Neutral Citation Number: [2026] EWHC 26 (Admin)

Case No: AC-2025-LON-001230 and 001208

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12th January 2026

Before :

Neil Cameron KC
sitting as a Deputy High Court Judge

Between :

GREEN LANE ASSOCIATION LIMITED	**Claimant (claim 001230)**
-and-	
TRAIL RIDERS FELLOWSHIP	**Claimant (claim 001208)**
-and-	
CENTRAL BEDFORDSHIRE COUNCIL	**Defendant**

Brendan Brett (instructed by Richard Buxton Solicitors) for the **Claimant in claim 001230**

Adrian Pay (instructed by DMH Stallard) for the **Claimant in claim 001208**

Joel Semakula (instructed by Pathfinder Legal Services) for the **Defendant**

Hearing dates: 9th and 10th December 2025

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JUDGMENT

The Deputy Judge (Neil Cameron KC):

Introduction

1. There are two claims before the court. One claim is made by Green Lane Association Limited, who I will refer to as the First Claimant, and the other by the Trail Riders Fellowship, who I will refer to as the Second Claimant.

2. The decision under challenge is the same in both claims. It is the decision of the Defendant to make The Central Bedfordshire Council (Prohibition of Motor Vehicles) (BOAT No.33, Sandy Lane, Aspley Heath) Experimental Order 2025 ("the 2025 ETRO"). The 2025 ETRO was made on 11th March 2025 and came into operation on 27th March 2025.

3. The First Claimant objects to the Defendant's reliance on the evidence of Ms Bettles (Rights of Way and Arboriculture Manager for the Defendant) (in relation to Ground 2 of its challenge). I will address that application when considering the ground of challenge to which it relates.

The Background Facts

4. Aspley Heath byway open to all traffic ("BOAT") No.33 starts at its junction with Milton Keynes Bow Brickhill BOAT No.29 and runs in a generally north-north-east direction for approximately 870 metres to its junction with Heath Road, Church Road and BOAT No.27 in Aspley Heath. BOAT No.33 runs through mixed coniferous and deciduous woodland over sandy soils, and is

known as 'Sandy Lane'. I will refer to BOAT No.33 as the "Sandy Lane BOAT".

5. The Defendant is the traffic authority for the Sandy Lane BOAT.

6. The Sandy Lane BOAT is situated within the Wavendon and Aspley Woods County Wildlife Site.

7. In early 2024 the Defendant carried out works to repair the surface of the Sandy Lane BOAT.

8. On 12th March 2024 the Defendant made the Central Bedfordshire Council (Prohibition of Motor Vehicles) (BOAT No.33, Sandy Lane, Aspley Heath) Experimental Order 2024 ("the 2024 ETRO").

9. The First Claimant and the Second Claimant brought claims under paragraph 35 of Schedule 9 to the Road Traffic Regulation Act 1984 ("RTRA 1984") by which they challenged the validity of the 2024 ETRO.

10. By consent orders sealed on 15th May 2024, the 2024 ETRO was quashed. In the Schedule of Reasons attached to the consent orders the Defendant stated that they accepted that they had failed to carry out a proper consultation as required by regulation 6 of the Local Authorities Traffic Orders (Procedure) (England and Wales) Regulations 1996 ("the 1996 Regulations").

11. On the 14th August 2024 the Defendant sent an email to a number of parties, including the Claimants. In that email the Defendant stated that they were consulting the recipients before deciding whether to make an experimental traffic regulation order which would prohibit use of motor vehicles on BOAT

No.33 (Sandy Lane). The email was accompanied by a public notice dated 14th August 2024. That notice included the following:

"Notice is hereby given that on (sic) Central Bedfordshire Council intends to make an Experimental Order under Sections 9, 10 and Part IV of Schedule 9 of the Road Traffic Regulation Act 1984 and all other enabling powers, after consultation with the Chief Officer of the Police in accordance with Part III of Schedule 9 to the Act.

If the order comes into operation it will introduce a Prohibition of Motor Vehicles as detailed on the length of road below at a date to be confirmed.

…

Reason for Experimental Order: The decision has been made to propose to prohibit all motorised vehicles in order to address inappropriate usage of Sandy Lane Byway. Reported inappropriate usage includes anti-social behaviour, fly-tipping, racing and use of the Byway by unsuitable vehicles which have consequently damaged the road surface. The Prohibition of Motor Vehicles will prevent all motorised vehicles from using the Byway and this will be enforced using a coded gate and bollards.

Implementing this as an Experimental Order will enable the Council to monitor the scheme to assess it's impact on addressing the anti-social behavior (sic) and its impact on the wider local area, and modify or remove it at any time should the need arise.

If made, it is proposed that the Experimental Order will be in operation for up to 18 months and Central Bedfordshire Council will consider in due course whether the provisions of this Order should be continued indefinitely. Within a period of 6 months beginning with the day on which the Order comes into force, any member of the public may object to the making of Order and making the effects permanent.

… "

12. On 16th August 2024 Pete Jones, the Legal Manager for the First Claimant wrote to the Defendant. That email included the following:

"The proposal's stated aim is to address the inappropriate usage of Sandy Lane Byway. No further information is provided on how the Council has decided the listed behaviours are inappropriate.

Consequently, it is difficult for the Association to make an informed response. I would be grateful if you could provide the information and reports relied on to support the proposal.

…"

13. On the 19th August 2024 Clive Beckett sent an email to a number of recipients including employees of the Defendant in which he said:

"I am familiar with this lane through management of Aspley Woods. For years this lane has had an issue with unsocial behaviour but we refrained from any action to restrict vehicular access as it is also well used by motor vehicles particularly 4x4's and motor cyclists. As far as I am aware that use continues. If

this was a road would the highway authority close it or would the police take appropriate action.

The lane serves as a short cut to Aspley Heath from Bow Brickhil (sic) and other settlements and has been used in the past as a link to the local school.

At the time we felt that the problem was more a police matter and closage (sic) was absolutely the last resort.

Also, is closure to all vehicles necessary. I am sure the Off Road Fellowship will.oppose such a proposal.

…"

14. Mr Beckett is the Chair of the Local Access Forum ("LAF"). In his email of 19th August 2024, Mr Beckett did not refer to his position as Chair of the LAF.

15. On 23rd August 2024 a Principal Highways Officer employed by the Defendant sent an email to Mr Jones of the First Claimant to which she attached a spreadsheet which contained approximately sixteen photographs together with commentary.

16. In a letter dated 3rd September 2024 Mr Jones of the First Claimant sent a letter setting out grounds of objection to the proposed ETRO. At paragraph 4 of his letter, Mr Jones states that he has attached a copy of the First Claimant's publication "Inclusive Countryside Access".

17. On 26th November 2024 the Defendant's officers produced a report to be presented to the decision making members at a Traffic Management Meeting ("the OR").

i) The OR recommended that an ETRO be made prohibiting Sandy Lane from being used by motorised vehicles.

ii) Paragraphs 6 and 7 of the OR state:

> "6. The introduction of an Experimental Traffic Regulation Order would provide the opportunity to repair the worst eroded sections of Sandy Lane, protect it from further damage by motor vehicles, and would allow the Council to monitor the level of erosion without the impact of motorised vehicles. For the period, the BOAT would operate as a traffic-free amenity route for walkers, cyclists, and horse-riders.
>
> 7. By introducing the order as an ETRO, the Council has a period of up to 18 months to assess its impact, noting that comments and objections can be raised during the first six months. Hence, after a minimum six-month period the Council will review its impact and effectiveness and whether it would be appropriate for the arrangement to continue and/or be made permanent.

iii) At paragraphs 19-21 the OR considered 'Options for Consideration'

> "19. The Council considered but discounted the option of advertising the order as a permanent TRO under the powers conferred by the Road

Traffic Regulations Act (1984). This was discounted on the view of officers that an experimental period would be preferable, as this would allow for a considered assessment of the impact on the Byway surface of motor vehicle use.

20. The recommended option is to introduce the ETRO as advertised.

21. There is also the option to uphold the objections and not progress with the order or make the restrictions less onerous."

iv) The following was included under the heading Equalities and Fairness Implication (at OR paragraphs 30-31)

"30. The Equality Act 2010 (the "Act") provides protection from discrimination in respect of certain protected characteristics namely: age, disability, gender re-assignment, pregnancy and maternity, race, religion or beliefs and sex and sexual orientation. It places the Council under a legal duty to have due regard to the advancement of equality in the exercise of its powers. In particular, the Council must pay due regard to the need to:

• eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act

• advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and

• foster good relations between persons who share a relevant protected characteristic and persons who do not share it

Due regard must also be given to the Public Sector Equality Duty (PSED). Section 149 of the Equality Act 2010 requires the Council to consider all individuals when carrying out their functions; this includes changes to policy. The duty requires that due regard be given to the need to eliminate discrimination, advance equality of opportunity, and foster good relations between different people. Specifically, the following protected characteristics must be given due regard - age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex, sexual orientation. The PSED also applies to marriage and civil partnership, but only in relation to the need to eliminate discrimination, harassment and discrimination

31. It is accepted that drivers of off-road vehicles will be disadvantaged by the prohibition to traffic whereas other, more vulnerable users including pedestrians, equestrians and cyclists, are likely to feel significantly less at risk. We are conducting equality screening to ensure we identify any potential equality impacts as we monitor the implementation of the proposal for closure to vehicles."

v) The following is set out at paragraphs 33 and 34:

"Other Corporate Implications

33. Closing this section to motor vehicles is likely to reduce the level of anti-social behaviour including fly tipping which has previously been reported on this section of Sandy Lane.

Conclusion and next steps

34. It is recommended that approval is granted to introduce an Experimental Traffic Regulation Order that prohibits traffic from using Aspley Heath BOAT No. 33 and that a report is bought back to the Traffic Management Meeting as to its impact after a period of no less than 6 months and no more than 15 months."

vi) The following documents are listed as appendices to the OR:

"Appendix A: Public Notice

Appendix B: Drawing

Appendix C: Police Response

Appendix D: Parish Council Response

Appendix E: Ward Member Response

Appendix F: Statutory Consultee and Prescribed Bodies Responses

Appendix G: County Wildlife Site Designation"

18. The documents in Appendix F to the OR included:

i) The spreadsheet and photographs attached to the 23rd August 2024 email from the Defendant's Principal Highways Officer to Mr Jones of the First Claimant.

ii) The First Claimant's letter of 3rd September 2024. The document 'Inclusive Countryside Access' was not included in the appendices to the OR.

19. In her First Witness Statement Ms Bettles states that an Equality Impact Assessment was carried out as part of the report writing process. She says that an equality and diversity checklist document was filled out in consultation with the Defendant's EDI Strategy Officers. Ms Bettles produced an Equality and Diversity Checklist ("the Checklist") dated 15th January 2025. The following appears at Section B of the Checklist:

"B) In which ways does the proposal support Central Bedfordshire's legal duty to:

 Eliminate unlawful discrimination harassment and victimisation and other conduct prohibited by the Act

By allowing safe access to pedestrians, cyclists and horse riders safer access to the use of the Byway without fear for safety or harassment

 Advance equality of opportunity between people who share a protected characteristic and people who do not share it

By allowing both people who share a protected characteristic and people who do not share it to have equal access to a safe use of the route

 Foster good relations between people who share a protected characteristic and people who do not share it

By allowing both people who share a protected characteristic and people who do not share it the same access and rights to pass and repass along the Byway safely"

20. On the 23rd January 2025 a traffic management meeting was held. The meeting was chaired by Councillor John Baker. As Councillor Baker is the ward councillor for the area which includes the Sandy Lane BOAT the agenda item at which the proposal to make the 2025 ETRO was considered was chaired by Councillor Zerny.

21. A representative of the First Claimant (Mr Jones) spoke at the meeting by video call using Microsoft Teams. In his witness statement Mr Jones said that he delivered a prepared three-minute speech, but that as the audio function did not work he was unable to listen to the proceedings, and therefore unable to respond to any points made.

22. The minutes of the meeting held on 23rd January 2025 record (amongst other things):

    i) A statement submitted by the LAF was read by the Committee Services Officer. In that statement the LAF opposed the proposed ETRO.

    ii) A statement submitted by the Second Claimant opposing the making of the proposed ETRO was read by the Committee Services Officer.

    iii) The decision:

> "1. That the proposal for an Experimental Traffic Regulation Order (ETRO) to introduce a prohibition of Motor Vehicles be implemented as advertised on the following length of road in Aspley Heath:-
>
> - Sandy Lane (BOAT 33), from the crossroads at Aspley Heath Lodge where Bridleway No.4 meets Byway No.33 and extending in a south

westerly direction for approximately 687 metres (ending at the county boundary)."

23. The 2025 ETRO was made on the 11th March 2025 and came into force on 27th March 2025. Articles 3 and 4 of the 2025 ETRO provide:

"3. Save as provided in article 4 of this Order no person shall cause any mechanically propelled vehicle to proceed in the roads specified in the schedule to this order.

4. Nothing in Article 3 of this Order shall apply to:-

a) a vehicle being used for police, ambulance, fire service or special forces purposes;

b) a pedal cycle which is not a motor vehicle;"

The Legal Framework

Road Traffic Regulation Orders

24. Section 1 of the RTRA 1984 provides:

"1.— **Traffic regulation orders outside Greater London.**

(1) [The traffic authority for a road outside Greater London may make an order under this section (referred to in this Act as a "traffic regulation order") in

respect of the road] where it appears to the authority making the order that it is expedient to make it—

(a) for avoiding danger to persons or other traffic using the road or any other road or for preventing the likelihood of any such danger arising, or

(b) for preventing damage to the road or to any building on or near the road, or

(c) for facilitating the passage on the road or any other road of any class of traffic (including pedestrians), or

(d) for preventing the use of the road by vehicular traffic of a kind which, or its use by vehicular traffic in a manner which, is unsuitable having regard to the existing character of the road or adjoining property, or

(e) (without prejudice to the generality of paragraph (d) above) for preserving the character of the road in a case where it is specially suitable for use by persons on horseback or on foot, or

(f) for preserving or improving the amenities of the area through which the road runs; or

(g) for any of the purposes specified in paragraphs (a) to (c) of subsection (1) of section 87 of the Environment Act 1995 (air quality).

…"

25. Section 9 of the RTRA 1984 provides:

"9.— **Experimental traffic orders.**

(1) The traffic authority for a road may, for the purposes of carrying out an experimental scheme of traffic control, make an order under this section (referred to in this Act as an "experimental traffic order") making any such provision—

(a) as respects a road outside Greater London, as may be made by a traffic regulation order;

…

(3) An experimental traffic order shall not continue in force for longer than 18 months.

…"

26. Carnwath J (as he then was) considered the ambit of section 9 of the RTRA 1984 in ***UK Waste Management Ltd. v. West Lancs DC*** [1997] RTR 201 at page 208E-G; his conclusions were summarised by Kerr J in ***R (oao Sheakh) v. LB of Lambeth*** [2021] EWHC 1745 (Admin) at paragraph 23 (affirmed by the Court of Appeal [2022] PTSR 1315, at paragraph 59):

"23. An ETO must be genuinely experimental in nature. It cannot be in truth and substance permanent though made under the guise of an experiment: it must be "an operation designed to glean information about the workings of the scheme in practice" (per Carnwath J, as he then was, in *UK Waste Management Ltd v. West Lancashire DC* [1997] RTR 201 , at 208E-F). "[F]or there to be a

valid experimental order there must be an experiment and the authority must be able to explain what it is" (ibid. at 108F-G).”

27. In ***Trail Riders Fellowship v. Peak District National Park Authority*** [2012] EWHC 3359 (Admin) Ouseley J said (at paragraph 31) “The Order-making authority simply has to identify what the experiment is and its purpose.” That purpose is to be identified in the statement of reasons. The authority must have a rational basis for the experiment (paragraph 36). A claimant is entitled to refer to material other than the statement of reasons to show that the stated purpose is not the real purpose (paragraph 37). There is no need for elaborate explanation (paragraph 39). The judge doubted that reference to extraneous material by a traffic authority is permitted to ascertain the purpose of an experimental order, but contemplated that it may be admissible to resolve a genuine ambiguity (paragraph 43).

28. Section 122 of the RTRA 1984 provides:

“122.— **Exercise of functions by [strategic highways companies or] local authorities.**

(1) It shall be the duty of every strategic highways company and local authority upon whom functions are conferred by or under this Act, so to exercise the functions conferred on them by this Act as (so far as practicable having regard to the matters specified in subsection (2) below) to secure the expeditious, convenient and safe movement of vehicular and other traffic (including

pedestrians) and the provision of suitable and adequate parking facilities on and off the highway or, in Scotland, the road

(2) The matters referred to in subsection (1) above as being specified in this subsection are—

(a) the desirability of securing and maintaining reasonable access to premises;

(b) the effect on the amenities of any locality affected and (without prejudice to the generality of this paragraph) the importance of regulating and restricting the use of roads by heavy commercial vehicles, so as to preserve or improve the amenities of the areas through which the roads run;

(bb) the strategy prepared under section 80 of the Environment Act 1995 (national air quality strategy);

(c) the importance of facilitating the passage of public service vehicles and of securing the safety and convenience of persons using or desiring to use such vehicles; and

(d) any other matters appearing to the strategic highways company or the local authority to be relevant.

…"

29. The balancing exercise required by section 122 was considered by the Court of Appeal in ***Trail Riders Fellowship v. Hampshire CC*** [2020] PTSR 194.

i) The relevant balancing exercise is described by Longmore LJ (with whom Lewison and Coulson LJJ agreed on these issues) at paragraph 37:

"37 One must, of course, be clear what the relevant balancing exercise is. On the one hand regard must be had to the duty set out in section 122(1) so far as practicable "to secure the expeditious, convenient and safe movement of vehicular and other traffic (including pedestrians)"; as the judge points out (paras 37(i) and 44) it is significant that pedestrians are included. On the other hand, regard must be had to the effect on the amenities of the locality affected and other matters appearing to the traffic authority to be relevant (section 122(2)(b) and (d)). This is not a particularly difficult or complicated exercise for the traffic authority to conduct. …"

ii) There is no requirement to make specific reference to section 122; if the order-making authority does in fact conduct the balancing exercise that is sufficient (paragraph 35).

iii) In considering whether the right balancing exercise has been conducted the analysis is not to be restricted to the statement of reasons (as the balancing exercise is to be conducted after representations have been received). Regard can be had, in particular, to the officer report which informed the decision to make the order (paragraph 36).

iv) There has to be actual evidence that the balancing process has been, in substance, conducted (paragraph 38).

v) At paragraph 40 Longmore LJ summarised the approach to be taken by order-making authorities:

> "40 Before parting with this aspect of the case it may be helpful to summarise the approach which should be adopted by traffic authorities in considering whether to make a TRO: (1) the decision-maker should have in mind the duty (as set out in section 122(1) of the 1984 Act) to secure the expeditious, convenient and safe movement of vehicular and other traffic (including pedestrians) so far as practicable; (2) the decision-maker should then have regard to factors which may point in favour of imposing a restriction on that movement; such factors will include the effect of such movement on the amenities of the locality and any other matters appearing to be relevant which will include all the factors mentioned in section 1 of the 1984 Act as being expedient in deciding whether a TRO should be made; and (3) the decision-maker should then balance the various considerations and come to the appropriate decision. As I have already said, this is not a particularly difficult or complicated exercise nor should it be."

30. Paragraphs 35 and 36 of Schedule 9 to the RTRA 1984 provide:

> "**35.**
>
> If any person desires to question the validity of, or of any provision contained in, an order to which this Part of this Schedule applies, on the grounds—
>
> (a) that it is not within the relevant powers, or

(b) that any of the relevant requirements has not been complied with in relation to the order,

he may, within 6 weeks from the date on which the order is made, make an application for the purpose to the High Court or, in Scotland, to the Court of Session.

…

36.—

(1) On any application under this Part of this Schedule the court—

(a) may, …; and

(b) if satisfied that the order, or any provision of the order, is not within the relevant powers, or that the interests of the applicant have been substantially prejudiced by failure to comply with any of the relevant requirements, may quash the order or any provision of the order.

…"

31. The approach to be taken by the court to a paragraph 35 statutory review is akin to that taken in judicial review proceedings. A failure to comply with relevant requirements will only result in order being quashed if the Claimant has been substantially prejudiced by the failure. The power to quash is discretionary and therefore regard can be had to the approach adopted in ***Simplex GE (Holdings)***

Ltd. v. Secretary of State for the Environment [2017] PTSR 1041 at page 1060E).

32. Section 16 of the Traffic Management Act 2004 ("TMA 2004") imposes the network management duty:

"16 **The network management duty**

(1) It is the duty of a local traffic authority or a strategic highways company ("the network management authority") to manage their road network with a view to achieving, so far as may be reasonably practicable having regard to their other obligations, policies and objectives, the following objectives–

(a) securing the expeditious movement of traffic on the authority's road network; and

(b) facilitating the expeditious movement of traffic on road networks for which another authority is the traffic authority.

…"

33. The procedure for making traffic regulation orders is governed by the 1996 Regulations. The publicity requirements for experimental orders are more limited than for traffic regulation orders with permanent effect. The consultation requirements imposed by regulation 6 apply to experimental orders. Regulation 22 makes express provision for experimental orders.

i) Regulation 22 provides:

"22.— Experimental orders

(1) The provisions of regulations 7 (publication of proposals) and 8 (objections) shall not apply to an experimental order.

(2) No provision of an experimental order shall come into force before the expiration of the period of seven days beginning with the day on which a notice of making in relation to the order is published.

(3) The order making authority shall, subject to Part VI, comply with the requirements of Schedule 2 as to the making of deposited documents relating to an experimental order available for public inspection.

(4) Deposited documents shall be so made available, at the times and at the places specified in the notice of making in relation to the experimental order, for a period beginning with the date on which that advertisement is first published and ending when the order ceases to have effect."

ii) Regulation 23 makes provision for the procedure to be followed when the sole effect of an order is to reproduce and continue in force indefinitely the provisions of an experimental order.

34. It can be seen that regulation 22(3) of the 1996 Regulations maintains the obligation to comply with the requirements of Schedule 2. Those requirements include the requirement at paragraph 2(d) of Schedule 2 for the deposited documents to include:

"a statement setting out the reasons why the authority proposed to make the order including, in the case of an experimental order, the reasons for proceeding by way of experiment and a statement as to whether the authority intends to consider making an order having the same effect which is not an experimental order;"

Local Access Forums

35. Section 94 of the Countryside and Rights of Way Act 2000 ("CROW 2000") provides:

"94.— **Local access forums**.

(1) The appointing authority for any area shall in accordance with regulations establish for that area, or for each part of it, an advisory body to be known as a local access forum.

(2) …

(4) It is the function of a local access forum, as respects the area for which it is established, to advise—

(a) the appointing authority,

(b) any body exercising functions under Part I in relation to land in that area,

(c) if the appointing authority is a National Park authority, the local highway authority for any part of that area, and

(d) such other bodies as may be prescribed,

as to the improvement of public access to land in that area for the purposes of open-air recreation and the enjoyment of the area, and as to such other matters as may be prescribed.

(5) The bodies mentioned in paragraphs (a) to (d) of subsection (4) shall have regard, in carrying out their functions, to any relevant advice given to them by a local access forum under that subsection or any other provision of this Act.

…"

Public Sector Equality Duty

36. Section 149 of the Equality Act 2010 ("the 2010 Act") provides:

"149 **Public sector equality duty**

(1) A public authority must, in the exercise of its functions, have due regard to the need to—

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

…"

37. The principles relating to the application of section 149 of the 2010 Act were summarised by McCombe LJ in ***Bracking v. Secretary of State for Work and Pensions*** [2013] EWCA Civ 1345 at paragraph 25:

"(1) As stated by Arden LJ in *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213; [2006] EWCA Civ 1293 at [274], equality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.

(2) An important evidential element in the demonstration of the discharge of the duty is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements: *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWHC 199 (QB) (Stanley Burnton J (as he then was)).

(3) The relevant duty is upon the Minister or other decision maker personally. What matters is what he or she took into account and what he or she knew. Thus, the Minister or decision maker cannot be taken to know what his or her officials know or what may have been in the minds of officials in proffering their advice: *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154 at [26 – 27] per Sedley LJ.

(4) A Minister must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy and not merely as a "rearguard action", following a concluded decision: per Moses LJ, sitting as a Judge of the Administrative Court, in *Kaur & Shah v LB Ealing* [2008] EWHC 2062 (Admin) at [23 – 24].

(5) These and other points were reviewed by Aikens LJ, giving the judgment of the Divisional Court, in *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), as follows:

i) The public authority decision maker must be aware of the duty to have "due regard" to the relevant matters;

ii) The duty must be fulfilled before and at the time when a particular policy is being considered;

iii) The duty must be "exercised in substance, with rigour, and with an open mind". It is not a question of "ticking boxes"; while there is no duty to make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument;

iv) The duty is non-delegable; and

v) Is a continuing one.

vi) It is good practice for a decision maker to keep records demonstrating consideration of the duty.

(6) "[G]eneral regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria." (per Davis J (as he then was) in *R (Meany) v Harlow DC* [2009] EWHC 559 (Admin) at [84], approved in this court in *R (Bailey) v Brent LBC* [2011] EWCA Civ 1586 at [74–75].)

(7) Officials reporting to or advising Ministers/other public authority decision makers, on matters material to the discharge of the duty, must not merely tell the Minister/decision maker what he/she wants to hear but they have to be "rigorous in both enquiring and reporting to them": *R (Domb) v Hammersmith & Fulham LBC* [2009] EWCA Civ 941 at [79] per Sedley LJ.

(8) Finally, and with respect, it is I think, helpful to recall passages from the judgment of my Lord, Elias LJ, in *R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin) (Divisional Court) as follows:

(i) At paragraphs [77–78]

"[77] Contrary to a submission advanced by Ms Mountfield, I do not accept that this means that it is for the court to determine whether appropriate weight has been given to the duty.

Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then as Dyson LJ in *Baker* (para [34]) made clear, it is for the decision maker to decide how much weight should be given to the various factors informing the decision.

[78] The concept of 'due regard' requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker. In short, the decision maker must be clear precisely what the equality

implications are when he puts them in the balance, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors. If Ms Mountfield's submissions on this point were correct, it would allow unelected judges to review on substantive merits grounds almost all aspects of public decision making."

(ii) At paragraphs [89–90]

"[89] It is also alleged that the PSED in this case involves a duty of inquiry. The submission is that the combination of the principles in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 and the duty of due regard under the statute requires public authorities to be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it and this will frequently mean than some further consultation with appropriate groups is required. Ms Mountfield referred to the following passage from the judgment of Aikens LJ in *Brown* (para [85]):

'….the public authority concerned will, in our view, have to have due regard to the need to take steps to gather relevant information in order that it can properly take steps to take into account disabled persons' disabilities in the context of the particular function under consideration.'

[90] I respectfully agree…." "

38. As noted by Lang J at paragraph 89 in ***Coulthard v. Secretary of State*** [2024] EWHC 3252, McCombe LJ's summary of the principles in ***Bracking*** was

approved by Lord Neuberger in ***Hotak v. Southwark*** [2016] AC 811 at paragraph 73, with the following additions at paragraph 75:

"75. As was made clear in a passage quoted in the *Bracking case [2014] Eq LR 60* , para 60, the duty "must be exercised in 'substance, with rigour, and with an open mind'": per Aikens LJ in *R (Brown) v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening) [2009] PTSR 1506* , para 92. And, as Elias LJ said in the *Hurley case [2012] HRLR 13* , paras 77–78 it is for the decision-maker to determine how much weight to give to the duty: the court simply has to be satisfied that "there has been a rigorous consideration of the duty". Provided that there has been "a proper and conscientious focus on the statutory criteria", he said "the court cannot interfere … simply because it would have given greater weight to the equality implications of the decision"."

39. When an order is experimental and is therefore only one stage in a sequence of decision making and where the full effects of the decision are to be ascertained over time the court must take care not to apply too demanding a standard in establishing whether the 'due regard' duty was discharged (***R (oao) Sheakh v. LB of Lambeth*** [2022] PTSR 1315 at paragraph 70). A 'rolling-assessment' is not automatically appropriate where the function being exercised is to initiate an experiment; it may be appropriate but this will depend on the facts (***Sheakh*** paragraph 71).

Consultation

40. Regulation 6 of the 1996 Regulations imposes a duty to consult.

41. Irrespective of how a duty to consult arises, the common law duty of procedural fairness will inform the manner in which the consultation should be conducted (***R (Moseley) v. Haringey LBC*** [2014] PTSR 1317 at paragraph 23). The four 'Sedley criteria' (accepted by Hodgson J in ***R v. Brent LBC ex parte Gunning*** (1985) 84 LGR 168 at page 189) were endorsed by the Supreme Court (***Moseley*** at paragraph 25).

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

42. At stage 4 of the process (conscientious consideration) there is no obligation to consider each and every specific point of detail (***R(oao Electric Collar Manufacturers Association) v. Secretary of State for Environment, Food and Rural Affairs*** [2019] EWHC 2813 (Admin) at paragraph 151). When considering reasons the real question is whether the response to the issues identified by consultees is rational (***Electric Collar*** at paragraph 153). There

should be evidence of consideration of important points made by consultees (***Electric Collar*** at paragraph 153).

Reasons

43. In ***South Buckinghamshire DC v. Porter (No.2)*** [2004] 1 WLR 1953 at paragraph 36, Lord Brown set out the standard of reasons required in the planning context.

44. In ***Williams v. LB of Waltham Forest*** [2015] EWHC 3907 (Admin) Holgate J (as he then was) considered a challenge to the making of experimental traffic orders. At paragraphs 92 and 93 the judge considered the standard of reasons applicable when giving reasons pursuant to paragraph 2(d) of Schedule 2 to the 1996 Regulations:

"92. Mr Wragg referred to the passage at paragraph 19 of the judgment given in *Sarah Jane Williams v Devon County Council* [2015] EWHC 568 (Admin) , which applied the well-known statement by Lord Brown in *South Buckinghamshire District Council* on the scope of the requirement of the duty to give reasons to a challenge to the adequacy of a statement issued under paragraph 2(d) of schedule 2 to the 1996 Regulations. However, the reasoning in that case does not appear to have recognised that the *Trail Riders* decision upon which the judge's view was based had been concerned instead with reasons given under regulation 17(3). In so far as the *Sarah Jane Williams* decision suggested that the principles in *South Buckinghamshire District Council* apply

to a statement under paragraph 2(d) of schedule 2 to the RTRA , I would not be inclined to follow it.

93. A statement under paragraph 2(d) of schedule 2 forms part of a package of notices and documents required to be placed on deposit so as to publicise the intention to make an order under the RTRA , the measures proposed and the reasons for taking those measures. The object is to enable the public to understand the nature of the proposals so that they may consider whether they wish to object to the order and, if so, on what grounds. The 1996 Regulations do not suggest that the statement under paragraph 2(d) of schedule 2 is required to give detailed reasons or to address every relevant consideration which has been taken into account."

Officer Reports

45. The principles to be applied when a challenge is based on criticism of an officer's report to a planning committee were set out by Lindblom LJ at paragraph 42 in ***Mansell v. Tonbridge and Malling BC*** [2017] EWCA Civ 1314.

46. Although ***Mansell*** was concerned with a report to a planning committee, reports relating to a traffic regulation order are also written for councillors with local knowledge. In my judgment a similar approach to that identified in ***Mansell*** is to be applied when considering a report prepared by officers to inform a decision on whether to make a traffic regulation order.

The Grounds of Challenge

47. The First Claimant relies upon the following grounds of challenge:

i) Ground 1: the 2025 ETRO was not made for an experimental purpose.

ii) Ground 2: the Defendant breached its statutory duty to give reasons for the making of the 2025 ETRO and proceeding by way of experiment.

iii) Ground 3: the Defendant failed to carry out the section 122 RTRA 1984 balancing exercise.

iv) Ground 4: the Defendant failed to carry out a lawful consultation pursuant to its statutory duty under regulation 6 of the 1996 Regulations causing the Claimant substantial prejudice.

v) Ground 5: the Defendant failed to comply with the public sector equality duty contained in section 149(1) of the Equality Act 2010; and/or acted irrationally and/or failed to take into account material considerations.

48. The Second Claimant relies upon the following grounds of challenge:

i) Ground 1: The 2025 ETRO is outside the statutory powers and has no sufficient evidence base.

ii) Ground 2: the statement of reasons for the 2025 ETRO does not disclose any genuine experiment.

iii) Ground 3: the Defendant failed to carry out the section 122 RTRA 1984 balancing exercise.

iv) Ground 4: the Defendant failed to have regard to the advice given by the LAF.

49. I will consider the grounds advanced by both Claimants under the following headings:

i) Does the 2025 ETRO fall outside the ambit of section 9 of the RTRA 1984 as it was not made for experimental purposes (First Claimant Ground 1 and the Second Claimant Ground 2).

ii) Did the Defendant breach their statutory duty to give reasons for the making of the 2025 ETRO and proceeding by way of experiment (First Claimant Ground 2).

iii) Did the Defendant carry out the balancing exercise required by section 122 RTRA 1984 (First Claimant Ground 3, Second Claimant Ground 3).

iv) Did the Defendant fail to carry out a lawful consultation pursuant to its statutory duty under regulation 6 of the 1996 Regulations causing the Claimant substantial prejudice (First Claimant Ground 4).

v) Did the Defendant fail to comply with the public sector equality duty contained in section 149(1) of the Equality Act 2010; and/or did they act

irrationally and/or fail to take into account material considerations (First Claimant Ground 5).

vi) Did the Defendant act outside its statutory powers when making the 2025 ETRO and did it have a sufficient evidence base (Second Claimant Ground 1).

vii) Did the Defendant fail to have regard to the advice given by the LAF (Second Claimant Ground 4).

i) Does the 2025 ETRO fall outside the ambit of section 9 of the RTRA 1984 as it was not made for experimental purposes (First Claimant Ground 1 and the Second Claimant Ground 2).

50. Mr Brett, for the First Claimant, submits:

i) The purpose of the 2025 ETRO as set out in the statement of reasons is contradicted by the OR. The reason given in the statement of reasons is to enable the authority to assess impact of the order on addressing anti-social behaviour and its impact on the wider local area. The reason given in the OR is to monitor the level of erosion without the impact of motorised vehicles.

ii) The OR provides evidence that there was no genuine experimental purpose as the authority had already reached a decided view on the effects and impacts of the restriction.

iii) To the extent that the purpose of the 2025 ETRO was that set out in the statement of reasons and was genuinely experimental it was irrational as there was no rational connection between the problem complained of and all mechanically propelled vehicles.

51. Mr Pay, for the Second Claimant, submits:

i) The reasoning is to the effect that an ETRO has been made because it can be revoked or modified during its currency. That does not amount to an experiment.

ii) The reasoning set out in the OR is inconsistent with the basis upon which the statement of reasons sets out the experimental basis for the order and also shows the lack of any genuine experiment.

52. Mr Semakula, for the Defendant, submits:

i) The appropriate place to look to determine the experiment is the statement of reasons.

ii) The suggestion that the statement of reasons and the OR are inconsistent is misplaced.

iii) The Defendant is entitled to act on informed hypotheses and assess outcomes over time.

53. The obligation on the Defendant was to identify what the experiment is and its purpose. The purpose is to be identified in the statement of reasons. In the

statement of reasons the Defendant states that implementing the prohibition on motorised vehicles using the Sandy Lane BOAT will enable them to monitor the scheme and assess its impact on addressing the anti-social behaviour and its impact on the wider area.

54. It is first necessary to consider whether the order was designed to glean information about the effect of the prohibition on anti-social behaviour. The Claimants contend that examination of the OR reveals that the stated purpose was not the real purpose in making the order. In ***Peak District*** (at paragraph 37) Ouseley J accepted that a claimant is entitled to look at other material to show that the purpose stated in the statement of reasons is not the real purpose for making the order. The OR (at paragraph 5) refers to anti-social behaviour. However, at paragraph 6 the OR states that the making of an ETRO would allow the eroded sections of the Sandy Lane BOAT to be repaired, to protect it from further erosion, and to monitor the level of erosion without the impact of motorised vehicles. At paragraph 22 of the OR it is said that the proposed order will help protect and preserve the surface of the BOAT and promote its amenity value for walkers and equestrians, and assist the Council's efforts to reduce antisocial behaviour including fly tipping.

55. The Sandy Lane BOAT had been repaired in early 2024. In that respect this case can be distinguished from the facts considered in ***Peak District*** (where repairs were carried out to some degree after the ETRO came into force – paragraph 35). Making an ETRO which prohibited use by motorised vehicles would allow the Defendant to monitor the level of erosion without the impact of motorised vehicles.

56. Although it is said that the proposed ETRO will 'also assist' in the Defendant's efforts to reduce antisocial behaviour and fly tipping, the purpose of the experimental order stated in the OR is to provide the opportunity to repair the worst eroded sections of Sandy Lane, to protect it from further damage by motor vehicles and to allow the Defendant to monitor the level of erosion. The purpose stated in the statement of reasons is to assess impact on anti-social behaviour and its impact on the wider local area. On the basis of those facts I accept the submissions made on behalf of the Claimants that there is an inconsistency between the statement of reasons and the OR.

57. The statement made at paragraph 22 of the OR (as to the effects of the proposed order) does not, in my judgment, indicate that the Defendant had reached a decision on the effect of the order. The statements in paragraph 22 set out the anticipated effect of the order, not a final determination as to its effect. I accept Mr Semakula's submission that an authority conducting an experiment is entitled to act on informed hypotheses as to the likely effect of the experiment.

58. The real issue to be determined is whether the experiment identified in the statement of reasons was a genuine experiment to determine the effect of the prohibition on the use of motorised vehicles on antisocial behaviour.

59. The explanation given in the statement of reasons does not identify the nature of the antisocial behaviour, and does not identify the nature of the impact on the wider area which it said will be monitored. There is no explanation of the operation which is to be undertaken to glean information about the workings of the scheme. In my judgment the statement of reasons does not explain what the

experiment is. Insofar as it is permissible to refer to the OR in order to resolve any ambiguity, that report does not assist. The OR gives a different reason (from that set out in the statement of reasons) for making the 2025 ETRO. Even if, in theory an experiment could consider both impact on anti-social behaviour and on surface erosion, the statement of reasons does not set out the terms of the experiment, in the sense that it does not identify an operation designed to glean information about the workings of the scheme in practice. Further, if reference is made to the OR, it again, does not set out the terms of the experiment. For those reasons I have come to the conclusion that the 2025 ETRO is not within the relevant powers, as it is not an experiment (or alternatively not a genuine experiment) in the sense that the nature of the experiment is not clear, and the authority's statement of reasons does not explain what the terms of the experiment are.

60. For those reasons the First Claimant's Ground 1 and the Second Claimant's Ground 2 are made out.

ii) Did the Defendant breach their statutory duty to give reasons for the making of the 2025 ETRO and proceeding by way of experiment (First Claimant Ground 2).

61. Mr Brett for the First Claimant submits:

i) The standard of reasons required is that set out in ***South Buckinghamshire***. The reasons required when making a traffic regulation order serve the same purpose as the reasons to be given when making a decision on a planning application, namely, to allow the

decision to be understood. The ***South Bucks*** standard is flexible and can be adapted to meet the circumstances.

ii) The reasons given in the statement of reasons is inadequate as it is not possible to understand from the reasons provided:

a) What is meant by "anti-social behaviour";

b) What is meant by "unsuitable vehicles"

c) Whether or not and how problems identified by the Defendant are associated with or caused by the use of the Sandy Lane BOAT by any or all types of motor vehicle.

d) Whether the Defendant considers that it is only the "unsuitable vehicles" which "have consequently damaged the roadsurface", or whether they consider that "anti-social behaviour, fly-tipping, racing" have also had that effect?

e) In what way it is said that "unsuitable vehicles" caused damage to the road surface, and the extent to which such damage is caused by other factors.

iii) The absence of proper reasons has caused the First Claimant material prejudice.

iv) The witness evidence of Ms Bettles constitutes inadmissible 'ex post facto' evidence as it seeks to supplement the reasoning (***R (United Trade***

Action Group Ltd) v. Transport for London [2022] R.T.R. 2 at paragraph 125).

62. Mr Semakula, for the Defendant, submits:

i) The 1996 Regulations do not require that the statement under paragraph 2(d) of Schedule 2 should set out detailed reasons which address every relevant consideration which has been taken into account. It is sufficient for the reasons to be set out in general terms to fulfil the function of public notification (***Williams*** at paragraph 93).

ii) In the alternative, if the ***South Buckinghamshire*** standard applies it is met.

iii) The reasons set out in the statement of reasons were legally adequate as they identified both:

a) The reasons for the measures proposed, namely, to address anti-social behaviour, fly-tipping, racing and use of the byway by unsuitable vehicles which have consequently damaged the road surface; and

b) Explained why an experimental order was proposed.

iv) Read together with the OR the references in the statement of reasons identify the type of conduct and effects being addressed.

v) Even if the reasons were inadequate, the First Claimant did not suffer substantial prejudice as a result of breach of the relevant requirement.

63. The statutory duty to give reasons is set out in paragraph 2(d) of Schedule 2 to the 1996 Regulations. The traffic authority is to provide a statement setting out the reasons why the authority propose to make the order, including, in the case of an experimental order, the reason for proceeding by way of an experiment, and a statement as to whether the authority intends to consider making an order having the same effect which is not an experimental order.

64. The first issue to consider is the standard to be applied when considering the adequacy of the reasons.

65. Regulation 17(1) of the 1996 Regulations provides that as soon as practicable after an order has been made, the order making authority shall include among the deposited documents a copy of the order as actually made. Regulation 17(2) of the 1996 Regulations provides that the order making authority shall, within 14 days of the making of the order, publish a 'notice of making'.

66. Regulation 22(3) of the 1996 Regulations provides that an order making authority shall comply with the requirements of schedule 2 as to the making of deposited documents relating to an experimental order available for public inspection. Regulation 22(4) provides that the deposited documents are to be made available at the times and at the places specified in the notice of making. The documents to be deposited include the statement of reasons required by paragraph 2(d) of schedule 2.

67. Holgate J expressed doubt about whether the legal requirements of a duty to give reasons when deciding an appeal or when deciding whether to accede to an objection when giving reasons under regulation 17(3) of the 1996 Regulations

apply to a statement of reasons set out in deposited documents pursuant to paragraph 2(d) of Schedule 2 (***Williams*** at paragraphs 91 and 92).

68. I note that the statement of reasons set out in documents deposited following the notice of making of an ETRO precedes an objection process. The notice of making of the 2025 ETRO was published on 20th March 2025. In accordance with the requirements of paragraph 2 of Schedule 5 to the 1996 Regulations, the notice of making states "within a period of 6 months beginning with the day on which the Order comes into force, any person may object to the making of Order and making the effects permanent."

69. At the time of the notice of making the 2025 ETRO had undergone consultation pursuant to regulation 6 of the 1996 Regulations but had not undergone a process whereby objections could be made and considered.

70. I agree with Holgate J that legal requirements for a statement of reasons deposited following the notice of making of ETRO are not the same as those applicable to reasons given for a decision following consideration of objections, such as a decision on a planning application, or reasons given for a decision pursuant to regulation 17(3) of the 1996 Regulations. It follows that, when considering a challenge to the adequacy of reasons given pursuant to paragraph 2(d) of Schedule 2 following the notice of making of an ETRO, it is not appropriate to apply the standard set out in ***South Buckinghamshire*** without making some modifications to take account of the fact that the decision was not made following a process which allowed for the making and consideration of objections. In particular in a statement of reasons made at that stage it is not

necessary to set out conclusions reached on principal controversial issues raised in objections, as the statement precedes the making and consideration of objections. Nonetheless, a statement of reasons produced pursuant to the obligation imposed by paragraph 2(d) of Schedule 2 to the 1996 Regulations (in relation to an ETRO), must enable the public to understand the nature of the proposals (in particular the nature of the experiment) so that they may consider whether they wish to object and on what grounds.

71. I next consider the admissibility of the evidence provided by Ms Bettles in her first witness statement in which she provides further explanation as to the reasons why the Defendant made the 2025 ETRO.

72. The law relating to the admissibility of 'ex post facto' evidence is summarised at paragraph 125 in the judgment of the Court of Appeal in ***United Trade Action Group***. At sub-paragraph (7) of paragraph 125 the court stated:

"(7) Judges will usually be able to distinguish between genuine elucidation of a decision and impermissible justification or contradiction after the event, without having to rule on applications to exclude parts of the opposing party's written evidence or documents it seeks to adduce. It follows that the best way for the court to proceed may be to receive the contentious evidence "de bene esse", and, having heard argument on the issues in the claim, simply to disregard any of the evidence that is irrelevant or superfluous, rather than embarking on a painstaking assessment of strict admissibility."

73. As stated by Green J (as he then was) in ***Timmins v. Gedling BC*** [2014] EWHC 654 at paragraph 110, a judicial review focuses the spotlight on the reasons given at the time of the decision.

74. Insofar as the evidence of Ms Bettles seeks to refer to discussions she had with the Senior Rights of Way Officer in which they discussed alternatives, and insofar as it seeks to expand on the reasons given in the statement of reasons and the OR, I disregard it.

75. In my judgment the Defendant failed to give proper and adequate reasons for making the 2025 ETRO as:

    i) For the reasons I have given when addressing issue (i) above, the nature of the experiment is not clear.

    ii) The decision is said to be made to address inappropriate usage of the Sandy Lane BOAT. Reported inappropriate usage is said to include anti-social behaviour, fly-tipping, racing and use of the byway by unsuitable vehicles. The nature of the 'anti-social behaviour' is not described. The type of vehicles which are said to be 'unsuitable' are not identified. Without that description or identification the reader is not able to understand why the Defendant has decided to make the ETRO. In addition a potential objector is not able to address, and seek to counter, the reasons put forward by the Defendant for making the order, or to address the maters to be considered as the experiment.

    iii) Reference to the OR does not assist in making the reasons clear, as (for the reasons given at paragraph [56] above) there is an inconsistency

between the reasons given in the OR and those set out in the statement of reasons.

76. In my judgment the interests of the First Claimant have been substantially prejudiced by the failure to give adequate reasons as it has been prevented from being able to formulate an objection which addresses the reasons for making the 2025 ETRO, and has been unable to formulate a response to the experiment.

77. In considering the adequacy of the reasons I have not applied the full ***South Buckinghamshire*** standard, as I have not considered whether the reasons allowed the reader to understand conclusions reached on principal controversial issues. If I had applied that standard I would have come to the same conclusion, namely that the reasons were inadequate, as the reasons did not address the main issues raised in the consultation responses.

78. For those reasons I conclude that the relevant requirements relating to the giving of reasons were not complied with and the interests of the First Claimant have been substantially prejudiced as a result. Accordingly this ground of claim is made out.

iii) Did the Defendant carry out the balancing exercise required by section 122 RTRA 1984 (First Claimant Ground 3, Second Claimant Ground 3).

79. Mr Brett, for the First Claimant, submits:

i) In order to comply with the section 122 RTRA 1984 duty there must be actual evidence that the balancing exercise has, in substance, been conducted.

ii) A three stage approach must be applied by the authority

a) The duty to secure the expeditious, convenient and safe movement of vehicular and other traffic must be borne in mind.

b) Regard must be had to factors which point in favour of imposing a restriction on the movement of such traffic.

c) The factors should be balanced.

iii) There is no evidence that, in substance, the balancing exercise was conducted, as:

a) The Defendant makes no reference to the duty.

b) The OR does not identify or recognise the impact that restricting the use of the Sandy Lane BOAT by motor vehicles would have on the need to secure the safe, expeditious and convenient movement of all forms of traffic.

c) There is no evidence in the OR of the undertaking of the balance.

d) The Defendant has provided no assessment as to how or why any damage to the surface of the BOAT has been caused by any or all types of mechanically propelled vehicles.

e) There is no real consideration of alternatives to the 2025 ETRO or any less restrictive measures.

80. Mr Pay, for the Second Claimant, submits that there has been a failure to comply with section 122 RTRA 1984 (in oral argument Mr Pay accepted that reliance on section 16 TMA 2004 added nothing to the submissions on section 122) as:

i) There is no reasoning in the statement of reasons which addresses the balancing exercise.

ii) There is no reasoning in the OR which addresses the balancing exercise.

81. Mr Semakula, for the Defendant, submits:

i) The balancing exercise was, in substance, carried out.

ii) The Defendant had the duty of securing expeditions, convenient and safe movement of vehicular and other traffic so far as practicable in mind as the OR identifies the key statutory purposes, preventing danger, preventing damage to the surface of the BOAT, and preserving amenity and safe use for non-motorised users. A key purpose of the experiment was to gather sufficient information to determine whether the restriction will:

a) contribute to more efficient use of the road network or the avoidance, elimination or reduction of disruption to the movement of traffic on their road network;

b) have a positive impact on the amenities of the locality and the other factors mentioned in section 1 of the RTRA 1984.

iii) The Defendant had regard to the factors favouring restriction.

iv) The Defendant balanced the considerations. In making this submission Mr Semakula relied, in particular, upon paragraphs 25 and 31 of the OR.

v) If the court were to hold that there was a failure to comply with the section 122 duty it should consider its discretion not to quash the making of the 2025 ETRO.

82. The question to be determined is one of substance not of form (***Bouchti v. LB of Enfield*** [2022] EWHC 2809 (Admin) at paragraph 76). It is for the Council as decision maker to decide where the balance lies and to determine the relevant weight to be given to different matters going into the balance (***Bouchti*** at paragraph 88).

83. It is not necessary to make express reference to section 122 (***Trail Riders Fellowship v. Hampshire*** at paragraph 35), however there has to be actual evidence that the balancing exercise has been, in substance, conducted (***Trail Riders Fellowship v. Hampshire*** at paragraph 38).

84. In determining whether the balancing process has, in substance, been undertaken, the court's consideration is not restricted to the statement of reasons and regard can be had to the OR (***Trail Riders Fellowship v. Hampshire*** at paragraph 36).

85. At paragraph 40 in ***Trail Riders Fellowship v. Hampshire*** Longmore LJ sets out a three stage approach which should be adopted. In my judgment, whether or not those three distinct stages are expressly identified in an officer report, the essential question to ask is whether the balancing exercise required by section 122 has in substance been undertaken.

86. The possibility of a less restrictive ETRO is, in principle, a factor which an authority should consider when undertaking the section 122 balancing exercise (***Peak District*** at paragraph 52). In this case the First Claimant's consultation response identified a number of potential alternatives, including maintaining the road surface, the use of public spaces protection orders, and using enforcement powers to control fly tipping. The Second Claimant's consultation response suggested changing the restriction so as to allow motorcycles to continue to use the Sandy Lane BOAT.

87. The duty imposed upon a local authority by section 122 is to exercise their functions to secure the expeditious, convenient and safe movement of vehicular and other traffic (including pedestrians). In order to conduct the required balancing exercise an authority should bear in mind that duty so far as practicable, have regard to the factors which may point in favour of imposing a restriction on that movement, and balance the various considerations.

88. In this case the OR:

    i) Does not make express reference to section 122.

    ii) Does not identify the three stages referred to at paragraph 40 in ***Trail Riders Fellowship v. Hampshire***.

iii) Refers (at OR paragraph 31) to the disadvantage which would be suffered by drivers of off-road vehicles, but does not refer to securing the expeditious, convenient and safe movement of vehicular and other traffic (including pedestrians).

iv) Refers (at OR paragraph 25) to the factors which point in favour of imposing the restriction.

v) Identifies (at OR paragraph 31) those who will suffer disadvantage and those who will benefit, but does not explain how the balance is struck between those competing interests.

vi) The OR does (at paragraph 21) refer to the option of not making the order or making the restrictions less onerous, but does not consider the specific suggestion made by the Second Claimant (to allow motorcycles to continue to use the BOAT) or the alternatives put forward by the First Claimant.

89. The OR fails to articulate the primary statutory duty (of securing the expeditious, convenient and safe movement of vehicular and other traffic (including pedestrians)). To the extent that a weighing exercise is conducted there is no explanation as to how the balance is struck between competing objectives.

90. For those reasons, in my judgment, the Defendant failed, in substance, to conduct the balancing exercise required by section 122, as it failed to refer to securing the expeditious, convenient and safe movement of vehicular and other

traffic whether directly or by implication, and failed to balance the factors for and against imposing the restriction.

91. For those reasons the First Claimant's Ground 3 and the Second Claimant's Ground 3 are made out.

iv) Did the Defendant fail to carry out a lawful consultation pursuant to its statutory duty under regulation 6 of the 1996 Regulations causing the Claimant substantial prejudice (First Claimant Ground 4).

92. Mr Brett, for the First Claimant, submits:

i) The second ***Gunning*** principle was breached as the Defendant failed to provide adequate reasons to allow the First Claimant to make an adequate and informed response on key elements of the proposal.

ii) The fourth ***Gunning*** principle was breached as the Defendant failed to give conscientious consideration to the product of consultation.

iii) The Defendant failed to give any reasons for rejecting the First Claimant's submissions (reliance was placed on ***Watton v. Cornwall Council*** [2023] EWHC 2436 (Admin) at paragraph 30).

93. Mr Semakula, for the Defendant, submits:

i) At the regulation 6 (of the 1996 Regulations) consultation stage there was no need to provide exhaustive definitions.

ii) The First Claimant understood the thrust of the proposal as is demonstrated by its detailed consultation response.

iii) The First Claimant's consultation response was appended to the OR. The principal themes were identified and addressed in the OR. There is no obligation to consider each and every specific item of detail (***Electric Collar*** at paragraph 151).

iv) The First Claimant's third ground is no different to the reasons challenge.

94. There is no dispute that the common law duty of procedural fairness, as set out in ***Gunning***, applies to a consultation carried out pursuant to regulation 6 of the 1996 Regulations. The requirements of fairness must be linked to the purposes of the consultation. In this case the consultation related to the proposed making of an ETRO. It has to be borne in mind that a regulation 6 consultation is a preliminary stage of a longer process, and that if an ETRO is made an opportunity to make formal objections will then arise.

95. In the email sent to the Defendant by the First Claimant on 16th August 2024 it was said that as no further information was provided as to how the Council has decided that the behaviours listed in the draft statement of reasons were inappropriate it was not possible to make an informed response. In an email dated 23rd August 2024 the Defendant's officer sent the First Claimant a spreadsheet which included photographs of the Sandy Lane Boat with commentary on those photographs. In that response the Defendant's officer states "A full report is being written by relevant officers and this will contain

more background information and evidence re the proposal and it is expected this will be presented at a Traffic Management Committee …".

96. In its response to the consultation dated 3rd September 2024 the First Claimant continued to contend that the Defendant had not provided information as to which vehicles they considered to be inappropriate or why certain vehicles were deemed unsuitable, and had not provided information on the behaviour which was considered to be anti-social, and that as a result the First Claimant found it difficult to respond.

97. The first issue to determine is whether the Defendant gave sufficient reasons to allow the First Claimant (and others) to give the proposal intelligent consideration and make a response.

98. The obligation under regulation 6 of the 1996 Regulations is to consult the specified consultees. It is to be noted that, when making an ETRO, the requirements imposed by regulations 7 and 8 do not apply; the opportunity to make an objection arises at a later stage. The sufficiency of the reasons given have to be seen in that context. Reasons which would be insufficient at a later stage of the process, may be sufficient at the early formative stage.

99. The draft notice of making formed part of the consultation material. The 14th August 2024 draft notice of making set out the same statement of reasons as those set out in the notice of making dated 20th March 2025. I have already found that the Defendant failed to give adequate and proper reasons for the making of the 2025 ETRO for the reasons set out above. For the same reasons I find that the reasons given at the time of the regulation 6 consultation were not

sufficient to permit of intelligent consideration and response, in particular, because the nature of the experiment proposed was unclear. As a result it was not possible for consultees to make intelligent representations on whether or not such an experiment should be conducted. Accordingly I find that there was a failure to comply with ***Gunning*** principle (ii).

100. The OR refers to and appends the response from the First Claimant. In addition a representative of the First Claimant was permitted to address the Traffic Management Meeting. Given that the full response from the First Claimant was appended to the OR, and that the First Claimant's representative was allowed to address the meeting, and the disadvantage to drivers of off-road vehicles was recognised in the OR, I find no breach of ***Gunning*** principle (iv).

101. I agree with Mr Semakula that the third point taken by Mr Brett is a reasons point. I have already considered the reasons challenge.

102. On the basis of my finding of a breach of ***Gunning*** principle (ii) I find that there was a breach of a relevant requirement, namely the duty to consult imposed by regulation 6 of the 1996 Regulations. I find that the interests of the First Claimant were substantially prejudiced by this failure, as it was not able to provide an intelligent and informed response to address the question of whether the experiment should be conducted.

103. For those reasons this ground of challenge is made out.

v) Did the Defendant fail to comply with the public sector equality duty contained in section 149(1) of the Equality Act 2010; and/or did they act irrationally and/or fail to take into account material considerations (First Claimant Ground 5).

104. Mr Brett, for the First Claimant, submits:

i) There is no evidence that the Defendant had due regard to the impact of the 2025 ETRO on elderly or disabled people who rely on motorised vehicles to access the countryside.

ii) The approach taken at paragraph 31 of the OR is unlawful and/or irrational as it does not refer to those with protected characteristics.

iii) The document produced by the First Claimant "Inclusive Countryside Access" explains the varied types of people, especially the elderly, disabled and mobility impaired who benefit from access to the countryside in vehicles. That document was appended to the First Claimant's consultation response to the proposal to make the 2025 ETRO but was not included in the appendices to the OR.

iv) The Equality and Diversity Checklist undertaken by Ms Bettles does not assist the Defendant as:

a) It is dated 15th January 2025 and was therefore prepared after the OR was written in November 2024.

b) The duty imposed by section 149(1) of the 2010 Act is on the decision maker personally (***Bracking*** paragraph 25(3)); and

c) The Equality and Diversity Checklist does not attempt to identify or assess the differential implications of the closure of the route

to mechanically propelled vehicles on those with protected characteristics.

105. Mr Semakula, for the Defendant, submits:

i) Due regard is context sensitive (***Sheakh*** at paragraph 56). Impacts will be considered again when a decision is made on whether to make the order permanent. Paragraph 31 of the OR refers to the fact that equality screening is being conducted to ensure that the Defendant monitors potential equality impacts as the implementation of the 2025 ETRO is monitored.

ii) The OR contained a discrete Equalities and Fairness section (at paragraphs 30-31) which included express reference to section 149 of the 2010 Act.

iii) The consultation responses were appended to the OR. Those responses included that made by the First Claimant which referred to access to the countryside by those with disabilities.

106. The decision to make an ETRO comes at an early stage of the process. The process will allow objections to be made, the effects of the order to be monitored, and a decision to be made on whether the order should be made permanent. As noted at paragraph 56 in ***Sheakh*** a decision made on an ETRO will not fix, once and for all, the impacts on people with protected characteristics. As a result the level of assessment required to qualify as 'due regard' is less demanding than if the decision is permanent.

107. Nonetheless the requirement to have due regard requires a decision maker to consider the effects on people with protected characteristics. The OR sets out the duty at paragraph 30. At paragraph 31 the OR accepts that drivers of off-road vehicles will be disadvantaged by the prohibition. The extent of the prohibition is referred to at paragraph 25 of the OR. The reference to drivers of off-road vehicles is a reference to a user type, not to people with protected characteristics.

108. In oral argument Mr Semakula fairly accepted that paragraph 31 of the OR does not consider impact by reference to protected characteristics. Nowhere in the OR are the effects of the prohibition on people with protected characteristics considered.

109. The Equality and Diversity Checklist was completed after the OR was prepared and was not before the councillor who made the decision at the Traffic Management Meeting. In any event the Equality and Diversity Checklist does not identify, by reference to protected characteristics, those who will be affected by the 2025 ETRO.

110. The First Claimant's consultation response dated 3rd September 2024 was appended to the OR. That letter refers to inclusivity and to protected characteristics. The Inclusive Countryside Access document which was appended to the First Claimant's letter was not included in the documents appended to the OR. Paragraph 4 of the First Claimant's letter dated 3rd September 2024 states that the publication 'Inclusive Countryside Access' is attached. Given the need not to overburden decision makers with very lengthy

reports and appendices, given that it would not be expected that documents which are referred to in (but not attached to) consultation responses would not be expected to be added to appendices to officer reports, and given that express reference is made in the consultation response which was appended to the OR to the fact that the publication was attached to the letter, I do not consider that the Defendant fell into legal error in failing to include the publication in the appendices to the OR.

111. The duty imposed by section 149 of the 2010 Act was imposed upon the Defendant. It was for the Defendant to have due regard to the matters set out in section 149.

112. Even though the level of assessment required to qualify as 'due regard' is less demanding that if the decision is permanent, there must be some specific regard by way of conscious approach to the statutory criteria. In this case the OR does not consider impact by reference to protected characteristics. As a result it is my judgment that there was a failure to comply with the section 149 duty.

113. For those reasons this ground of challenge is made out.

vi) Did the Defendant act outside their statutory powers when making the 2025 ETRO and did they have a sufficient evidence base (Second Claimant Ground 1).

114. Mr Pay, for the Second Claimant, submits:

i) There was no proper basis or evidence base to make an order prohibiting all mechanically propelled vehicles from the route, particularly

motorcyclists, and/or responsible users such as members of the Trail Riders Fellowship, and to make such an order was irrational. The Defendant did not obtain the information on fly-tipping until after they had made the decision.

ii) There should not be a ban on all forms of mechanically propelled vehicle without some form of investigation. As a result there was a breach by the Defendant of the duty to take reasonable steps to acquaint themselves with the relevant information (***Secretary of State for Education and Science v. Tameside MBC*** [1977] AC 1014 at page 1065A-B).

115. Mr Semakula, for the Defendant, submits:

i) The RTRA 1984 does not set a highly prescriptive framework for traffic authorities when making ETROs.

ii) The Defendant had a rational evidence base and made such enquiries as were reasonable in the context.

116. Section 9 of the RTRA 1984 empowers a traffic authority to make an experimental traffic order making any such provision as may be made by a traffic regulation order. A traffic regulation order may be made where it appears to the authority that it is expedient to make it for any of the purpose set out in section 1(1) of the RTRA 1984. A traffic regulation order may make any provision prohibiting, restricting or regulating the use of a road by vehicular traffic or by vehicular traffic of any class specified in the order (section 2(1) RTRA 1984).

117. The general principles relating to the ***Tameside*** duty were set out by the Court of Appeal in ***Balajigari v. Secretary of State for the Home Department*** [2019] 1 WLR 4670 at paragraph 70:

"70. The general principles on the Tameside duty were summarised by Haddon-Cave J in *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 (Admin) at paras. 99-100. In that passage, having referred to the speech of Lord Diplock in *Tameside* , Haddon-Cave J summarised the relevant principles which are to be derived from authorities since *Tameside* itself as follows. First, the obligation on the decision-maker is only to take such steps to inform himself as are reasonable. Secondly, subject to a *Wednesbury* challenge, it is for the public body and not the court to decide upon the manner and intensity of enquiry to be undertaken: see *R (Khatun) v Newham LBC* [2004] EWCA Civ 55, [2005] QB 37 , at para. 35 (Laws LJ). Thirdly, the court should not intervene merely because it considers that further enquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the enquiries made that it possessed the information necessary for its decision. Fourthly, the court should establish what material was before the authority and should only strike down a decision not to make further enquiries if no reasonable authority possessed of that material could suppose that the enquiries they had made were sufficient. Fifthly, the principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a

duty of procedural fairness to the applicant but rather from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion. Sixthly, the wider the discretion conferred on the Secretary of State, the more important it must be that he has all the relevant material to enable him properly to exercise it."

118. At the time that the Defendant made their decision at the January 2025 Traffic Management Meeting, they had before them the information they had obtained, including the photographs and commentary in the spreadsheet attached to the email sent to the First Claimant on 23rd August 2024, and the consultation responses received. That information was appended to the OR. The information in the spreadsheet included photographs of fly-tipping which had been sent to the Defendant by Aspley Heath Parish Council.

119. In my judgment, the steps taken by the Defendant to obtain information were reasonable. It was for the Defendant to determine the manner and intensity of the inquiry to be undertaken. The information obtained related to fly-tipping, use of the Sandy Lane BOAT, and to the condition of the surface of the road. The purposes for which a road traffic regulation order can be made include preventing damage to the road, and preserving or improving the amenities of the area through which the road runs. It is not sufficient to establish that further inquiries on the effect of different types of mechanically propelled vehicles might be sensible or desirable. In my judgment, it cannot be said that no reasonable authority could have been satisfied on the basis of the enquiries made that it possessed the information necessary for it to make a decision on whether to make an ETRO.

120. In addition the decision to make an ETRO cannot be said to be irrational on the basis that the Defendant had failed to obtain information. The Defendant had obtained information which was relevant to the purposes for which a road traffic regulation order may be made.

121. For those reasons I reject this ground of challenge.

vii) Did the Defendant fail to have regard to the advice given by the LAF (Second Claimant Ground 4).

122. The duty imposed upon the Defendant by section 94(5) of CROW 2000 is to have regard to relevant advice given to them by a LAF.

123. The essence of the complaint made by the Second Claimant under this ground is that, although an email written by the Chair of the LAF was included in Appendix F to the OR, all personal data was redacted, and therefore the decision maker had no way of knowing that the email was from Mr Beckett. I note that the copy of the email included in Appendix F to the OR is dated 20th August 2024, whereas the unredacted version is dated 19th August 2024.

124. At paragraph 68 of the Second Claimant's grounds it is said that (at that time) it was unclear whether the decision maker was aware of the email of the 21st January 2025 sent by the Chair of the LAF to the Defendant.

125. The minutes of the Traffic Management Meeting held on 23rd January 2025 record that the Committee Services Officer read out the statement from the Chair of the LAF.

126. In advancing this ground of claim the Second Claimant has not addressed the fact that the statement from the Chair of the LAF was read out at the Traffic Management Meeting. Given that the statement was read out as being a statement from the LAF represented by its Chair, Mr Beckett, the contention that the Defendant failed to have regard to relevant advice from the LAF is not made out on the facts.

127. For those reasons I reject this ground of challenge.

Relief

128. I have found that the First Claimant succeed on all its grounds, and the Second Claimant on grounds 2 and 3.

129. It cannot be said that the Defendant would necessarily have still made the same decision if the errors which have led to me upholding those grounds which establish that the Defendant did not act within the relevant powers had not occurred (applying ***Simplex***).

Conclusion

130. For the reasons I have given, the claims succeed and the decision to make the 2025 ETRO is quashed.