Worksop now attend the local St Mary's School from the age of five to 11, and then the local Robert Ludlam School until they are 16. Roman Catholic children in Boughton now attend the local St Joseph's School from five to 11, and then they too go on to Robert Ludlam. Under the terms of the reorganisation, which affects children over a wide area of north Nottinghamshire and not only children of Worksop and Boughton, Roman Catholic children in Worksop will go to St Mary's School between the ages of five and nine, then to Robert Ludlam between nine and 13, and finally they will go to a new comprehensive school, which has been specially built for the purpose, 16 miles away at Mansfield; and that will offer them education between the ages of 13 and 18. Roman Catholic children in Boughton will go to St Joseph's between five and nine, then to St Bede's in Mansfield between nine and 13, and then they, too, will enter the new comprehensive school at Mansfield.

These proposals were put forward after much discussion by the education authorities in 1969. They were discussed at public meetings, in newsletters and in churches, between 1969 and January 1972. Letters were sent by the education authorities to parents explaining the proposals. Anyone likely to be affected by the proposals should have been aware of their nature and effect and received opportunities to voice disapproval to the education authorities, the courth authorities, and local government elected representatives.

That, however, is not enough. Parliament requires that proposals with regard to education must be approved by the Secretary of State of Education and Science, and objectors must have an opportunity to make their views known to the Secretary of State before he comes to a decision.

St Mary's School, the Robert Ludlam School and St Joseph's School are voluntary schools. Proposals for the alteration of ages for public eligible for admission involve significant changes in the chracters of those schools, and s 13(2) of the Education Act 1944, as amended provides:

'... where the managers or governors of ... a voluntary school intend to make any significant change in the character... of the school, they shall after consultation with the authority submit proposals for that purpose to the Secretary of State.'
Section 13(3) provides:

'[The managers or governors] shall forthwith give public notice of the proposals in the prescribed manner, and... any ten or more local government electors for the area... may within two months after the first publication of

the notice submit to the Secretary of State objections to the proposals...'
By s 13(4), Parliament provides for the third stage:

'Any proposals submitted to the Secretary of State under this section may be approved by him after making such modifications therein, if any, as appear to him to be desirable...'

The defendants, who are between them managers and governors of St Mary's School, the Robert Ludlam School and St Joseph's School, submitted proposals to the Secretary of State and claim to have given the requisite public notice on 1st January 1972. The Secretary of State purported to approve the proposals on 12th September 1972. The plaintiffs, who are parents of children who will be affected by the proposals with regard to St Mary's School, the Robert Ludlam School, and St Joseph's School, contend tht the defendants did not give the prescribed public notice in the prescribed manner; and that in consequence the purported approval of the Secretary of State is a nullity and the defendants should be restrained from giving effect to those proposals.

The manner of giving public notice is prescribed by reg 2 of the County and Voluntary Schools (Notices) Regulations 1968 n1, and so far as is relevant notice must be given --

n1 SI 1968 No 615

'(a) by publishing the notice in at least one newspaper circulating in the area served... by the school; (b) by posting the notice in some conspicuous place or places within that area; © ... by posting the notice at or near any main entrance to the school; and (d) in such other manner, if any, as appears... to be desirable for giving publicity to the notice.'

I find that the notice with regard to St Mary's School, Worksop, was (a) published in the Nottinghamshire Evening Post on the 1st January 1972; (b) affixed to the notice board of St Mary's Church, Worksop; © posted on the inside of the main front door of St Mary's School in January and February 1972. So far as (d) is concerned, Father O'Keefe, who was the parish priest of St Mary's Church, Worksop, at the relevant time said that on one Sunday at about the time of display of the notice he devoted the sermon time at all three massess at St Mary's Church to a detailed explanation of the proposed changes:

'I remember this clearly because at the evening mass on that Sunday an unusual incident occurred in that a gentleman attempted to heckle me while I was speaking about these matters.'

In oral evidence he repeated and made plain that the whole parish was in a turmoil about these proposals. But it is not suggested that he actually read out the notice or the full terms of it when he gave his homilies.

I find that the notice with regard to the Robert Ludlam School was (a) published in the Nottinghamshire Evening Post on 1st January 1972; (b) exhibited in the St Mary's Church, Worksop; and © sent to the headmaster in January 1972 without instructions, so that he did not know he ought to display the notice until January 1973, when he did post it at or near the main entrance.

I find that the notice with regard to St Joesph's School, Boughton, was (a) published in the Nottinghamshire Evening Post on 1st January 1972; and (b) affixed inside St Joseph's Church, Ollerton, that being the Roman Catholic

church for Boughton and Ollerton; © not posted at or near any main entrance to the school, again I think because the headmistress did not know of the necessity; but (d) in the case of Boughton there is evidence that in the first fortnight of February there was issued a newsletter or mission letter from the church, which was delivered to all the households, whether Roman Catholic or otherwise, in the area covered by the church, and that newsletter reproduced the notice. As far as Boughton was concerned there was in practice effective saturation of the area; and so far as Worksop was concerned, whatever the technical merits or demerits of the methods adopted, I have no doubt that the proposals were very widely known and people knew what to do if they objected.

Before 1st January 1972 copies of the public notice were sent to head teachers and managers and governors of over 37 schools in Nottinghamshire, and were displayed on parish notice inside or outside churches in areas affected by the proposals. As I have said, the proposals were not confined to Worksop and Boughton, but affected a large area. There is no doubt that genuine and strenuous efforts were made to disseminate information concerning the proposals and the rights of objection.

One of the results of the publicity was that on 14th February 1972 the plaintiff, Mr Coney, joined with other parents to form the Worksop, Carlton and Ollerton Catholic Action Committee, which was formed (and still exists) to co-ordinate opposition to the proposals for reorganisation of the schools in North Nottinghamshire. On 28th February 1972, within the time limit provided by the notice, there was a petition. It was headed: 'Education Acts 1944 to 1968. Sections 13(3).' So it is quite clear that those petitioners knew what they were up to, the legal foundation for their petition and what their rights were. Petition set out:

'We, the undersigned, being parents of children currently attending Catholic Schools in Worksop and Ollerton and or electors of the said areas, hereby object to the proposed establishment of the new Roman Catholic Upper School at Westified Lane, Mansfield, Nottinghamshire, and the consequent re-organisation of existing R.C. Schools, both primary and secondary, on the following grounds...'

It is clear that those petitioners recognised that this was a scheme, the centre and pivot of which was the erection of a new school at Mansfield, the establishment of which would have reverberations throughout the North Nottinghamshire areas concerned. The petition continued with these grounds of objection:

'1. that due regard has not been given to the amount of travel involved for Ollerton children of 9+ years of age, who would have a daily return journey of 20 miles, and the travelling distance (some 50 miles return) for children of 13+ who live in the Carlton/Langold area north of Worksop. 2. Because of No. 1 above, children will have little or no opportunity to participate fully in the social life afforded by Schools. 3. two good Catholic secondary schools already exist in Mansfield and Worksop respectively, and we see no need to be heavily burdened financially with the establishment of a third secondary school, (proposed Upper School) when both the existing secondary schools could be developed, at least on an 11-16 comprehensive basis, to serve their respective catchment areas; which, in the case of the Worksop school, could continue to include not only Worksop, but also Ollerton, Carlton, Langold, Retford, (recently hived off and re-routed to Cantly, Doncaster), and the small area of Derbyshire adjacent to Worksop. 4. Discrimination. We want for our children a

system of education which is similar to that enjoyed by all other children in the area, i.e., infant -- primary (5-11) with transfer to secondary education at 11+ on a non-selective basis. 5. parents of many children, because of the distances involved, would find it extremely difficult, and perhaps impossible to get to a particular school for any purpose.'

That petition set out very clearly five obviously cogent grounds of objection. It was of course for the Secretary of State to determine whether, having regard to those objections, the proposals should be approved. Although I heard a good deal of evidence, I have not heard of any additional ground of objection which really adds to those five. The petition ended with the usual list of signatories and their addresses, from Worksop, Carlton, New Ollerton and Boughton, Langold, Newark and Edwinstowe, and there were in sum about 287 signatures.

If one asks whether in reality people knew what was going on, powerful evidence is put in by the plaintiffs themselves that in a relatively small area a praiseworthy number of 287 persons took the trouble to join together and send up a reasoned and detailed objection, all exercising their rights under s 13(3) of the 1944 Act. The Minister must know that petitions are only representative; and that for every person who signs there may be two or three or more who do not sign, because they do not know or because they are too idle or they are away for the weekend, or something of that sort. Education is not a question purely of head counting.

Mr Coney, one of the plaintiffs, states that he first became aware that the proposals had not, as is now contended, been given the prescribed manner of publication, in the course of a meeting which took place at the Department of Education and Science on 28th November 1972. That, of course, was after the Minister, having received that petition in February, gave approval on 12th September 1972. At that stage, the battle for the soul of the Minister had been fought by the objectors and lost. The Minister had taken a time over it; had received the petition, considered the proposals, and given approval. It appears that at a meeting of the Department of Education and Science, when I imagine reasons were still being urged on the Minister why she should retract or not follow up the approval, Mr Coney got an idea that the technical requirements of the 1968 regulations might not have been carried out. Perfectly properly, he made further enquiries. He made representations to the Secretary of State claiming that the regulations had not been complied with and therefore the proposals ought not to be allowed to go forward. And he did this not only himself but through a Member of Parliament, and by solicitors who referred to the possibility of legal proceedings. I have no doubt that he acted with the help and on behalf of the committee which had been formed to fight the proposals.

On 4th April 1973 the Ministry wrote saying this:

'On the information available the Secretary of State, as advised, concludes that there is no reason to believe that local government electors affected by the proposals were denied adequate information for the purpose of exercising their rights under Section 13 of the Education Act as amended.'

The Minister, having heard representations about failure to comply with the regulations, came to the conclusion that enough had been done to publicise the proposals and tell people what their rights were, and in those circumstances

there was no reason, the Minister thought, rightly or wrongly, why the proposals should not go ahead.

Early in May 1973 Mr Coney's solicitors wrote to school governments, managers and others, stating they had instructions to issue a writ unless the reorganisation was abandoned, but the writ was not in fact issued until 29th October 1973, and a notice of motion for interlocutory relief was not issued until 8th March 1974. It has been agreed to treat the motion which came on before me as trial of the action. The facts concerning the other plaintiff, Mr Ludden, are not for present purposes materially different.

The objects of s 13(3) of the 1944 Act are to ensure that the public are aware of the proposals and of their rights to object to the Secretary of State; that is a preliminary to ensuring that objections reach the Secretary of State for his consideration before he decides the fate of the proposals. He cannot decide to approve the proposals unless he has in front of him the objections which can fairly be raised against them. The objects of s 13(3) were in my judgment achieved. The notices were well publicised. A petition of 287 persons from small part of the affected area shows great efficiency on the part of those who organised it.

It was not really contended that further and more effective grounds of opposition could have been deployed if more notices had been served or posted up in more places. It was, and is, strenuously contended that if the notices had appeared in more or different newspapers, and had been displayed at more or different places, then the number of objectors would have been substantially increased, and that this would or might have affected the mind of the Secretary of State. The largest claims are made, as not unnaturally and frequently happens, about what is thought to be public opinion. But in my judgment, this is wishful thinking unsupported by convincing evidence. In the light of the wide and effective publicity which was achieved, and in the light of the history of the proposals, and of the objections, and of the evidence in this case -- a good deal of which I have not had occasion to mention in detail and shall not be able to do so -- I am satisfied that more notices in more or different places would not have unearned a significantly greater number of objectors.

In the case of Mr Coney, one and only one person gave evidence that he did not know of his rights; but then it appeared that his evidence was not impressive because he was the person who had heckled the priest in the middle of his sermon, and that in fact his interruption in church created a stir. There must have been people who came up and said: 'We don't agree with this either. What can we do about it?' In the case of Mr Ludden there are two and only two people who say they did not know of their rights.

The 1968 regulations are not designed to see that everybody knows. If they were, they would provide for different publicity. Suppose, for example, a notice is put up at the town hall, that it is published in the local paper, and that it is posted at the school, thus complying with the Regulations. There must in the area of Worksop be a large number of citizens who go more frequently to the football ground and the public house than the town hall, who have children none of whom is over the age of five, and who read the Daily Mirror and nothing but the Daily Mirror. Those persons probably never go near the particular places where the 1968 regulations have been fulfilled and the notice has been put up. The regulations are not designed to bring the matter home to everybody. If that were required there would have to be the town crier, or

perhaps on the local radio announcements every quarter of an hour.

What the Regulations require is that notice should be published in a manner designed to show a representative number of people what their rights are, and leave to them the organisation of others. In fact that is obviously what happened in this case. Some people, I think a great number, saw the notice. They organised the Parents Association. No doubt they went around and said: 'Have you heard this monstrous proposal which has been going on for years; now it is coming to a head, and if we are going to do anything about it we have got to write to the Minister. Will you sign a petition?'

In my judgment these regulations are not to be regarded in the light of regulations which are intended, if the proposals and the approval are to be effective, to be observed to the full rigour of the regulations. What the Minister wants, and what the Minister must have before he approves, are the objections which can be urged so that there is not lurking around some quite valid objection which he has never heard of, and he must have some idea of the weight of the objections. For example, if the method of publicising the notice was such that only five people wrote, the minister might erroneously think there was not much weight in the opposition. But any Minister would take a petition, such as the one put forward in the present case by 287 persons, as showing a degree of opposition to which he ought to pay serious attention. If there had been more notices, even if -- and I do not think there would have been -- the number of objections had been doubled, it does not seem to me that would be sufficient to make any real difference to the problem which troubled the Minister who sat down with the proposals on the one hand and the objections on the other.

If I am entitled to apply common sense and to dismiss these proceedings if I am satisfied that as a result of a bona fide and reasonable attempt to carry out the duties imposed by the regulations there was ample public notice of the proposals and of the rights of those who wished to object, I have no doubt these actions ought to be dismissed. The merits and demerits of the objections and the proposals are, of course, not in issue in these proceedings.

Counsel for the plaintiffs, who argued, as always, strenuously and persuasively, submitted that I am not concerned with the merits of the attempt to give publicity to the notice of the proposal. If, he submits, one single breach of the regulations be proved, then the approval of the Secretary of State is a nullity. Alternatively, he says, if the court may turn a blind eye to one or two breaches of the regulations, there were yet sufficient serious breaches in the present case to invalidate the approval of the Secretary of State. I must therefore consider whether the letter of the regulations has been observed.

There was an objection to the newspaper publication, but that was limited to Worksop. In the cases of all three schools the Nottingham Evening Post was chosen; and it appears that the Nottingham Evening Post has been used by persons giving notices in north Nottinghamshire generally. It is conceded that as far as Boughton was concerned, the Post was a newspaper circulating in the area served by the school. In the neighbourhood of Worksop, detailed research by the plaintiffs has produced evidence that the Nottingham Evening Post was only purchased by 26 persons in Worksop at that time, and by them only by virtue of a specific order; this, it is submitted, is not circulation.

I should be very sorry to think that it is not left to the judgment of local

persons to select a newspaper bona fide. Or that they may be attacked, and the whole edifice of proposal and approval come crashing to the ground, if it appears they might have chosen some paper which had a larger circulation. If a newspaper chosen bona fide can be bought and is sold in the area in question, then in my judgment that is compliance with the regulations. Of course, if a newspaper were chosen deliberately in order to attempt to muffle up the publicity, different considerations would apply. But, as I say, I should be sorry to think that when in respect of an area in Nottinghamshire there is chosen the Nottingham Evening Post, the ferreting around as to how many people actually bought it and on what terms would be enough to bring up the dread spectre of nullity and ultra vires. That deals with the newspaper.

Se far as the conspicuous places are concerned, we had a long argument as to what was and was not conspicuous. It was said that some of the notices were not in fact seen. There was evidence that some people said they did not see them, and if the notices had been there, they would have seen them. There was a contention that a notice board in a Roman Catholic church is not a conspicuous place, especially as non-Roman Catholics would not frequent it.

But again it seems to me this is a matter for those who in good faith set out to fulfil the regulations requiring the posting of notices in some conspicuous place, and if against the background of this case they said to themselves: 'The obvious and most conspicuous place is the Roman Catholic church', it seems to me to be quite wrong for the court to interfere, especially when the threatened consequences are nullity. I find as a fact that the requisite notices were displayed at the selected churches.

The objection to notices required to be posted at or near a main school entrance applied to all the schools, and again we had a long arguments as to exactly what was done. At St Mary's School, it was said, the main entrance was closed for repairs. The notice should have been posted at the de facto school entrance; it was posted on the inside of the door and it ought to have been put on the outside; the parents used some other entrance and never saw the notice; and the school was closed for holidays part of the time.

Now again, the task of everybody concerned with education, and of this court, is going to be made intolerable if every single action which is taken -- bona fide action -- to conform with the regulations is to be attacked in this minute manner. The headmaster gave evidence. Early on he reported that he received the notice and that he posted it on the main entrance door, and he put that on oath in an affidavit. He had to be brought here and cross-examined; and then issues were raised as to whether he was right in thinking that the door was in use until near the end of February, and whether the notice was blown down by the wind, and who used the door -- and his recollection even of putting up the notice was attacked, as was the recollection of the priest in connection with the churches.

I am very sorry he had to be brought here, and I am not going to tell a headmaster how to post a notice at or near the main entrance of his own school; I accept his evidence that he put it up and that he complied with the regulations.

As regards the other two schools, there has never been any question that when investigation was made it was found that the headmasters at Robert Ludlam and St Joseph's did not display the notice because they did not know -- and there it

is.

So I find that the regulations were not complied with in the case of Robert Ludlam, Worksop, and St Joseph's, Boughton, in respect and in respect only of one matter, namely, the failure to post the notice at or near the main entrance to the school. I have to consider the effect of that. I have also to bear in mind, in considering the effect of attempted compliance with the regulations, the evidence that though in Worksop, as I have found, the letter of the regulations was observed with regard to the newspaper, it appears that the choice of newspaper could have been happier and that a newspaper could have been chosen which had a wider circulation in Worksop than that which was quite innocently chosen.

Counsel for the plaintiffs, as I have said submits that any breach of the regulations makes the decision a nullity. Alternatively, he says, the breaches are so serious, particularly in the case of Robert Ludlam, that the decision of the Secretary of State is a nullity. There has been no approval, and the court must therefore prevent the implementation of the proposals which have not been approved.

Counsel for the defendants submits that if there was, as there undoubtedly was, a genuine attempt to comply with the regulations, and if the actual compliance with the regulations, coupled with any other steps taken to give publicity to the rights of the objectors, resulted in the Secretary of State receiving objections, the nature and weight of which were properly represented, then any decision made after consideration of those objections cannot be a nullity. In the present case there was wide publicity. No objections were omitted from the petition. The Secretary of State had everything before him which he could possibly have had before him.

For the reasons which I have given, I accept that by and large, putting it shortly, the breaches of the regulations did not make any difference.

Counsel for the defendants does not dispute that if this had been a case where the failure to comply with the regulations had been deliberate; or if the breaches of the regulations were such that when the Secretary of State purported to approve the proposals he did not have before him the necessary information regarding the actual objections, or as to the weight of possible objections, then it would have been impossible for the Secretary of State validly to consider the proposals or validly to approve them. His purported approval would be a nullity, vitiated by the fact that he was never in a position to do his duty, namely, to consider the proposals in the light of the objections. But that, says counsel, is not the case here -- and I agree.

In those circumstances a suggested test, which counsel for the defendants adopted and put forward, and with which, as a test, counsel for the plaintiffs did not quarrel -- although of course he disputed the consequence of applying test -- is to be found in *de Smith's Judicial Review of Administrative Action* n1. After hinting that the law might have been in a bit of a mess, he continues:

n1 (3rd Edn 1973), pp 122, 123

'When Parliament prescribes the manner or form in which a duty is to be performed or a power exercised, it seldom lays down what will be the legal

consequences of failure to observe its prescriptions.'

That describes the present case. Parliament has prescribed the manner in which the duty of giving public notices is to be performed, but it has not specified the consequences of failure. It has not said if the 1968 regulations are not carried out then the approval is invalid. It has left the result unspecified, and in those circumstances I go back to Mr de Smith, who says n2:

n2 Ibid, p 123

'The courts must therefore formulate their own criteria for determining whether the procedural rules are to be regarded as mandatory, in which case disobedience will render void or voidable what has been done, or as directly, in which case disobedience will be treated as an irregularity not affecting the validity of what has been done (though in some cases it has been said that there must be "substantial compliance" with the statutory provisions if the deviation is to be excused as a mere irregularity). Judges have often stressed the impracticability of specifying exact rules for the assignment of a procedural provision to the appropriate category. The whole scope and purpose of the enactment must be considered, and one must assess "the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act" n3. Furthermore, much may depend upon the particular circumstances of the case in hand. Although "nullification is the natural and usual consequence of disobedience " n4, breach of procedural or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature, or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced, or if serious public inconvenience would be caused by holding them to be mandatory, or if the court is for any reason disinclined to interfere with the act or decision that is impugned.'

n3 See *Howard v Bodington* (1877) 2 PD 203 at 211

n4 Maxwell on the Interpretation of Statutes (11th Edn, 1962), p 364
I accept that test, and applying it, here is an Act which is concerned with the administration of education in which, as has been seen in the present case, the ramifications can be considerable as regards different areas and as regards a host of children. It would in my judgment be lamentable if the carrying out of the purposes of the Education Act 1944 as amended were hampered by a strict insistence on the letter of the 1968 regulations being carried out subject to the dire penalty of the whole thing being invalid. In my judgment, this is a case where the regulations must be treated as directory. Both the object and the terms of the regulations themselves seem to me to support that, and the consequences of the contrary also seem to me to require it.

I accept there must be substantial compliance with the regulations, and in my judgment there has been. Asking myself whether any substantial prejudice has been suffered by those for whose benefit the requirements were introduced, I am quite satisfied the answer is No. The plaintiffs having lost the battle on the merits are now fighting a battle purely on the technicalities. I make no criticism. If the 1944 Act is so full of technicalities that the proposals can be tripped up, the plaintiffs are entitled to do just that. But in my judgment this is not an Act where Parliament intended that the technicalities should rule rather than the spirit of the law. The object of s 13 has been achieved, and in those circumstances it seems to me that it would be quite wrong to hold that the

technical defects in compliance with the regulations make the Minister's approval invalid.

Counsel for the defendants had an alternative argument. He said even if there had been breaches, or even serious breaches of the regulations, the only remedy of the plaintiffs was to apply under s 99(1) of the 1944 Act. That provides:

'If the Secretary of State is satisfied either, upon complaint by any person or otherwise, that... the managers or governors of any county school or voluntary school, have failed to discharge any duty imposed upon them by or for the purposes of this Act, the Secretary of State may make an order declaring... the managers or governors... to be in default in respect of that duty, and giving such directions for the purpose of enforcing the execution thereof as appears to the Secretary of State to be expedient; and any such directions shall be enforceable, on an application made on behalf of the Secretary of State, by mandamus.'

There is clear authority to the effect that when Parliament has given one remedy of this sort, then that is the remedy to which aggrieved persons are confined and they cannot go outside to the courts. In the present instance, for example, complaint was made to the Secretary of State, and after consideration the Secretary of State gave the answer which I have already read, namely, that he was not disposed to take any action because he thought, and in my judgment rightly thought, that no prejudice had been caused. Counsel for the defendants admits that s 99 would not save the Secretary of State if in fact there had been substantial non-compliance with the order or some gross breach which clearly amounted to prejudice, even though the Minister purported under s 99 to take no action.

In *Bradbury v London Borough of Enfield* n1 an injunction was granted against a local education authority to restrain it from giving effect to proposals whereby, in breach of a positive obligation imposed by s 31(5) of the London Government Act 1963, the authority ceased to maintain eight schools. In that case no notices had been given because the Minister wrongly thought that they did not have to be given. The Court of Appeal held that notices ought to have been given Lord Denning MR said n2:

n1 [1967] 3 All ER 434, [1967] 1 WLR 1311

n2 [1967] 3 All ER at 440, [1967] 1 WLR at 1323

'I hold, therefore, in agreement with the judge, that in regard to the eight schools, the council intend to "cease to maintain" them and "to establish new" schools within s. 13 of the Act of 1944. They ought, therefore, to have given public notices of their proposals, so that people could object. On objects being lodged, the Secretary of State would have to consider them. Not till then could the Secretary of State give his approval. Counsel for the defendant council submitted to us that the Secretary of State's approval would be good, even though public notices were not served, nor objections considered. I cannot agree. It is implicit in s. 13 (3) and (4) that the Secretary of State cannot approve unless he had considered all objections submitted to him.'

In *Bradbury* n1 there were two distinctions from the present case. First, no notices at all had been served, so there could have been no substantial

compliance. Secondly, in *Bradbury* n1, s 99 of the 1944 Act plainly did not apply because the requirement of maintaining the schools and not ceasing to maintain them was found in the *London Government Act 1963*, and s 99 has no application to any Act other than the *Education Act* itself.

n1 [1967] 3 All ER 434, [1967] 1 WLR 1311

In my judgment, if one approaches the present problem on general principles, the 1968 regulations are directory and only render void a decision if substantially there had been no compliance with the regulations. If one approaches the matter under s 99, which can only avail the Minister if there is substantial compliance with the regulations, I am of the opinion that the same result is obtained. Under the general law, the Minister was entitled to find as he did that the regulations had been substantially complied with; and under the particular law, under s 99, the Minister was entitled to take no action; and in either event there is no cause for this court to interfere. Other cases were cited to me, but they do not seem to me to get near the present point which is peculiarly concerned with regulations where an honest attempt has been made to carry them out, where substantially they have been carried out, plus further publicity, and one is left with the bare argument that the technicalities have not been complied with. So that both on the grounds of general approach and on the grounds of s 99, this action fails.

Even if I had been in favour of the plaintiffs on the strict letter of the law, I would have felt disinclined to grant any relief in this case. What is sought is a declaration that the approval is invalid and has no legal effect, and an injunction restraining the defendants from carrying out the proposals. Counsel for the plaintiffs said that if he satisfied me that the Minister's approval was a nullity, then he was entitled to his order as of right. But a declaration and an injunction are both forms of relief which are discretionary, although discretion must of course be exercised in accordance with principle.

In the present case the plaintiffs delayed between November 1972, when they first found out about these defects -- or at least one or more of them -- and October 1973, when they issued the writ. They knew, one of them was in fact a governor of one of the schools, that the pivot of the scheme, namely the building of the *Mansfield School*, was driving ahead. They knew as a fact, and I find, that everything is geared round that school. I have heard evidence that as one would expect the viability of the school depends on an orderly intake from proper areas at proper ages. That school is due to open on 1st September. It is going to be the centre of education at the appropriate age in north Nottinghamshire. If the school opens on 1st September, but the pupils from *Worksop* and *Boughton* cannot go there, counsel for the plaintiffs say there will be no damage suffered, at any rate not to the children of *Boughton* and *Worksop* who, he says, may be better off where they are. But I have to bear in mind, in the exercise of my discretion, that vast sums of money have been spent on this school. It is clearly unsatisfactory that it should operate without having these pupils for the time being. And if I make a declaration and injunction to please the plaintiffs, I must inevitably be making a declaration and injunction which large numbers of parents, those who approve the proposals, consider not to be in the best interests of their children.

There was evidence that in regard to the *Boughton* and *Worksop* children, if there was an injunction in theory that merely meant more notices and two months

to elapse for more objections, but in practice the educational system being what it is, and teachers having to be lined up and sent to various places, that would put the entry of Worksop and Boughton children back for a whole year -- because you cannot have children suddenly popping up in November and being fed into what is a highly complicated mechanism.

If an injunction and declaration were granted, notices would be put up, objections would be received, and the Secretary of State would then reconsider the whole matter. Of course, if that happened, he would sit down and clear his mind as much as possible and furrow his brow to decide whether to approve the proposals or not. But having regard to what has happened, to the fact that this objection only applies to these two small areas, to the *raison d'etre* of the school which has been built at enormous expense, and to the fact it is not suggested that any new objections could be presented to him other than those which were considered some years ago now, it seems to me that it would be really perverse of any Minister to change his mind or disagree with his predecessor. No one can be absolutely certain what a Minister will do; it is a matter for him. But in considering whether to grant relief in this case, which would seriously prejudice some children, I think I must bear in mind the probabilities. The probabilities are that if the plaintiffs succeeded on a technical ground, it would only avail them for at most a year, and then the whole thing would go forward to the prejudice of those who had been delayed for a year, and to the prejudice, I think, of the whole educational machine in north Nottinghamshire.

It is in my judgment partly the plaintiffs' fault things have got to this pretty pass that here we are, on 31st July, and if a decision is made in favour of the plaintiffs it would have most undesirable repercussions as from 1st September. If the writ had been issued earlier this action could have come on earlier and before 1st September loomed so alarmingly close.

So that in the present instance, if I had been for the plaintiffs on the technicalities, or for that matter on the merits, I would not have been disposed to grant relief. I would have left it to the Minister, in the light of my judgment, to decide whether she ought to order any further action or any postponement of the action which is to take place on 1st September. That is an administrative matter for her, and I should be very slow to introduce the swingeing weapon of an injunction, interfering in administrative and educational matters of great moment by the sledgehammer of an injunction which would bring to a grinding halt all the co-operation from these two places which has been obtained in the course of the last few years.

In the result, it being agreed that the motion shall be treated as the trial of the action, I dismiss the action.

DISPOSITION:

Motions by consent treated as trial of actions. Actions dismissed.

SOLICITORS:

Prentis, Seagrove & Co, agents for A E Furniss & Co, Worksop (for the plaintiffs); Ellis, Wood, Bickersteth & Hazel (for the defendants).