



Neutral Citation Number: [2018] EWHC 3390 (Admin)

Case No: CO/2381/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/12/2018

Before :

SIR ROSS CRANSTON
(sitting as a High Court Judge)

Between :

<u>Trail Riders Fellowship</u>	<u>Claimant</u>
- and -	
<u>Hampshire County Council</u>	<u>Defendant</u>

Adrian Pay (instructed by Brian Chase Coles) for the Claimant
Stephen Whale (instructed by Hampshire Legal Services) for the Defendant

Hearing dates: 28 November 2018

Judgment Approved

Sir Ross Cranston :

INTRODUCTION

1. This is a statutory challenge to the decision of Hampshire County Council (“the Council”) to make a traffic regulation order, the Hampshire (Various Roads, Warnford) (Prohibition of Driving) (Except for Access) Order 2018 (“the Order”). It was made under section 1 of the Road Traffic Regulation Act 1984.
2. The Order prohibits the use of three linked rural “green lanes” in 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.

3. The claimant is a national organisation, the Trail Riders Fellowship, 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 wholly or in part the Order under Part VI, Schedule 9 of the Road Traffic Regulation Act 1984. The defendant Council is both the traffic and highway authority for the county.

BACKGROUND

4. It is convenient to begin in 2014, when there were complaints about the misuse of the three lanes by "off-roaders", 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 is that this has 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.
5. 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 is nothing in the evidence to suggest otherwise. One its members asserts in a witness statement that the damage to the lanes is attributable to access by tractors for forestry purposes, but even if this were the case it would seem to relate to only part of the three lanes.
6. Following an investigation by a member of the Council's highways department, and correspondence between the department and the local County Councillor, Cllr Huxstep, Council officers met Warnford Parish Meeting on 10 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 seems not to have improved, and the Parish Meeting pursued the Council. On 21 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.
7. 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 having met 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 Road Traffic Regulation Act 1994 and the attendant 1996 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 obtaining one. Again there was no reference to section 122.
8. 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, 15 December 2016, at Warnford Village Hall. Mr Sykes

expressed the view that there was a strong case for a traffic regulation order on grounds including 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.

9. The Council 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 11 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 made it difficult to access Bere Farm and led to flooding; and noise, and antisocial and threatening behaviour from the off-rovers.
10. On 11 May 2017 Mr Andy Smith, the team leader of the Council's Traffic Management East, drew Mr Sykes' attention to the need under paragraph 9 of Schedule 20 to the Road Traffic Regulation Act 1994 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 was carried out with the Hampshire Constabulary Roads Policing Unit ("the RPU"). The RPU was written to on 26 May 2017.
11. On 1 June 2017 a traffic management officer at the RPU, based at Havant Police Station, replied that the police did not support the proposal. It asked whether the only safety implication was to protect landowners' property from damage. It 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.
12. Mr Smith wrote to Mr Sykes that the RPU reply was fairly standard, adding that it 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. In his evidence Mr Jarvis states 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.
13. The Council gave its formal Notice of Proposal to make an order about 24 June 2017. The draft order was for a prohibition on 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 for access to Bere Farm track, and results in flooding down the farm access.”

14. The Council 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.
15. The Council received 31 responses of which twenty-eight were in favour of the proposed order. Sergeant Gilmour and Warnford Parish Meeting continued to support it. Only three responses were opposed to the Order. One of these was the claimant’s notice of objection dated 11 July 2017. Mr Steven Taylor, an individual member of the claimant, filed a notice of objection two days later.
16. The claimant’s response contended that the Statement of Reasons was inadequate as to what the Council hoped to achieve and 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.
17. The 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 potentially serious danger for horse riders from the noise of the off-roader traffic.
18. In February 2018, Mr Sykes prepared a report for Mr Stuart Jarvis, the Council’s Director of Economy, Transport and Environment recommending the proposed order (“the officer’s report”). (Mr Jarvis is Fellow of the Chartered Institution of Highways and Transportation and a Chartered Member of the Royal Town Planning Institute.) 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.”
19. 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.” However, an exemption to allow only responsible users would be impossible to enforce.

20. On 26 February 2018 Mr Jarvis, acting under delegated powers, 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 Bede Farm could continue. In his witness statement Mr Jarvis explains that he had read Mr Sykes' report and the three appendices before making the decision along with other documents.
21. 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.
22. The Council formally made the Hampshire (Various Roads, Warnford) (Prohibition of Driving) (Except for Access) Order 2018 on 14 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 indicating the lanes to which it applied.

THE LEGAL FRAMEWORK

The statutory provisions

23. The power to make a traffic regulation orders is contained in section 1(1) of the Road Traffic Regulation Act 1994. It provides as follows:-

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, 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).

24. In December 2005, the Department for Environment, Food and Rural Affairs published *Making the Best of Byways A Practical Guide for Local Authorities Managing and Maintaining Byways which Carry Motor Vehicles* (“the Defra Guidance”). As regards the type of traffic regulation orders which should be considered, the Defra Guidance included one which allowed access to mechanically propelled vehicles driven by a responsible driver with a permit from the local authority. It said: “One year permits would be issued by the local authority and could be restricted to drivers who are members of recreational driving organisations with a published code of conduct. Similar restrictions could apply to other users if necessary” (p. 85).

25. Section 122 of the Act falls under Part X, “General and Supplementary Provisions”. It provides as follows:-

(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...

26. Paragraph 20 of Schedule 9 to the Act provides that before making a traffic regulation order, an authority shall “shall consult with the chief officer of police of any police area in which any road or other place to which the order is to relate is situated.”
27. 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.”

In *Williams v Devon County Council* [2015] EWHC 568 (Admin) Holgate J highlighted this need for a claimant to establish “substantial prejudice”.
28. The Local Authorities' Traffic Orders (Procedure) (England and Wales) Regulations 1996, 1996 SI No 2489 (“the 1996 Regulations”) sets out the procedure for making a traffic regulation order. Regulation 6 provides for consultation prior to notifying a proposal to make an order with certain bodies, including such other organisations representing persons likely to be affected as the order making authority thinks it appropriate to consult. Under regulation 7 before making an order an authority shall publish a Notice of Proposals. Regulation 7(3) and Schedule 2, paragraph 2(d), require the authority to deposit for a period of at least 6 weeks the Notice of Proposals for public inspection, together with a draft of the order, a map and a statement setting out the reasons why the authority proposed to make the order.
29. Any person may object to the proposed order: regulation 8(1). Regulation 13 requires the authority to consider, inter alia, all objections duly made under Regulation 8 which have not been withdrawn. After making an order an authority must publish a Notice of Making and must write to any person whose objection has not been acceded to setting out the reasons why that is the case: regulation 17.
30. The Openness of Local Government Bodies Regulations 2014, 2014 SI No 2095 (“the 2014 Regulations”) provide that in the case of a delegated decision the decision-maker must produce a written record of any decision which affects the rights of an individual: regulation 7. The written record must be produced as soon as reasonably practicable after the decision is made and must contain inter alia: (a) the date the decision was taken; (b) a record of the decision taken along with reasons for the decision; and (c) details of alternative options, if any, considered and rejected. Regulation 8(1) states that the written record (together with any background papers) must as soon as reasonably practicable after the record is made, be available for public inspection by members of the public.

Section 122 case law

31. In *Trail Riders Fellowship v Powys County Council* [2013] EWHC 3144 (Admin) I considered the authorities on section 122 of the Road Traffic Regulation Act 1984 up to that point.

25. Authoritative for the interpretation of section 122 are the obiter remarks of Carnwath J in *UK Waste Management Ltd v West Lancashire District Council* [1997] RTR 201, at 209:

“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 them 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.”

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.

26. Carnwath J's approach in *UK Waste Management* has been applied in subsequent authorities: *R (on the application of LPC Group plc) v Leicester City Council* [2002] EWHC 2485 (Admin), [58]; *Wilson v Yorkshire Dales National Park Authority* [2009] EWHC 1425 (Admin), [66]; *Trail Riders Fellowship v Peak District National Parks Authority* [2012] EWHC 3359 (Admin), [51]; *Trail Riders Fellowship v Devon Country Council* [2013] EWHC 2104 (Admin). In the *LPC case* the traffic regulation order was quashed because there was no evidence that the balancing exercise required by section 122 had been conducted: [69], [71]. The same result followed in *Wilson v Yorkshire Dales National Park Authority* [2009] EWHC 1425 (Admin): counsel for the park authority accepted that it had not directed itself to the effect that it was not practicable to observe the duty to secure the expeditious, convenient and safe movement of mechanically propelled vehicles on the routes in question, and although the access committee

had considered a number of matters, it had not been demonstrated that the balancing exercise demanded by section 122 had occurred: [77], [80].

27. Thus the duty imposed by section 122 of the 1984 Act is a qualified duty. Against the duty to secure the expeditious, convenient and safe movement of vehicular and other traffic (including pedestrians) is to be balanced 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, the purposes for this identified in section 1(1). As a matter of law the duty of securing the expeditious, convenient and safe movement of vehicle and other traffic (including pedestrians) is not given a primacy: Carnwath J made that clear in rejecting the assumption in *Greater London Council v Secretary of State for Transport* that the matters in section 122(2) were subordinate to those in section 122(1).

32. On behalf of the claimant in the present case Mr Pay accepted this as an accurate statement of the law.
33. Following *Trail Riders Fellowship v Powys County Council*, section 122 has been considered in several other cases. In *Williams v Devon County Council* [2015] EWHC 568 (Admin) HHJ Cotter QC dealt with an experimental traffic regulation order, which reversed the direction of vehicular traffic on a route and prohibited vehicles larger than a certain length on part of it. The judge quashed the order on the basis that a public inquiry should have been conducted. He also held that he would have quashed it on the basis that it could not be discerned that the authority had properly considered section 122.
34. In the course of reaching that conclusion, HHJ Cotter QC considered what Jeremy Baker J had said in *Trail Riders Fellowship v Devon County Council* [2013] EWHC 2104, that although the Council having made no express reference to section 122 did not mean that it had failed to consider it where the matter was considered by a specialist committee, which could be taken to have knowledge of the relevant statutory powers, and where the issue of expediency was implicit in the decision itself: at [44]-[45]. HHJ Cotter QC said that each case had to be considered on its own facts, and what may be considered implicit in one decision may not be in another, even if the decision was made by the same body: [122]. The judge went on to say that there was
- “the need for an authority to specifically set out its analysis of section 122 considerations in reaching any decision on any complicated question”: [122]
35. On appeal the section 122 point was left open: [2016] EWCA Civ 419, [48].
36. In *Williams v Waltham Forest BC* [2015] EWHC 3907 Holgate J endorsed the approach of Jeremy Baker J in *Trail Riders Fellowship v Devon County Council* [2013] EWHC 2104 to section 122, and declined to follow that in *Williams v Devon County Council* [2015] EWHC 568 (Admin). Holgate J summed up the position as follows:
- “firstly, that a decision maker with specialist expertise can be taken to be aware of its statutory powers and duties; and, secondly, it is sufficient that the relevant

duty is satisfied as a matter of substance, whether expressly or by implication": [85].

Thus in as much as there is a conflict between the authorities *Williams v Devon County Council* [2015] EWHC 568 (Admin) does not represent the law.

37. It seems to me that on the current state of the authorities, the position with section 122 is 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;
 - 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.

Reasons for a traffic regulation order

38. Running through these decisions is a consideration of the separate issue of what materials can be examined to determine whether the relevant duties in both sections 1 and 122 Road Traffic Regulation Act 1984 have been complied with. When considering the statutory obligation to provide reasons for the making of the experimental traffic regulation order in *Trail Riders Fellowship v Peak District NPA* [2012] EWHC 3359 (Admin), Ouseley J said that he would have very considerable reservations about whether any document, other than the Statement of Reasons and those incorporated in it, should be referred to: [43].
39. As to the adequacy of reasons for a traffic regulation order, I accept that there may be an analytical distinction, as Mr Pay submitted, between what is required for the purposes of consultation and what is necessary for understanding a decision once it is taken. In most cases, I would have thought, the two will in practice coincide.
40. As to the first, consultation, the general law is as stated *R (on the application of Moseley) v Haringey LBC* [2014] UKSC 56; [2014] 1 W.L.R. 3947, [26]-[27], [39]. The reasons for any proposal must be such as to permit intelligent consideration of a proposal and a response. As to the second, reasons for a decision, in the course of considering the making of a traffic regulation order in *Trial Rider Fellowship v Devon County Council* [2013] EWHC 2104 (Admin), Jeremy Baker J invoked the well-

known passage of Lord Brown's in *South Buckinghamshire DC v Porter* [2004] UKHL 33; [2004] 1 W.L.R. 1953:

"[36] The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds."

GROUND OF CHALLENGE

Ground 1: order not made for statutory purpose and/or failure to identify statutory purpose

41. The claimant's first ground was that the Council failed to identify a statutory purpose for which the Order was to be made in the draft order, the Statement of Reasons, the officer's report, the decision record or the Order itself. Thus it failed to direct itself that it could only make an order if it considered that it was expedient to do so for a statutory purpose and to satisfy itself that it was expedient to make an order for that purpose.
42. This ground goes nowhere. To take the Statement of Reasons alone, the reasons given fit the statutory purposes at the least at sub-sections (a)-(d) of section 1(1) of the Road Traffic Regulation Act 1984. At the very outset the statement refers to the object of preventing damage caused by vehicles, which make the lanes dangerous and almost impossible to use safely, which brings in section 1(1)(a)-(b). The second paragraph of the statement refers to difficulties for access and to the lanes being used for trespass, which takes in section 1(1)(c)-(d). The effect of flooding from the churning up of mud could fall within section 1(1)(b), (e) or (f). I accept the Council's submission that it is obvious that it was satisfied that the Order was expedient for a statutory purpose, and that it was made for one or more of the statutory purposes.

Ground 2: breach of s. 122

43. For the claimant Mr Pay underlined that the Statement of Reasons accompanying the notice of proposal did not refer to section 122 of Road Traffic Regulation Act 1984, the officer's report did not mention it, and there was nothing in the contemporaneous documentation referring to the section. In his submission the documents explained this: Mr Sykes expressed a lack of any particular familiarity with making traffic regulation orders, and the Council's solicitor did not mention it in her two memoranda. Mr Pay emphasised that in their witness statements neither Mr Sykes nor Mr Jarvis stated that they considered section 122 or that they were aware of its existence. In Mr Pay's submission, the Council therefore failed to have regard to section 122 and failed to comply with its duty to exercise its powers to secure, *inter alia*, the expeditious and convenient movement of vehicular traffic. The Order must be quashed.

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 acknowledgment that a balance needs to be struck. In my view the section 122 duty was in substance fulfilled.

Ground 3: inadequate Statement of Reasons and procedural unfairness

46. From what has been said the Statement of Reasons in my view did set out the statutory purpose for which the Order was to be made and did address section 122. In the context of the consultation, it was in my judgement adequate to identify the reasons for proposing the order and enabling the consultees to make informed responses. Just as in *Trail Riders Fellowship v Powys County Council* [2013] EWHC 3144 (Admin), the claimant in these proceedings and some of the other consultees such as the Warnford Parish Meeting, the police and the neighbouring landowners were sophisticated and knowledgeable about the issues at play behind the making of the order: at [44].
47. The additional point made by the claimant is that the decision relied on noise nuisance whereas the Statement of Reasons made no reference to that factor. Consequently, Mr Pay submitted, no member of the public would have appreciated that it was an issue. Accordingly neither the public at large nor the claimant in particular provided representations relating to it.
48. As we have seen noise nuisance was raised on a number of occasions by different parties. Mr Sykes mentioned it on 11 April 2017 when he requested that the process for an order be started, and Warnford Parish Meeting in their December 2017 report on the proposed order referred to the potentially serious danger of noise for horse riders. That is why it found its way into the background of decision-making, but it was not a primary consideration.
49. In any event, I accept Mr Whale's submission that the claimant was not substantially prejudiced, as we have seen a statutory test for a remedy for any inadequacy in the Statement of Reasons. It understood the nature of the proposal; it did object, at length; and it provided grounds for its objection. Along the same lines there is no basis to a claim that there was procedural unfairness.

Ground 4: breach of 2014 Regulations and/or procedural unfairness

50. Mr Pay for the claimant accepted that this ground was not independent of the other grounds. Given my conclusions on the other grounds I need say no more about it.

Ground 5: failure to consider the claimant's representations properly

51. Mr Pay fairly accepted that this was not his strongest point. In essence the submission was that the claimant in its representation said that it was forestry operations and failure to repair the lanes which was mainly responsible for the damage. Nowhere was this referred to or addressed in the officer's report.
52. As we have seen the claimant's representations were considered in the officer's report. Forestry operations and the Council's failure to address damage from extraordinary traffic were never its main points. Indeed the forestry point was put tentatively; it was its "understanding" that this was the cause of the damage. I have already commented that the evidence to this effect seemed to relate to only part of the damage.

Ground 5A: procedural impropriety/failure to consider results of consultation with police

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 muddled-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 startling 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 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.

Ground 6: prohibition of all motor vehicles, in particular rejection of claimant's alternative proposal, irrational and/or otherwise unlawful where Council accepted that responsible motorcycle users would probably cause minimal damage to lanes

58. Under this head Mr Pay submitted that the officer's report seemed to accept that the claimant's members could be expected to use the lanes responsibly, and accordingly caused minimal damage, or at least did not reject that assertion. Yet it went on to recommend a total ban on motor vehicles, including motor cycles and those which could be expected to use the routes responsibly on the basis that a permit system was impossible to enforce.
59. Relying on difficulties of enforcement was irrational, Mr Pay continued, since the reasoning was premised on users other than those within the proposed exemption contravening the prohibition. Such users would be just as likely to contravene a prohibition which did not contain an exemption for the claimant's members. Further, the conclusion that exemptions would be impossible to enforce was irrational when other local authorities successfully operated permit systems in relation to other green lanes and the Defra Guidance tells local authorities that they should consider such a system.
60. Irrationality is a very high hurdle. As Mr Whale submitted the proposed order had the support of the Warnford Parish Meeting, the local police, all the adjacent landowners, Cllr Huxstep, the local county councillor, and 28 of the 31 respondents in the consultation. Further, it had been the subject of extensive consideration over several years. The Council did consider the alternative of a permit system but regarded it as unenforceable. Perhaps with hindsight, the claimant should have included more details in its representations about the operation of permit systems elsewhere in the country. It is unlikely that this would have been persuasive when there was no evidence that the claimant's members were responsible. The evidence was that the culprits were 4x4 vehicles, and the photographic evidence was of scrambler type bikes, not motorbikes. But the situation had reached the point where only a total ban was considered effective. In the event the irrationality hurdle has not been surmounted.

CONCLUSION

61. For the reasons given none of the grounds are made out. I dismiss the claim.