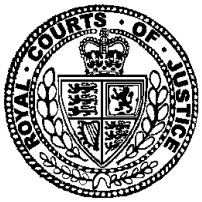

Neutral Citation Number: [2019] EWCA Civ 1275

Case No: C1/2018/3077

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
PLANNING COURT
SIR ROSS CRANSTON (Sitting as a Judge of the High Court)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/07/2019

Before:

THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
THE RIGHT HONOURABLE LORD JUSTICE LEWISON
and
THE RIGHT HONOURABLE LORD JUSTICE COULSON

- -

Between:

TRAIL RIDERS FELLOWSHIP	**Appellant**
- and -	
HAMPSHIRE COUNTY COUNCIL	**Respondent**

- -
- -

Mr Adrian Pay (instructed by **Brain Chase Coles Solicitors**) for the **Appellant**
Mr Stephen Whale (instructed by **Hampshire Legal Services**) for the **Respondent**

Hearing date: 3rd July 2019

- -

Approved Judgment

Lord Justice Longmore:

Introduction

1. This is an appeal from the order of Sir Ross Cranston, sitting as a High Court Judge in the Administrative Court. By that order, Sir Ross dismissed a challenge brought by the Trail Riders Fellowship to a road traffic regulation order ("TRO") made by the defendant council ("Hampshire").

2. There are two main issues:-

    1) first whether, when making the TRO, Hampshire had proper regard to, and complied with, its duty under s. 122 of the Road Traffic Regulation Act 1984 ("the 1984 Act"). That provision imposes on a local authority when considering whether to make a TRO, a duty to "secure the expeditious, convenient and safe movement of vehicular and other traffic (including pedestrians)" as far as practicable (s. 122(1)) having regard to factors including the maintenance of local amenities and reasonable access to premises and any other matters appearing to the local authority to be relevant (s. 122(2)); and

    2) second, whether the report of Hampshire's consultation with the road policing unit of Hampshire Constabulary pursuant to paragraph 20 of Schedule 9 of the 1984 Act, which was not passed to the individual decision-maker, was a "relevant consideration in the legal sense" and/or whether the judge correctly exercised a discretion not to quash the order notwithstanding the failure of the decision-maker to have regard to the report.

3. The TRO prohibits the use of three linked rural "green lanes" near Warnford in the Meon Valley of Hampshire - Bosenhill Lane, Green Lane and Dark Lane - by mechanically propelled vehicles, in other words motor vehicles and motor cycles. Together these lanes form a through - route from Warnford to Brockwood Park, joining tarmacked public vehicular highways at their three termini. They are unclassified roads which, although appearing on the Council's list of streets under section 36 of the Highways Act 1980, are not recorded on its Definitive Map and Statement.

4. The Trail Riders Fellowship ("TRF") is a national organisation which aims to preserve the full status of vehicular green lanes and the rights of motorcyclists to use them. It has a code of conduct and its members are expected to maintain high standards of behaviour. It applies to quash the TRO wholly or in part under Part VI of Schedule 9 of the 1984 Act. Hampshire is both the traffic and highway authority for the county.

Statutory Provisions

5. The relevant provisions of the 1984 Act seem to have their origin in Part II of the London Government Act 1963, sections 1 and 84(1) of the Road Traffic Regulation Act 1967 and section 130 of the Transport Act 1968. As they now appear in the 1984 Act they are:-

> "**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) …

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) …
>
> (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 …
>
> **Para 20 of Schedule 9**
>
> (1) … before making an order under or by virtue of … section 1 … a local authority shall consult with the chief officer of police of any police area in which any road … is situated."

6. Part VI of Schedule 9 provides that any person may question the validity of an order 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. Application is to the High Court within six weeks of the date on which the order is made: para 35. Paragraph 36(1)(b) provides that the court

> "(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."

Factual background

7. I can gratefully adopt the judge's account of the facts. In 2014 complaints arose about the misuse of the three lanes by "off-roaders", both four wheeled and two wheeled. There is photographic evidence at various dates which shows the damage to the surface of the three lanes and their parlous state. The evidence was that this had been compounded by the deliberate blocking of a drain at the junction of Dark and Green Lanes to create an obstacle for the off-roaders, and by the use of the three lanes to trespass on adjacent land. Whatever the cause, the Council have not kept these lanes in repair.

8. The claimant does not deny the damage to the lanes but states that its members behave responsibly in accordance with its code of conduct. There was nothing in the evidence to suggest otherwise.

9. Following an investigation by a member of Hampshire's highways department, and correspondence between the department and the local County Councillor, Mr Huxstep, Council officers came to a meeting of Warnford Parish Meeting on 10th April 2015 to discuss the lanes and the issues associated with the off-road use of them. After the meeting Warnford Parish Meeting raised the issue with what it described as "the off-roader lobbies". The situation did not improve, and the Parish Meeting pursued the Council. On 21st January 2016 Mr Richard Sykes, the Council officer with direct responsibility for the lanes, undertook a site visit to all three lanes. Mr Sykes has a

master's degree in civil engineering and nearly four decades of local government experience in highways and transport.

10. At some point the proposal for a traffic regulation order emerged. In November 2016 Mr Sykes acknowledged to the clerk of the Warnford Parish Meeting that even after meeting the Council's legal team he would still not purport to understand all the implications of each type of traffic regulation order, but could explain the basics. That month a solicitor at the Council sent Mr Sykes a memorandum about the law relating to the making of a traffic regulation order. The memorandum addressed section 1 of the 1984 Act and the attendant Local Authorities' Traffic Orders (Procedure) (England and Wales) Regulations 1996 ("the regulations"), but not section 122 of that Act. The following year, in February 2017, the same solicitor sent a further memorandum about the law and a breakdown of the procedure for making a TRO. Again, there was no reference to section 122.

11. Meanwhile, Mr Sykes had carried out another site visit, as did Councillor Huxstep and Sergeant Gilmour from the local Meon Valley Police Station. There was a meeting the same day, 15th December 2016, at Warnford Village Hall. Mr Sykes expressed the view that there was a strong case for a traffic regulation order on grounds which included avoiding danger, preventing damage, facilitating pedestrian and equestrian use and preventing use by unsuitable traffic. There were two police officers in attendance. Sergeant Gilmour stated that, "the Police would be in favour of closing the [three] lanes to motor traffic as this is the only realistic way of solving the problem". The upshot of the meeting was an agreement that the way forward was a permanent traffic regulation order banning motor traffic, including motor cycles, from the entirety of the three lanes.

12. Hampshire began working towards a traffic regulation order. Councillor Huxstep, Warnford Parish Meeting, the five adjacent landowners, and Sergeant Gilmour all endorsed the proposed order. On 11th April 2017 Mr Sykes asked the Council's Senior Technical Officer, Traffic Orders, to begin the process of advertising the draft order. The justification was the damage to the lanes, so other users could not use them; the danger from irresponsible 4x4 drivers; use of the lanes to trespass onto private land; the churned-up mud which made it difficult to access Bere Farm and led to flooding; and noise, and antisocial and threatening behaviour from the off-roaders.

13. On 11th May 2017 Mr Andy Smith, the team leader of Hampshire's Traffic Management East, drew Mr Sykes' attention to the need under paragraph 9 of Schedule 20 to the 1984 Act to consult with "the chief officer of police" before making an order. He also explained to Mr Sykes that for this purpose the Council's consultations on traffic regulation orders were carried out with the Hampshire Constabulary Roads Policing Unit ("RPU"). The RPU was written to on 26th May 2017.

14. On 1st June 2017 Ms Carole Bagshaw, a traffic management officer at the RPU, based at Havant Police Station, replied that the police did not support the proposal. She asked whether the only safety implication was to protect landowners' property from damage. She continued that to erect prohibition notices would attract more traffic; that a prohibition order would be unlikely to have the desired effect on those currently committing offences; that an "access only" order would be almost unenforceable; that the police had limited resources and targeted them "at areas where there is a known casualty issue"; and that an order would raise expectations of the police, where none

existed previously. The reply concluded that nonetheless it was up to the Council to decide on the matter.

15. Mr Smith sent the RPU reply to Mr Sykes saying that it was a standard response and that the RPU had not said that it formally objected, that the local police supported the proposal, that Mr Sykes had reasonable grounds to proceed, and that Sergeant Gilmour was satisfied that the proposed order could be enforced. Mr Sykes did not pass the RPU response to Mr Stuart Jarvis who, as Hampshire's Director of Economy Transport and Environment, ultimately approved the making of the TRO on Hampshire's behalf under delegated powers. In his later evidence to the court, however, Mr Jarvis stated that the RPU often do not support the making of new traffic regulation orders since it does not want Hampshire Constabulary to have to commit resources to enforcing them.

16. Hampshire gave its formal Notice of Proposal to make an order about 24th June 2017. The draft order was for a prohibition on most vehicles proceeding along the three lanes. The notice was accompanied by a statement of reasons setting out the purpose of the order as follows:-

> "The order is proposed to prevent damage to the lanes by misuse of 4x4 vehicles and trail type motorcycles which make the lanes dangerous and almost impossible to use safely by other users, such as horse riders and pedestrians.
>
> The lanes are also being used as access for trespass onto private land and public footpaths, particularly by motorcycles, which results in mud being churned up causing difficulties to access the Bere Farm track, and results in flooding down the farm access."

17. Hampshire sent the proposal to a range of statutory and other consultees in accordance with regulations 6-7 and Schedule 2 of the 1996 Regulations. It also published its Notice of Proposals, displayed notices on the site and sent copies of the "deposited documents" (Notice of Proposals, proposed order, map and Statement of Reasons) to three locations including the Council's principal offices.

18. Hampshire received 31 responses of which twenty-eight were in favour of the purposed order. Sergeant Gilmour and Warnford Parish Meeting continued to support it. Only three responses were opposed to the Order. One of these was the TRF's notice of objection dated 11th July 2017. Mr Steven Taylor, an individual member of the TRF, filed a notice of objection two days later.

19. The TRF's response contended that the Statement of Reasons was inadequate as to what the Council hoped to achieve and as to which statutory purposes it was directed. Those engaged in illegal activity at the present would not be deterred by an order in the future. The primary problem with the road was one of lack of repair. The claimant's understanding was that the damage resulted from forestry operations in the area and the Council's failure to address damage caused by extraordinary traffic. The damage was compounded by 4x4 activity. There was no objective evidence to demonstrate that responsible motorcycle access was the problem. The claimant concluded by suggesting a permit system.

20. Warnford Parish Meeting prepared a detailed report in December 2017, with photographs, which set out seven reasons, with details, justifying a traffic regulation order. One of these was the potential serious danger for horse riders from the noise of the off-roader traffic.

21. In February 2018, Mr Sykes prepared a report for Mr Jarvis recommending the proposed order ("the officer's report"). The report stated that the recommendation had "the full support of the local police". The conclusion read: "Taking into account the benefits and dis-benefits of the proposal it is recommended that the report be approved and the [order] implemented as advertised".

22. Appendix C of the officer's report summarised the representations. It referred to the claimant's objection, and recorded its suggestion for exemptions to facilitate responsible use by motorcycles. The report went on to state that a balance had to be struck between the competing demands, the beneficial enjoyment for motor vehicle drivers in negotiating the lanes, and the dis-benefits to the local community and the environment. The report recorded that "responsible riders of motorcycles would probably cause minimal damage to the lanes". The report expressed the view, however, that an exemption to allow only responsible users would be impossible to enforce.

23. On 26th February 2018 Mr Jarvis, who is a Fellow of the Chartered Institution of Highways and Transportation and a Chartered Member of the Royal Town Planning Institute, signed the decision letter to make the Order. The decision letter contained reference to the reasons for an order, as well as a discussion of other options, namely, to continue to repair the lanes or to do nothing. The latter was not considered viable since the lanes would remain unusable for the majority of legitimate users and flooding at Bere Farm could continue. In his witness statement Mr Jarvis explained that he had read Mr Sykes' report and the three appendices before making the decision along with other documents.

24. In May 2018 the Council wrote to those who had made representations, including the claimant, stating that their consultation had been taken into account and including the decision letter and report.

25. The Council formally made the Hampshire (Various Roads, Warnford) (Prohibition of Driving) (Except for Access) Order 2018 on 14th June 2018. The one difference from the initial draft was that, following representations from the British Horse Society, "motor" was inserted before "vehicle" to allow for horse-drawn carts. The Statement of Reasons with the Order mirrored those given earlier in the process. There was a map including the lanes to which it applied.

The Judgment

26. The judge considered a number of first instance authorities and then summarised (para 37) the position with section 122 as follows:-

    i) the duty in section 122(1) when exercising functions conferred by the Act to secure the expeditious, convenient and safe movement of traffic extends not only to vehicles but includes pedestrians;

ii) the duty of securing the expeditious, convenient and safe movement of traffic is not given primacy but is a qualified duty which has to be read with the factors in section 122(2), such as the effect on the amenities of the area and, in the context of making a traffic regulation order, with the purposes for this identified in section 1(1) of the Act;

iii) the issue is whether in substance the section 122 duty has been performed and what has been called the balancing exercise conducted, not whether section 122 is expressly mentioned or expressly considered; and

iv) in the particular circumstances of a case compliance with the section 122 duty may be evident from the decision itself, or an inference to this effect may be drawn since the decision has been taken by a specialist committee or officer who can be taken to have knowledge of the relevant statutory powers.

27. The judge had to deal with no less than seven grounds of challenge but only two now remain, the failure by Hampshire to have any (or any sufficient) regard to section 122 and the failure by Mr Jarvis to consider the result of the consultation with the RPU.

28. As to the first of these grounds the judge said:-

> "44. Clearly the Council did not expressly refer to section 122 in the process of making the Order and it did not expressly consider the section during the process. On my reading of the authorities neither omission is fatal. The issue is whether the duty was satisfied as a matter of substance. In his submissions Mr Pay placed emphasis on the expeditious and convenient movement of vehicular traffic, but that is only one aspect of the section. Section 122(1) also mentions the expeditious and convenient movement of pedestrians. There are also the factors in section 122(2) and the relationship between section 122(1) and 122(2) as explained earlier.
>
> 45. Quite apart from Mr Jarvis' expertise and the implications which can be drawn from that, the Statement of Reasons demonstrates that as the decision-maker he complied in substance with the section 122 duty. The statement refers to pedestrians, access, amenity effects and safety. The officer's report recommending the order which Mr Jarvis read, and his decision letter adopting it, considered these matters, along with the continued use of the lanes by vehicular traffic. But that was rejected as an option for the reasons given. In several places there is an express acknowledgement that a balance needs to be struck. In my view the section 122 duty was in substance fulfilled."

29. As to the second of these grounds the judge said:-

> "53. The claimant's submission in this regard is that while the officer's report stated the proposed order had the full support of the local police, that was only part of the story since the RPU did

> not support it. In that regard the officer's report was misleading by omission. The Council had recognised that Sergeant Gilmour's representation did not comprise the consultation required by paragraph 20 Schedule 9 of the Act, namely the chief officer of police. It had therefore consulted the RPU to discharge its statutory obligation but then failed to disclose this to the decision-maker, Mr Jarvis. Thus he did not have regard to this as a relevant consideration and made his decision on the basis of incorrect facts.
>
> 54. At first blush I had some sympathy with this submission. However, the RPU response was wrong and muddle-headed. As Mr Sykes noted when he received it, its author seemed not to have read the proposal given the question posed about whether the only safety implication was to protect landowners' property from damage. On its face, the proposal set out other safety concerns.
>
> 55. The RPU response continued with what might be thought to be some starling assertions on behalf of a police force: (i) erecting prohibition notices would encourage wrong-doing; (ii) the order would be unlikely to have the desired effect on those already committing offences; (iii) an "access only" order would be almost unenforceable; and (iv) an order would raise expectations of the police where none existed previously. Perhaps the real reason for the RPU's approach was, as the response said, that the police had limited resources. Mr Jarvis's evidence is that the RPU often does not support the making of new orders as it does not want Hampshire Constabulary to have to commit resources to enforcing them.
>
> 56. Given the nature of the RPU response, it is perhaps unsurprising that the officer's report omitted mention of it. The crucial point was that Sergeant Gilmour had expressed his support for the proposed order on no less than three separate occasions. It was he [who] would have the responsibility for enforcing the proposed order, and he seemed to take the commendable approach that if adopted it could and would be enforced.
>
> 57. The officer's report should have included reference to the RPU report but pointed out its inadequacies. In my view it was not "so obviously material" to be a relevant consideration in the legal sense. Alternatively, as a matter of discretion I accept Mr Whale's submission that this shortcoming does not reach the level of seriousness to warrant the quashing of the Order."

The parties' submissions

30. Mr Adrian Pay for the claimant accepts that the Statement of Reasons need not specifically mention section 1 or section 122 of the 1984 Act but submits:-

1) Mr Jarvis as the delegate of the traffic authority for this purpose should at least have been aware of and considered the requirement of the section; once it is accepted (as it is) that he did not expressly consider section 122, the order must be quashed;

2) if that is wrong and the question is whether he conducted the appropriate balancing exercise, he did not in fact do so; there is no reference to any balancing exercise in the Statement of Reasons and Mr Sykes' report of 20th February 2018 does not mention any balancing exercise or, to the extent that it does, does not start, as it should, from the premise that the lanes should be open to all traffic;

3) the 1984 Act required Hampshire to consult with the RPU; although Mr Sykes did seek the views of the RPU and received them by way of a response from Ms Bagshaw, that response was never passed on to the decision-maker (Mr Jarvis) and was therefore never considered by him; that was also a fatal flaw in the making of the TRO; and

4) the TRO had therefore to be quashed.

31. Mr Whale for Hampshire submitted:-

1) the fact that Mr Jarvis did not expressly consider section 122 of the 1984 Act when making the TRO is not the end of the matter; the authorities showed that it was not necessary for the decision-maker to mention or consider section 122, if in fact he struck the right balance between the duty to secure expeditious movement of traffic as required by section 122(1) and the factors set out in section 122(2);

2) Mr Jarvis did indeed strike that balance because the report made by Mr Sykes to him before he made the TRO set out considerations which, if not expressly, at least on a true understanding of the report showed that a balance was being struck between the duty to secure expeditious movement of traffic (including pedestrians) and the factors referred to in section 122(2) particularly the effect on the amenities of the locality and the need to preserve or improve them (factor (b)) and dealing with the potential noise and nuisance and damage done from motor vehicles being matters appearing to Hampshire to be relevant (factor (d));

3) The RPU response was so muddle - headed and wrong that it could never have been a material consideration in making the TRO and the failure to pass it on to Mr Jarvis was not a ground for quashing the order; and

4) in any event the judge had a discretion when deciding whether the TRO should be quashed and his refusal to do so was an exercise of that discretion which should not be disturbed.

The Law

32. In the event there was not much dispute about the law. The statutory provisions have been considered in a number of first-instance decisions of which the most important is probably that of Carnwath J in UK Waste Management v West Lancashire District Council [1996] RTR 201. He made the point at page 209 that the words "so far as practicable" qualify the duty to secure the expeditious movement of traffic rather than

the duty to have regard to the factors in section 122(2) and he also referred to the balancing exercise that is required:-

> "The second main point is in relation to the duty under section 122 to have regard to the desirability of maintaining reasonable access to premises. I do not find section 122 an altogether easy section to construe. It refers to a wide range of different matters which have to be taken into account, but it is not clear precisely how the priorities between these various matters are to be ordered. The words "so far as practicable" show that some limitation is intended on the weight to be given to some of the factors. In Greater London Council v Secretary of State for Transport [1986] J.P.L. 513 at 517, the Court of Appeal appear to have assumed that those words qualify the duty to have regard to the items in subsection (2), thus, in effect, making those matters subordinate to the matters which are referred to in subsection (1). However, there appears to have been no detailed argument on the point in that case and the comments appear to be obiter. To my mind, it seems more likely that the intention is the other way round. Had it been as the Court of Appeal suggest, one would have expected the parenthesis to read, "having regard so far as practicable to the matters specified in subsection (2) below". Furthermore, it is difficult to see the purpose of such a limitation on a duty which is simply to "have regard" to certain matters, since it is always practicable to have regard to matters, not always to give then effect. It is more likely that the limitation was intended to qualify the duty in subsection (1) to secure the expeditious, convenient and safe movement of traffic, that being a duty which would otherwise be expressed in absolute terms."

In the later case of Trail Riders Fellowship v Powys County Council [2013] EWHC 2142 (Admin) Cranston J commented (para 25):-

> "That was a case where the traffic authority had made an experimental traffic regulation order banning the use of heavy goods commercial vehicles on an access road to a landfill site. In fact there was no effective experiment and the order was quashed for that reason. The order also failed because the authority had not considered under section 122 the desirability of securing and maintaining reasonable access to the site and what that might entail. Only when it had done that, Carnwath J held, could it proceed to the balancing exercise which section 122 involved, however that section was to be interpreted: at 209 F-G."

33. All this was common ground between counsel. It was also common ground that it was not necessary for the decision-maker to make express reference to section 122 in the reasons for the order or anywhere else. There have been some different expressions of view in some of the first instance authorities on this topic. For instance, in R (LPC Group) v Leicester County Council [2002] EWHC 2485 Sir Christopher Bellamy QC said (para 61) that the relevant statutory considerations must primarily be ascertained

from the council's statement of reasons. Moreover, HHJ Behrens QC quashed TROs in Wilson v Yorkshire Dales National Park Authority [2009] EWHC 1425 (Admin) because the necessity of carrying out the balancing exercise required by section 122 had not been brought sufficiently to the authority's attention (para 80). In similar vein HHJ Cotter QC in Williams v Devon County Council [2015] EWHC 568 (Admin) (para 125) spoke of the need for the relevant authority to specifically set out its analysis of section 122 considerations in reaching its decision.

34. By way of contrast in Trail Riders Fellowship v Devon County Council [2013] EWHC 2104 (Admin) Jeremy Baker J said (para 45) that an authority's failure to refer to section 122 does not of itself give rise to a conclusion that the authority failed to have regard to its statutory duty. In Williams v Waltham Forest LBC [2015] EWHC 3907 Holgate J said (para 85) that it would be sufficient that the relevant duty is satisfied as a matter of substance whether expressly or by implication.

The section 122 balancing exercise

35. These last two cases (which I would respectfully approve) justify the judge's third proposition of law set out in para 26 above and are, of course, the reason why Mr Pay was constrained to accept that no specific reference to section 122 need be made in the authority's decision. He emphasised, however, that the words "in substance" are not an excuse for performing some different balancing exercise from that required by the statute and with that I agree. But I cannot agree that the decision-maker must have "expressly considered" section 122 and that, if he does not, the TRO must be quashed. If the report submitted to and considered by him does in fact conduct the balancing exercise required by the statute that is sufficient and I would therefore reject Mr Pay's first submission.

36. The question is, therefore, whether the right balancing exercise has been conducted. I would respectfully disagree with Sir Christopher Bellamy's view that this must be primarily ascertained from the traffic authority's statement of reasons, which are statutorily required for the purpose of seeking the view of interested parties but are not a statutory requirement at the time of the making of the TRO. The balancing exercise has to be conducted after, not before, the receipt of such views. The report made by Hampshire's traffic officer (Mr Sykes) to Mr Jarvis as decision-maker in the light of the responses received is inevitably an important part of the overall picture.

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. It is indeed difficult to imagine that a county's Director of Economy Transport and Environment will not be acutely aware of the county's obligations (so far as practicable) to secure the expeditious, convenient and safe movement of vehicular traffic. Part of that duty is inevitably a duty to consider any necessary repairs and that was one of the considerations expressly referred to but rejected as impracticable in Mr Sykes' report to Mr Jarvis and in section 3 of Mr Jarvis' own decision of 26th February 2018. Appendix C of Mr Sykes' report

also expressly referred to the balance which needed to be struck between the beneficial enjoyment for motor vehicle drivers and what Mr Sykes called the disbenefits to the local community and the surrounding environment. These considerations amply justify the judge's conclusion that the section 122 duty was in substance fulfilled. I would therefore reject Mr Pay's second submission.

38. I am, with respect, somewhat more doubtful about the latter part of the judge's proposition (iv) that it is possible to infer that the section 122 duty has been complied with merely because the decision had been made by a specialist committee or a specialist officer who can be taken to have knowledge of the relevant statutory powers. There does, in my judgment, have to be actual evidence that the balancing process required by section 122 has been, in substance, conducted. It cannot be merely a matter of inference from the status of the decision-maker. But that requirement has been satisfied in this case.

39. In the event therefore I would approve the judge's succinct statement of the law as contained in para 37 of his judgment and para 26 of this judgment save for the last part of proposition (iv).

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.

Failure to have in mind the RPU report

41. The judge was troubled by this but in the end concluded that the report was not "so obviously material" as to be a legally relevant consideration. The test of obvious materiality is, no doubt, highly important when considering whether an authority has taken relevant considerations into account in taking any decision, see In re Findlay [1985] A.C. 318, 334C. But I respectfully doubt if it can apply when there is a statutory requirement that a particular body be consulted and the decision-maker is unaware of the results of such consultation.

42. On the other hand, there is no doubt that the grant of relief whether by way of judicial review or on a statutory appeal from an administrative decision is a matter of discretion and the judge did decide, alternatively, that in his discretion he would not quash the

order. His reasons have to be determined from paras 54-56 of his judgment in which he described the RPU response as "wrong and muddle-headed". In my judgment that was a correct description. The author started the response by asking whether the only safety implication was to protect the property of adjacent landowners from damage when the proposal made it clear that that was only one of the safety concerns and, indeed, hardly the most important. The judge described the remaining responses as "startling assertions" which again was justified and he also said that the real reason for the RPU approach was perhaps concern about limited resources.

43. Mr Pay submitted that it was understandable that the RPU should say that the TRO would be unlikely to deter those who were already committing offences (such as, Mr Pay suggested, damaging public rights of way or aggravated trespass). But that does not address the point that it is far easier to prove breach of a TRO than other potential criminal activity. It is, moreover, "startling" for a police authority to assert that it would effectively decline to enforce a TRO if made.

44. It is not the case, therefore, that the RPU was not consulted; it is just that Mr Sykes did not pass its wrong and muddle-headed response to Mr Jarvis for his consideration but instead emphasised the willingness of the local constabulary in West Meon to enforce the TRO.

45. In these circumstances it would be a strong exercise of judicial power to quash a carefully considered TRO merely because the actual decision-maker was not presented with a wrong and muddled-headed response from the RPU and the judge's exercise of discretion is not, to my mind, surprising. He may have had in mind the recently enacted section 31(2A) of the Senior Courts Act 1981 which provides that, on a judicial review, the court must refuse to grant relief if it appears to the court to be highly likely that the outcome of the case would not have been substantially different if the conduct complained of had not occurred.

46. It is perhaps more likely that he had in mind para 36(1)(b) of schedule 9 to the 1984 Act providing that the court "may" quash a TRO if satisfied that the applicant has been substantially prejudiced by failure to comply with any relevant requirement. The judge no doubt thought that the TRF was not substantially prejudiced by the failure of Mr Jarvis (through no fault of his own) to consider the RPU response. The judge had already referred to para 36(1)(b) in connection with a submission that the issue of noise was not highlighted in the consultation documentation and that there had therefore been procedural unfairness, see para 49 of the judgment. He probably continued to have it in mind when dealing with the RPU report in para 57.

47. In these circumstances, although the judge gave no specific reasons for the exercising of his discretion not to quash the TRO for breach of this particular requirement, those reasons can be sufficiently discerned from other parts of his judgment. I would not myself interfere with his discretion the exercise of which, in the circumstances, was an entirely understandable decision.

Conclusion

48. I would therefore dismiss this appeal.

Lord Justice Lewison:

49. I agree with Longmore LJ that ground 1 fails because in substance Hampshire performed the balancing exercise required by section 122. In my judgment the statutory requirement is capable of being fulfilled whether or not the decision-maker knows that the requirement exists. In Hotak v Southwark LBC [2015] UKSC 30, [2016] AC 811 one of the questions that arose was whether, in the context of a homelessness review, the reviewing officer had complied with the public sector equality duty. Lord Neuberger said at [79]:

> "I quite accept that, in many cases, a conscientious reviewing officer who was investigating and reporting on a potentially vulnerable applicant, and *who was unaware of the fact that the equality duty was engaged*, could, despite his ignorance, very often comply with that duty." (Emphasis added)

50. Like Longmore LJ, I do not agree with the judge's view at [37] (iv) that the fact that the decision has been taken by a specialist officer enables the court to draw the inference that he *in fact* knew of the statutory duty, when all the evidence points to the opposite conclusion.

51. So far as ground 2 is concerned, Hampshire had a statutory duty to consult the chief officer of police (in practice the RPU). The result of a consultation required by statute is plainly a material consideration; and in my judgment the judge was wrong to suggest otherwise. Where a public authority has a statutory duty to consult, the courts have consistently applied the so-called "Sedley criteria" derived from the submissions of Mr Stephen Sedley QC in R v Brent London Borough Council, Ex p Gunning (1985) 84 LGR 168. They have been approved by the Supreme Court in R (Moseley) v Haringey LBC [2014] UKSC 56, [2014] 1 WLR 3947; and are as follows:

> "First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third … that adequate time must be given for consideration and response and, finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals."

52. In the present case, not only was Mr Jarvis, the decision-maker, unaware of the response of the RPU; he was positively misled that the proposal had "the full support of the local police." I do not consider that, in those circumstances, Hampshire complied with the fourth of the Sedley criteria. Accordingly, in respectful disagreement with what Longmore LJ has said at [44], I do not consider that Hampshire complied fully with its statutory duty.

53. The question that then arises is whether TRF have been "substantially prejudiced" by that failure. If it were obvious that the decision would have been the same even if the decision-maker had conscientiously taken into account the response of the RPU then I would answer that question "No". Although I have harboured more doubt on that question than Longmore LJ or the judge, I do not push my doubts to a dissent. Accordingly, I agree that the judge was entitled, as a matter of discretion, to refuse to quash the TRO.

54. Subject to my one point of disagreement, I, too, would dismiss the appeal for the reasons that Longmore LJ has given.

Lord Justice Coulson:

55. I agree with my lords that this appeal should be dismissed. Although it is probably unnecessary for me to express a view on the one point on which they disagree, I should say that, in the circumstances of this case (and, in particular, the misconceived nature of the RPU's response compared with the views of the local constabulary, which were known), I agree with Longmore LJ's analysis at [41] – [47] above.