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Case No: CO/3674/2016

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/08/2016

Before:

MR JUSTICE STUART-SMITH

- -

Between:

THE QUEEN (on the application of THE INTERIM EXECUTIVE BOARD OF X)	**Claimant**
- and -	
OFSTED	**Defendant**

- -
- -

Mr Peter Oldham QC (instructed by **X Council Legal Services**) for the **Claimant**
Ms Helen Mountfield QC and Ms Sarah Hannett (instructed by Ofsted Legal Services) for the **Defendant**

Hearing date: 27 July 2016

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Approved Judgment

Mr Justice Stuart-Smith :

Anonymity Order

1. Pursuant to CPR 39.2(4), no report of or relating to this claim and in whatever form shall, until further order, name, or refer to in such a way that they can be identified, any individual referred to in the materials in the case or mentioned in court or the school that is the subject of these proceedings.

Introduction

2. On 21 July 2016 Wyn Williams J made an interim order restraining the publication of an Ofsted report on a school ["the School"]. On the same day, the Claimant issued Judicial Review proceedings claiming the interim remedy granted by Wyn Williams J and, as a final remedy, that the report be quashed and Ofsted be prevented from publishing it, along with all necessary declarations and other ancillary relief. The Claimant also applied for an anonymity order.

3. The Claimant applies to quash the report and prevent its publication on the following specified grounds:

    i) Alleged irrationality and inconsistency with previous inspection reports;

    ii) Alleged irrationality because of an absence of evidential basis for the findings in the report;

    iii) The report is alleged not to be the product of an independent, merits-based evaluation, and bias;

    iv) The treatment of the School is alleged to be inconsistent with treatment of other schools and therefore irrational; and

    v) The powers of inspection are alleged not to have been used for statutory purposes and are therefore alleged to be ultra vires.

4. On 27 July 2016 Ofsted applied to set aside Wyn Williams J's interim order. At the start of the hearing I made an interim anonymity order until further order. This is my ruling on the application to set aside the interim order of Wyn Williams J.

5. It should be emphasised at the outset that no Acknowledgement of Service has yet been served and the Defendant has not yet fully developed its opposition to the proceedings either by formulating its case or by the submission of evidence. Both sides have put in evidence for the purposes of the present hearing; but the Court is not in a position to form a reliable view on the merits of contested facts. Although there are certain facts that are not contentious, it is clear that there are others that will be significantly in dispute.

The Factual Background

6. The School is a voluntary aided school for boys and girls of ages 4-16. It has an Islamic religious ethos. As a result of Ofsted inspections and reports, it was put into special measures in 2014 because of concerns about Leadership, Governance, Teaching and

Learning, and Financial Management. An Interim Executive Board ["the IEB"] was appointed in place of the previous school governing body in about May 2014. A new executive head teacher was appointed. Evidence from the executive headteacher and the chair of the IEB (and others) indicates that they are people of experience, quality and some distinction in their field. On the evidence before the Court the appointment of the IEB at first met with very considerable opposition from the local community; but a combination of improved educational results and other changes made by the IEB and the head teacher has led to a greatly improved situation where the School and those who run it have the confidence of at least the majority of the parents and community.

7. One of the characteristics of the School at all material times from well before it went into special measures was that children are segregated from an early age for many activities. There are times of overlap and the evidence before the Court is that there is no difference, distinction or discrimination between the curriculum, teaching or pastoral care provided to boys and girls. The policy of separation is and has been advertised as part of the School's admissions policy and is and has been known to all, including parents and Ofsted. Until very recently it has not been the subject of any comment from Ofsted. According to the evidence before the Court it is a feature that at least some parents regard as a beneficial aspect of the School's organisation.

8. The history of the Ofsted inspections and reports from the time that the School went into special measures is agreed by the parties to be of relevance, both as an indicator of the progress made by the School between mid-2014 and early 2016 and as something to be taken into account by subsequent Ofsted inspectors. Three such reports are before the Court, namely those for December 2014, March 2015 and December 2015.

9. The inspection for the report in December 2014 was the third monitoring inspection since the School had become subject to special measures. It was carried out by a team of three, including HM Inspector Mr James McNeillie – of whom more later. The covering letter from the lead inspector stated that "the school is making reasonable progress towards the removal of special measures." Under the heading of behaviour and safety the report identified the need to develop strategies for tackling bullying and poor behaviour. The executive headmaster and senior leaders were described as "a cohesive team" with a shared vision and no illusions about the enormity of the task facing them in ensuring that the School was removed from special measures in the allocated timetable. "Their approach to school improvement is characterised by determination, energy and optimism. They have an accurate view of the strengths and weaknesses of the school." It was said that the local authority "continues to tackle the range of complex and sensitive issues surrounding this school. A school improvement officer is providing effective support to the primary phase. The executive headteacher, brokered by the local authority, is providing clear leadership."

10. The inspection for the March 2015 report was carried out by the same inspector with two different colleagues. The covering letter again said that "the school is making reasonable progress towards the removal of special measures." The same recommendation was made in respect of behaviour and safety as in the December 2014 report, but it was recorded that behaviour continued to improve. It was said that "leaders have established a calm and purposeful environment where expectations of behaviour are clear and are based on mutual respect." On the subject of leadership, the report noted that "the executive headteacher and associate headteacher continue to provide clear, decisive and determined leadership to the school", though with several

key leadership positions being held on a temporary basis by staff from another school the report stated that "as a result, the long-term stability of the school leadership, while improving, remains fragile." Despite substantial progress, "there is much ground to cover if the school is to be removed from special measures within the allotted timescale." On the issue of equality of opportunity, the report stated that "leaders ensure equality of opportunity for all pupils, including those with disabilities and special educational needs, and discrimination of any kind is not tolerated. However, the schools' (sic) current policy for equal opportunities does not reflect this practice and does not comply with current regulations." It was said that members of the IEB were knowledgeable about the issues facing the School and were working diligently to provide leaders with a high level of support and challenge. In addition it was said that they were working efficiently with the local authority and were proactive in contacting other agencies. The local authority "continue[d] to provide a high level of effective support."

11. The inspection for the December 2015 Report was carried out by a team of four, who were different from those who had carried out the December 2014 and March 2015 inspections. The information provided about the inspection included that there had been visits to the library to look at the range and suitability of books available for pupils. The report listed particular strengths of the School including that "the safety of pupils is given a very high priority. Safeguarding procedures are highly effective in creating a safe culture in the school" and that "governance is highly effective through the knowledgeable and experienced [IEB], led exceptionally well by the Chair, who has a clear vision for how to improve the school." The section identifying what needed to be done to improve further said nothing about either safeguarding or discrimination. On the contrary, the report stated that "the arrangements for safeguarding are highly effective in creating a safe culture in the school." Effectiveness of leadership and management was said to require improvement because the team was new; but the governance of the School was said to be highly effective, with the "very experienced and knowledgeable IEB" being "led exceptionally well by the Chair who has a clear vision of how to improve the standard of education for pupils at the school" and "through the IEB, had been instrumental in driving improvements in the school so far". Personal development, behaviour and welfare were said to require improvement, but the School's work to promote pupils' personal development and welfare was said to be good. "Safety of pupils is given a very high priority. Pupils know this and confirmed that they feel safe in school and know how to keep themselves safe such as when using the internet. They know the threats posed by extremist views and understand how to keep themselves safe from radicalisation. Pupils' understanding of British values in increasingly promoted through the curriculum and a range of activities." While early years provision was said to require improvement, it was said that "the children are happy and settled. They are well cared for. They behave well and show signs of developing empathy and concern for others."

12. Drawing the strands of these reports together:

    i) No report commented adversely on the segregation policy adopted by the School. While there was reference in the December 2014 Report to the School's policy not meeting current regulations, it was also recognised that it did not match current practice, which was to ensure equality of opportunity for all pupils;

ii) The leadership of the School was endorsed consistently, while recognising the substantial challenges it faced;

iii) Safeguarding of children was not criticised and was expressly considered to be highly effective in creating a safe culture in the School;

iv) Educational and teaching standards were consistently improving.

13. The consequence of the December 2015 Report was that the School came out of special measures.

14. It is common ground that on 8 June 2016, Her Majesty's Chief Inspector of schools, Sir Michael Wilshaw, visited the School as part of a wider series of visits to a number of schools in the city. The headteacher of the School says that he was informed in advance that Sir Michael's purpose was to visit Trojan Horse schools and that he pointed out that the School was not a Trojan Horse school. That is consistent with the evidence of a high ranking officer of the city's education department about another visit by and meeting with HMCI in May 2016.

15. Evidence from the headteacher and the Chair of the IEB gives a graphic account of a disastrous meeting on 8 June 2016. According to their evidence, HMCI pressed the issue of segregation of pupils from the outset, making clear his opposition to the practice and stating that his opposition was going to cause him to order a no-notice inspection of the school. He referred to the School as a Trojan Horse school and, when corrected, asserted that it had traits of the Trojan Horse schools. On the evidence of the headteacher and the chair of the IEB the meeting was highly confrontational to the extent that some of the staff said that they had felt bullied.

16. I bear in mind that I have no evidence from HMCI or from anyone who attended the 8 June 2016 meeting as part of his team or entourage. However, it appears to be indisputable that HMCI's visit led directly to the instituting of a further Ofsted inspection on 13-14 June 2016. There is a powerful inference to be drawn that the inspection occurred because HMCI said that it should; and that his prime concern was the fact of segregation in the School. Since he did not undertake a tour of the School, it is difficult to conceive that he had any other substantial reason for deciding that there should be an inspection.

17. The inspection was carried out by a team of seven, of whom four were Her Majesty's Inspectors and three were Ofsted Inspectors. They were led by Mr James McNeillie, who had previously participated in the December 2014 inspection. Another of the HM Inspectors, Jane Millward, had participated in the March 2015 inspection. The inspections in December 2014, March and December 2015 had been undertaken by teams of three or four inspectors.

18. There is divergent evidence about how the inspection was conducted. The evidence on behalf of the School is to the effect that the inspectors appeared to be on a mission to find fault. One witness describes the approach adopted as "incomprehensible and utterly devastating to the School leadership team and the IEB and deeply shocking to the experienced professionals who have been working closely with the school throughout its journey out of special measures." The same witness, with full knowledge of the gravity of what she is saying, says that "the inspectors appeared to be determined

to find evidence to support pre-determined views that the school requires special measures." She also states that she "believe[s] that the inspection was driven by a pre-determined agenda to find fault with the School due to the specific concerns of HMCI Sir Michael Wilshaw, raised on his visit to the School on 8 June, regarding the separation of girls and boys from year 5."

19. In the course of the inspection, Mr McNeillie converted the inspection from being a Section 8 inspection into a Section 5 inspection. According to the witness he explained the change as being "to explore further the choices made with regard to separate lessons and especially separate social times. Specifically to explore the educational value and the link between these decisions and the leadership and management of the school; and the social development of the pupils", words which she says she wrote down verbatim at the time. Her evidence is consistent with Mr McNeillie's recent witness statement at [8]. The criteria for conversion of a Section 8 inspection to a Section 5 inspection are set out in Ofsted's School Inspection handbook at [12], [47] and [213] and are that safeguarding is not effective or pupils are considered to be at risk in any way.

20. Witness statements were submitted to the Court on behalf of Ofsted from Mr Malynn, Ofsted's Principal Officer in the Schools Policy Team, and Mr McNeillie. The witness statements were dated 26 July 2016 and allowance must be made for the pressures imposed by the urgency of the inter-party hearing. Mr Malynn's statement goes to Ofsted's processes and procedures, which allow for a moderation process and for the school having an opportunity to comment upon a draft report before it is finalised. As a matter of Ofsted policy, judgments contained in a draft report cannot be changed unless factual errors or omissions have a significant bearing on them. School reports are usually not published outside school terms. This convention is observed to allow schools to fulfil their obligation to share the report with parents prior to the planned publication date.

21. Much more important for present purposes is the evidence of Mr McNeillie. Even allowing for the pressures under which it may have been produced, it is startlingly vague in a number of fundamental respects. While it provides generalised support for the general case being run by Ofsted, it does not provide any significant detail of the findings that influenced the Inspectors when drafting their report. Although produced at the last moment, the challenge to the inspectors' conduct has been clear since the School and Council lodged a formal complaint about the conduct of the inspection even before the Draft Report was provided; and the pre-action letter was sent on 19 July, swiftly followed by the issuing of these proceedings on 21 July. Whatever the reasons for the lack of specificity in Mr McNeillie's witness statement, it represents the evidence on behalf of Ofsted with which the Court has to work.

22. Mr McNeillie says that he converted the inspection to a full Section 5 inspection on the first day because of concerns regarding equality of opportunity at the School and how well leaders were preparing pupils for life in modern Britain, particularly in relation to pupils' social development. I infer from this description that his decision was driven by the fact of segregation. His witness statement concentrates significantly on the finding of "textbooks in the library … that contained misogynistic views and incited violence towards women" which led to the conclusion that safeguarding arrangements were inadequate. The books are not identified; nor are the offending passages set out. In its comments on the Draft Report the School asserted that the Inspectors had said that the books (unspecified) would be perfectly acceptable in a Religious Studies

classroom and that the actual quotes used to the Headteacher and in the Ofsted feedback section are from the Qur'an (standard translations and interpretations); and that at least one of them was used in a recent GCSE examination question paper. The Court cannot make findings of fact about what were the texts or whether they were in fact appropriate; but I note that, in the face of objection from the School to the draft on the basis that there was no evidence to support it, Ofsted excised a sentence suggesting that some staff believed that the comments, which it (Ofsted) regarded as objectionable, were acceptable.

23. Mr McNeillie says that he "came to the inspection without pressure having been placed on me to make any particular judgment." Otherwise he makes no comment about whether or not he knew of the reasons and motivation that led to the inspection being ordered. His evidence is that the segregation issue was not an isolated issue and that he reached his views on the inadequacy of the School on a number of other bases as well as on the basis of segregation. However, returning to the issue of segregation, he considers "that complete educational and social segregation in an ostensibly mixed sex school, without any educational justification for it, and without any analysis of its rational or its social consequences, is discriminatory."

24. The Draft Report was provided to the School under cover of a letter of 4 July 2016. Extensive objections were raised as a result of which a number of statements in the Draft Report were excised. But the thrust of the Final Report remained the same and was different from the December 2015 report to a degree that might suggest that they were reports on two completely different schools, not the same School separated by a distance of one term and with the history of progress outlined in the earlier reports to which I have referred. I am not going to trace in this judgment the changes that occurred between the Draft Report and the Final Report. For the purposes of this judgment it is sufficient to note that the passages that were excised were significant and would have been detrimental to the School if retained, adding to the thrust of the Final Report to which I now turn.

25. At the head of the report, the overall effectiveness (which in December 2015 had been assessed as "Requires Improvement") was assessed as "Inadequate". Three of the five main headings (Effectiveness of Leadership and Management, Personal Development, Behaviour and Welfare, and Early Years Provision) which had in the previous report been assessed as "Requires Improvement" were now assessed as "Inadequate". The summary of key findings for parents and pupils stated:

> "This is an inadequate school
>
> - Leaders have failed to keep pupils safe from extreme views that undermine fundamental British values.
>
> - Leaders have failed to have due regard to the need to achieve equality of opportunity.
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> - Books in the school library contained derogatory views about, and incited violence towards, women. Pupils had easy access to these books. Leaders told inspectors that they did not know the books were there.

> - Boys and girls are segregated in all lessons and at social times from Year 5 onwards. They are taught on separate corridors, have separate breaktimes and are not allowed to mix during the shared lunch hour. When they go on some trips to the same venues they go on different days.
>
> - Leaders' decision to segregate pupils by gender limits the opportunities for pupils' social development. The arrangements in this school do not provide sufficient opportunities to foster good relations between boys and girls.
>
> - Some older pupils told inspectors they are worried that being segregated by gender will mean that they are not prepared well for life beyond school.
>
> - …
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> - Provision in early years is inadequate because of safeguarding weaknesses. …
>
> - The interim executive board has failed to ensure that safeguarding arrangements for pupils or to ensure that pupils are provided with sufficient opportunities for good social development.
>
> - The interim executive board has not ensured that all steps have been taken to comply with its duty under the Equality Act 2010 to have due regard to the need to achieve equality of opportunity for pupils."

26. Under the heading "What does the school need to do to improve further?" the report said:

> - Urgently ensure that pupils are kept safe by reviewing the content of all books and other materials in the school to make sure that pupils are not exposed to extreme and intolerant views.
>
> - Improve leadership and management, including governance, by ensuring that:
>
> - All necessary steps are taken to keep pupils safe and improve their welfare
>
> - All books and any other materials in the school support equality of opportunity and promote fundamental British values of tolerance and respect, particularly in relation to the role of women in modern Britain
>
> …"

27. The section entitled "Inspection judgements" repeated and amplified the key findings set out above. Its comments on governance of the School went further, stating that the IEB has failed in its duty to ensure that pupils are kept safe from the risks of extreme views; that the IEB has failed in its duty to have due regard to the need to achieve equality of opportunity as required by S. 149 of the Equality Act 2010 and Regulations 2(3) and 3 of the Equality Act 2010 (Specific Duties) Regulations 2011; and that the arrangements for safeguarding are not effective. "In addition to the serious concerns about keeping pupils safe from the risk of extreme and intolerant views, the school's curriculum does not include well-developed opportunities to help pupils understand the risks associated with issues such as forced marriage and sexting. …".

28. Elsewhere there was a marked deterioration in the assessment of the School when compared with the December 2015 report, including in the assessment of teaching and the finding that "the whole-school arrangements for safeguarding are not effective and there are weaknesses in the risk assessment arrangements in the early years. This is why the early years provision is judged to be inadequate."

29. The Final Report was provided to the School under cover of a letter dated 15 July 2016 which said that it would be published within five working days from the date of the letter, i.e. on 22 July. As it happened, 22 July 2016 was to be the last day of the summer term. On 19 July 2016 the Council sent a pre-action protocol letter to Ofsted stating its intention to bring Judicial Review proceedings and asking Ofsted not to publish the report until 5 September 2016 in order "to enable parties to correspond about and/or discuss the school's and Council's concerns in an orderly manner. More importantly, we ask that whatever the outcome of such discussions, publication is delayed until after the 6 week school Summer break in order to ensure that the very serious concerns set out in the report are not raised at a time when school colleagues are on leave, the School is closed to pupils and the Council and the School will effectively be denied the opportunity to manage the undoubted community cohesion tensions that will emerge if the report is published." Ofsted replied on 20 July rejecting the possibility that Judicial Review proceedings could be justified and reaffirming its intention to publish the report on 22 July.

30. It was in these circumstances that the Claimant issued proceedings and applied to the Court for the interim relief that Wyn Williams J granted on 21 July 2016.

The Principles to be Applied

31. It is common ground that a Claimant seeking to restrain publication in a public law injunction case has additional hurdles to overcome over and above those posed in a purely private law case adopting normal *American Cyanamid* principles. Those additional hurdles have been expressed in different terms by different judges in situations which, while similar in having a public law element, are not congruent. One difference that may arise is between those cases where there is a statutory duty upon a person to publish and those where the person is not under a duty but has a power to publish. This case is in the latter category, the power of Ofsted to publish being conferred by s. 11(1) of the Education Act 2005.

32. Whether acting pursuant to a duty or (as in this case) pursuant to a power, there is a public interest that favours the publishing of Ofsted reports: see *Cambridge Associates*

in Management v Her Majesty's Inspector of Schools in England (Ofsted) [2013] EWHC 1157 (Admin) at [60].

33. In *R (Birmingham City College) v Ofsted* [2009] ELR 500, [2009] EWHC 2373 (Admin), Burton J reviewed a number of earlier decisions before providing a summary of principle at [25]-[30].

> *25 There is a clear and identifiable line of authority in relation to the grant of injunctions to restrain public bodies from publishing decisions or reports, which makes it clear that there are separate public law questions which fall to be considered alongside the ordinary principles of private law injunctions. So far as private law injunctions are concerned, the ordinary test, by reference to American Cyanamid Co v Ethicon Ltd [1975] AC 396 , is whether there is an arguable case for the claimant, and if so, where the balance of convenience lies. In defamation cases, injunctions will rarely be given because of the obligations of freedom of speech, but certainly so where the defendant asserts that he or she intends to justify the truth of what it asserts. However, in the public law field there are additional considerations, as is clear from the authorities which have been put before me. The central authorities are, first of all R (Matthias Rath BV) v Advertising Standards Authority Limited [2001] HRLR 22, a decision of Turner J which chose to follow the earlier decision of Laws J in R v Advertising Standards Authority ex parte Vernons Organisation Ltd [1992] 1 WLR 1289, rather than an earlier decision of Popplewell J in R v Advertising Standards Authority ex parte Direct Line Financial Services Ltd (1997). Turner J pointed out that Popplewell J had approached the matter as if the dispute between the parties existed in private law, whereas Laws J, experienced as he is in public law, had considered the matter properly in the area of public law.*
>
> *26 ...*
>
> *27 Different words are used by the judges in differentiating the more difficult hurdles which must be achieved by a claimant in a public law injunction case such as I have described from the ordinary, run of the mill, private law injunction case to which I have referred. There were pointed out by the various judges distinctions, some of which apply to this case: one in particular, namely that in a public law situation, such as here, it is usually the case that individuals are not seeking to salvage their reputation or avoid personal loss, and therefore there is, in addition, the impact of* Derbyshire County Council v Times Newspapers Ltd and Others [1993] AC 534 *in the House of Lords to be filtered in. Secondly, and almost duplicatively, the courts will, for that reason among others, have less readiness to grant an injunction in favour of one public body against another.*

> *28 The real issue is one in respect of which, once again, this case is a fortiori because of the statutory duty to publish, and is the interest of the public in there being publication by the body which is required to prepare the report. In Rath Turner J said that the defendant should only be prevented from publishing its opinions in a manner and time that was appropriate on 'pressing grounds'. In London Borough of Ealing, Stanley Burnton J said that the public has a right to receive the information contained in the Audit Commission report, 'unless there are exceptionally strong grounds for preventing them from doing so'. In the Debt Free Direct Ltd decision, Sullivan J said that he, like Turner J, unhesitatingly preferred the approach of Laws J to that of Popplewell J, and stated (in para [21]) 'if restraint of the expression of private opinions is justified only in exceptional circumstances, then the grounds for restraining the publication of an adjudication by a public body exercising a quasi-judicial function must be all the more compelling if they are to succeed'. He said, in para [24], that there would have, in his judgment, to be 'the most compelling reasons to prohibit a public body which is embarked on a quasi-judicial task ... from publishing its decision'.*
>
> *29 It is not simply, therefore, that there are all these additional words: 'exceptional circumstances', 'most compelling reasons', 'pressing grounds', 'exceptionally strong grounds', which require to be satisfied, but such that it will not be in every circumstance – far from it, that a good arguable case is entitled to be protected by an injunction.*
>
> *30 Sullivan J gave examples of where there might be extreme circumstances – as he put it, in para [24], 'most compelling reasons to prohibit a the public body': if for example the public body had engaged in a vendetta against the person the subject of the adjudication or if the adjudication was prompted by a deliberate desire to inflict damage on the reputation of the person criticised. One can think of other examples involving fraud or corruption, or perhaps involving the intention to proceed with a report which is, and can be shown to be, as on a justification injunction, manifestly untrue or riddled with error. It is never helpful to come up with examples, except suffice it to say that the test of the judge's thermometer, in terms of response to an injunction, will be set and calibrated several degrees higher, so far as looking at the arguability of a case, than it is in this case.*

34. *R (Birmingham City College) v Ofsted* involved a duty to publish pursuant to s. 125(3) of the Education Act 2005. Of the other cases mentioned by Burton J in the passage set out above, the starting point was taken as the judgment of Laws J (as he then was) in *R v Advertising Standards Authority ex p Vernons Organisation Ltd* [1992] 1 WLR 1289 where the normal function of the ASA in publishing its findings was taken to be

part of its public duty. At p. 1293, after considering submissions that were made by reference to the principles applicable when the Court is asked to restrain publication of allegedly defamatory statements Laws J said:

> *Is there here a set of circumstances which disengages the general principle that the courts will not prevent the publication of opinion or the dissemination of information save on pressing grounds? … If a private individual will not be restrained from expressing his opinion save on pressing grounds I see no reason why a public body having a duty, other things being equal, to express its opinion should be subject to any less rigid rules. It seems to me that the case is, if anything, analogous to one where an administrative body has an adjudicative function and in the course of its duties publishes a ruling criticising some affected person and the ruling is later disturbed or reversed by an appropriate appellate process. There are many such instances and many of them involve the criticism of members of the public, corporate or natural.*
>
> *I do not know of an instance in which a public body of that kind would fall to be restrained from carrying out what is no more nor less than its ordinary, but important, everyday duties simply upon the grounds that the intended publication contains material which is subject to legal challenge as being vitiated by some error of law. If the application for judicial review here is successful I cannot think but that there are ample means at the applicant's disposal to correct any adverse impression which what, ex hypothesi, would be an unlawful report may have given to the public. Indeed, though it has not been canvassed in argument, I know of no reason why the fact that they have obtained leave should not itself be disseminated if they wish to take any steps in that direction since this is an attempt to prevent the public and indeed, in fairness to the applicant, its fellow advertisers and others in the trade to which it belongs from seeing that the authority has reached these conclusions. I do not consider that the effects of that publication are damaging to the applicant in a manner which would be so irreparable, so past recall as to amount to a pressing ground, in the language of Strasbourg, a pressing social need, to restrain this public body from carrying out its function in the ordinary way.*

35. This passage is and remains important in weaving together different strands that should be brought into account as appropriate in any such case: the court's approach to the restraining of allegedly defamatory statements; the existence of a public duty (or power) to publish; the likelihood that damage caused by publication may be irreparable; and, viewed more generally, the existence or absence of a pressing ground or pressing social need to restrain publication.

36. Similarly, and adopting the approach of Laws J in the Vernons case, Sullivan J treated the publication of reports by the ASA as part of its public duty when acting in a quasi-judicial capacity in *R(Debt Free Direct Ltd) v Advertising Standards Authority Ltd* and

made his observations about the requirement of "most compelling reasons": see [23-24].

37. I do not find Burton J's reference to "the test of the judge's thermometer" at [30] of the Birmingham City College case entirely easy to understand or to apply. However, I take it to mean that the apparent strength of the case or the nature of the circumstances which are alleged to underpin the Claimants' complaint may be brought into account when considering whether or not to grant an injunction in the public law field. In its application to the present case, I take it to mean that the arguable existence of bias or other reprehensible behaviour can properly be taken into account when deciding whether or not to grant an injunction restraining publication.

38. I have referred to it being common ground that previous Ofsted reports are relevant to be taken into account by those carrying out subsequent inspections: see [8] above. That was recognised by Coulson J in *Old Co-operative Nursery v Ofsted* [2016] EWHC 1126 at [72-73], in a passage with which I respectfully agree. I also recognise that it is always possible that the opinions expressed in previous reports may be mistaken, or that previous reports may fail to identify matters that should have been identified, and that subsequent Inspectors are not bound by what their predecessors have said: see *Tate & Lyle Sugars Ltd v SS for Energy and Climate Change* [2011] EWCA Civ 664 at [34] per Elias LJ and *R (London Borough of Lewisham) v AQA and others* [2013] EWHC 211 (Admin) at [112]-[126] per Elias LJ. It therefore cannot be said that a subsequent Ofsted report is unlawful simply because it is inconsistent with a previous one, however stark the inconsistency.

Application of Principles to the Facts of the Present Case

39. I start by reminding myself that I am not in a position to reach a concluded view on any disputed fact, and I do not do so. What is required for the present exercise is to determine whether the Claimant succeeds in overcoming the hurdles that I have outlined when summarising the applicable principles above. I approach that task with no pre-disposition or assumption that the witness evidence put forward by the Claimant is correct. The documents that are available to the Court speak for themselves and are largely clear. If anything, I start with a mild scepticism that HMCI or the Inspectors who carried out the inspection would have behaved in the way described by the witness evidence put forward for the Claimant.

40. It is convenient to start with the documentary evidence. I accept that every Inspection must be carried out independently and that there is always scope for different judgments by different Inspectors either at a given moment in time or over time. Even allowing for that, however, the discrepancy between the judgments stated in the July 2016 Report and the three previous reports that are before the Court are extraordinary. To my mind they are frankly inconsistent in the sense that there is no obvious way of reconciling them given the identity and qualifications of the successive Inspectors who carried out the earlier reports and the limited time for the School and the IEB to have sustained the fundamental and entirely detrimental change between the earlier Reports and the July 2016 Report.

41. Given the frank inconsistency of the Reports, it is necessary to look for an explanation. On the one hand there is clear evidence of antagonistic behaviour on 8 June 2016, which led to the ordering of the inspection and which was followed within a week by an

apparent determination to find fault when the inspection was carried out. That evidence is at least corroborated by the fact of the complaint to Ofsted about the conduct of the inspection before the results were known and the need for the Draft Report to be significantly pruned of unsubstantiated statements in the light of the School's response to the draft. Taken together and in the light of the gulf between the judgments reached in the latest report and those set out in previous reports, the evidence about the conduct of the visit on 8 June and the subsequent inspection is apparently plausible and credible.

42. On the other hand, and making all due allowances for the pressure of timing, Mr McNeillie's response in his witness statement is limited. It is not an adequate response to say that he came to the inspection without pressure having been placed on him to make any particular judgment. That statement does not begin to answer the question whether he came to the inspection with a pre-determined mindset, or whether he was aware of the reasons why the inspection had been ordered at short notice, or by whose wish it had been ordered, or whether he knew the views of HMCI or that others held those views. It is, in my judgment, literally true to say that his statement begs more questions than it answers.

43. In an attempt to bolster its position, the Defendant submits that segregation such as that practiced at the School is unlawful because it necessarily involves discrimination contrary to s. 13 of the Equality Act 2010 and a breach of the Public Sector Equality Duty laid down by s. 149 of that Act. I shall leave it to others possessed of the full facts to decide whether either the degree of segregation practiced at the School or any other degree of segregation necessarily and without more is illegal, while noting that it is common knowledge that there are schools of high repute that practice degrees of segregation in mixed sex schools based upon an ethos other than Islam. What matters more in the present context is that *if* the degree of segregation practiced at the School is illegal, it has been illegal for years and there is no credible evidence or submission before the Court at this stage to explain why successive inspections failed to mention it even though they were critical enough to put the School into special measures at a time when Ofsted must have been sensitised to the issue of segregation in schools with an Islamic ethos.

44. By way of further submission, the Defendant submits that the outcome of the inspection would have been materially the same (i.e. a finding of inadequacy) even without the expressed concerns about segregation. There are two related responses to that submission. First, the concerns about segregation are the dominant concerns of the Report and influence other findings as well. Second, if it is right that the inspection process was affected in the way that the Claimant alleges, there is no reason to think that a mindset that was determined to find fault even if such findings were not justified would not have affected other parts of the Report as well.

45. Taken overall, the material now before the Court gives rise to an arguable case that the process leading to the production of the July 2016 report was infected by a pre-determined mindset or prejudice that would be quite alien to the proper and independent inspection process upon which the education system and the public at large rightly depends. If true it would, to adopt Burton J's slightly elliptical phrase, raise the Judge's thermometer to a temperature well above *American Cyanamid* arguability. I emphasise again that I do not and cannot make any findings about whether the Claimant's allegations are in fact well founded.

46. It was not suggested in submissions that damages would either be recoverable or would be an adequate remedy in the event that the injunction were to be discharged and the Claimant were ultimately to succeed. There is compelling evidence that the effect of publication of the report could be both extremely adverse and irreparable. The potential seriousness of the effects of publication is the subject of evidence from officers of the Council, the chair of the IEB and the interim executive headteacher of the School. The immediately foreseeable effect of publishing the Report would be to raise the spectre that the School will be placed back into special measures. The adverse effects go much wider. I accept as entirely plausible that, at the present time and in the febrile atmosphere that has prevailed since the Trojan Horse school problem arose, publication of the report has the capacity to affect social and community cohesion. It also has the capacity to be seen as an unwarranted attack on aspects of the School's Islamic religious ethos which have in the very recent past been acceptable to Ofsted, because the nature and effect of the School's segregation policy have not changed since the previous reports. The adverse impact will be liable to be exacerbated by the fact that Ofsted originally planned to publish the report on the last day of the School's term. It can be said that the last day of term does not technically breach Ofsted's sensible convention of publishing reports during term time to allow schools to fulfil their obligation to share the report with parents prior to the planned publication date. However, it is obvious (and evidenced) that publishing such a significant document on the last day of term would maximise the difficulties for the School and the Council in managing the fall out that would inevitably follow, as was pointed out to Ofsted in the Pre-action Protocol letter on 19 July 2016.

47. The Defendant submits that the detriments that are evidenced by the Claimants' witnesses would not flow from the publication of the report prior to determination of the substantive claim. I do not agree. Publication of the report before the determination of the substantive claim would be likely to generate a media storm and tensions and fears for parents and the local community that will not happen if the report in its present form is quashed. If it is upheld, those problems will have to be addressed, but that is not the point when addressing the question of adequacy of damages or remedies.

48. I turn therefore to the balance of convenience. In doing so I bear in mind Ofsted's general power to publish such reports, the public interest in valid reports being published, and the hurdles that must be overcome by the Claimant, as outlined above. However, the present hearing remains one that is limited to a claim for an interim injunction. Delaying publication in the circumstances of this case (assuming now that the Claimant is ultimately unsuccessful and the report is upheld) will be a temporary inconvenience for Ofsted which does not undermine the general principle that there is a public interest in favour of publication. Ofsted submits that it is important for the report to be published now so that parents (and particularly parents whose children are due to start in the School in the autumn) should be told of the inspection grade received by the School before September on the basis that the upset of learning that the School is in special measures is better handled if it is not communicated at the very start of the school year. The force of that submission is substantially blunted by the fact that publishing on the last day of the previous school year would minimise the ability of the School, the IEB (if it survived) and the Council to deal with the effect of communicating the news now. It would also minimise the ability of prospective or current parents to make alternative educational arrangements for their children.

49. As a further submission on balance of convenience, the Defendant submits that there is nothing to stop the Claimant communicating to the parents that it disagrees with the Defendant's assessment that segregation at the School is unlawful. I reject that submission on the evidence because the timing of the proposed publication meant that the ability of the School to muster a coherent communication strategy would be minimised by the onset of the holidays. It seems to me to be profoundly unreal to suggest that the damage caused by the publication of the report can be prevented by the School saying it disagrees with it.

50. Standing back and viewing the case as it is now in the round, I am conscious of the high hurdles that the Claimant must overcome, as set out above. I take into account the general approach of the law, even in private law cases, to the restraining of defamatory statements and the general power of Ofsted to publish its reports. Set against those features, I am satisfied that the evidence now before the Court goes beyond mere *American Cyanamid* arguability and provides plausible evidence of a state of affairs which, if true, turns up the temperature. I am substantially influenced by the evidence that the damage caused by the publication of the report may be widespread and irreparable, at least in the medium term. If the validity of the report is upheld, it will be published (and published soon) and adverse consequences will then follow; but if the report were to be quashed it can readily be foreseen that the consequences of its having been published would be highly regrettable. Striking an overall balance is complex and I accept that others might take a different view. However, I consider that the Claimant has established a pressing ground and pressing social need in exceptional circumstances for the interim injunction granted by Wyn Williams J to be maintained until the question of permission to bring the Judicial Review proceedings has been determined or further order.