Neutral Citation Number: [2021] EWHC 3082 (Admin)

Case No: CO/1937/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 November 2021

Before :

MRS JUSTICE LANG DBE

- -

Between :

THE QUEEN	**Claimant**
on the application of	
KEYHOLE BRIDGE USER SAFETY GROUP	
- and -	
BOURNEMOUTH, CHRISTCHURCH AND POOLE COUNCIL	**Defendant**

- -
- -

Piers Riley-Smith (instructed by **Richard Buxton Solicitors**) for the **Claimant**
Kate Olley (instructed by **BCP Legal Services**) for the **Defendant**

Hearing date: 6 October 2021

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Approved Judgment

Mrs Justice Lang :

1. The Claimant challenges the decision made by the Defendant ("the Council") on 1 March 2021, to revoke the Bournemouth, Christchurch and Poole (Whitecliff Road) (No Vehicles Except Cyclists and Waiting Restrictions) Experimental Order (No.2) 2020 ("the Order"). The Order prohibited vehicle access (other than bicycles) on Whitecliff Road at the point where it runs under a narrow bridge, known as Keyhole Bridge, into Poole Park. It was an experimental traffic order ("ETO") made pursuant to section 9 of the Road Traffic Regulation Act 1984 ("RTRA 1984").

2. The Claimant is an unincorporated association whose members are local residents living in Bournemouth, Christchurch and Poole.

3. Permission to apply for judicial review was granted on 14 July 2021 by Neil Cameron QC, sitting as a Deputy High Court Judge.

Grounds of challenge

4. The Claimant's grounds of challenge may be summarised as follows:

   i) The Council acted in breach of Schedule 5 to the Local Authorities' Traffic Orders (Procedure)(England and Wales) Regulations 1996 ("the 1996 Regulations"), by curtailing the statutory 6 month period for representations (both objections and statements in support).

   ii) The Council promised that the experimental closure of the road would operate for 6 months and then be reviewed, that the public would be consulted on the closure, and responses received by 21 February 2021 would be taken into account in the review. This gave rise to a procedural legitimate expectation. Councillor Greene decided to revoke the Order on 27 January 2021, and the Overview and Scrutiny Board upheld the decision on 1 March 2021. The Council failed to honour its promises and curtailed the consultation period for no justifiable reason, which was so unfair that it amounted to an abuse of power.

   iii) When deciding whether or not to revoke the Order, the Council failed to take into account material considerations, namely, consultation responses which might have been lodged in the remaining weeks of the consultation period if it had not been curtailed.

   iv) The Council acted irrationally when deciding whether or not to revoke the Order, by relying on unevidenced assumptions about the detrimental effect of the ETO on air quality.

5. In response, the Council submitted:

   i) The objections procedure in Schedule 5 to the 1996 Regulations was not a general consultation about the merits of the Order; its purpose and scope was to give the public an opportunity to object to the Council continuing the provisions of the experimental order indefinitely in a permanent order. It did not prevent the Council from exercising its discretion to revoke the Order at any time prior to the 6 month period for lodging objections.

ii) The Council did not make any clear and unambiguous representations, as contended by the Claimant, which were capable of giving rise to a procedural or a substantive legitimate expectation. In any event, the decision to revoke the Order did not take effect until 1 March 2021, when it was confirmed by the Overview and Scrutiny Board. Until 1 March 2021, members of the public could and did continue to make representations, which were taken into account, and thus met the expectation that the consultation period would continue until 21 February 2021. Alternatively, the Council lawfully resiled from any legitimate expectation.

iii) In law, the duty on the Council was to have regard to the material issues before making its decision. The Claimant was not able to point to any issues which were not already before the Council in numerous other representations when it made its decision. The representation from Mr and Mrs Philips did not raise any new issues. Responses which were never made, such as from Dr Mew, could not amount to a material consideration as they did not exist.

iv) The Claimant's case on irrationality was a disagreement with the merits of the decision, rather than a demonstration that it was perverse.

v) Section 31(2A) of the Senior Courts Act 1981 applied, as it was highly likely that the outcome would not be substantially different if the conduct complained of had not occurred.

Facts

6. On 4 August 2020, the Council exercised its powers under section 9 RTRA 1984 to make the Order. It was accompanied by a Statement of Reasons and a Notice of Making. The Statement of Reasons stated that the Order was made in discharge of the Council's duty under section 122 of the RTRA 1984 "to secure the expeditious, convenient and safe movement of vehicular and other traffic (including pedestrians)" and, in accordance with the provisions of section 1(1) of the RTRA 1984, it appeared to the Council that it was expedient to make the Order.

7. The Statement of Reasons and the Notice of Making included the following statement:

> "The Council will be considering in due course whether the provisions of the Order should be continued in force indefinitely. Within a period of six months from the coming into force of the Order – 14 August 2020, or if the Order is subsequently varied by other Orders (under Section 9 of the Road Traffic Regulation Act 1984 or modified pursuant to sub-section (2) of Section 10 of the Act), from the coming into operation of those variations or modifications (whichever are the latest), any person may object to the making of an Order for the purposes of such indefinite continuation. Any such objection must be in writing … and must give the grounds on which it is made and must be emailed …or sent to: Director, Growth & Infrastructure, Room 159, Civic Centre, Poole BH15 2RU. Please note that all

> representations received will be available for public inspection. Objectors will be informed of the outcome."

8. The Council also issued an "Information Document" which described the effect of the Order and stated in the introduction:

> "As this is an ETRO, we want to hear your views on the changes and their impact throughout the process…..You can give your views using the online form …
>
> The consultation will start on 7 August 2020 and the online form will be open for the duration of the trial. The council will undertake a review six months after the works implementation date. Comments received by 21 February 2021 will be considered as part of the six month review."

9. Later on the document stated:

> "**Have your say**
>
> Your views are important to us and we want to hear from those who live in, work in or visit the area. You can give your views on the changes and how they affect you using the online form at …. You can give feedback in this way throughout the trial period. Comments received by 21 February 2021 will be considered as part of the council's six month review.
>
> If you wish to formally object to or support the proposed Order, please send your comments by 21 February 2021 to ….. Please ….specify the grounds for your support or objection in your response. Any representations received may be made public. Emails of objection and support will be considered by the Council before deciding whether or not to make the experimental measures permanent.
>
> **What happens next?**
>
> The Council intend to review the changes in early 2021. A full report on the findings and outcomes of the ETRO will be presented to the Council's Cabinet, who will make a decision on whether the changes should be made permanent, retained (with minor alterations) or removed. The experimental order can also be maintained for further review, up to a maximum period of 18 months."

10. The Order came into force on 14 August 2020. It did not specify its duration but under section 9(3) of the RTRA 1984, it could not continue in force for longer than 18 months.

11. The works to close the route to vehicles (installation of large plant containers) were carried out in the week commencing 17 August 2020.

12. In October 2020, there was a change in the administration of the Council. A new Leader and Cabinet were appointed, and Councillor Michael Greene, an experienced Member, was appointed to be Portfolio Holder for Transport and Sustainability.

13. On 15 October 2020, the Council announced that it intended to revoke the Order but that statement was later retracted. In his witness statement, Councillor Greene related that he undertook a review of 8 ETOs which had recently been made in the area. He obtained information and views from lead officers and local ward members, and considered the consultation responses. Among other matters, he explored the impact of the ETOs on neighbouring roads and areas, so as to consider possible adverse impacts from the displacement of traffic out of the ETO areas.

14. The responses to the non-statutory "informal" consultation were recorded in the "Portfolio Holder Decision Record" as 270 responses (60%) in favour of the measure and 164 responses (37%) opposed to the measure, received from 19 August 2020 to 11 January 2021. The responses to the statutory "formal" consultation were recorded in the same document as 128 responses in support, and 35 responses objecting, received from 7 August 2020 to 6 January 2021.

15. On 15 January 2021, Councillor Greene published a "Proposed Decision" to revoke the Order. Interested Parties were invited to comment on the proposal, over a period of 5 days, until 22 January 2021. It was not on the Council's consultation webpage as, according to the Council, it was not a formal consultation. The Council explained at the time that the "five day period is similar to the publication of an agenda whereby interested parties can make their views known to relevant members" (second witness statement of Ms Susan Smith, at paragraph 3(i)). Some 438 responses were received, and scheduled to the document headed "Post Engagement Final Decision".

16. On 27 January 2021, Councillor Greene confirmed his decision to revoke the Order in the document headed "Portfolio Holder Decision Post Engagement Final Decision" and the "Portfolio Holder Decision Record". An Equality Impact Assessment was undertaken. Councillor Greene explained in his witness statement that he considered all the responses which had been received.

17. The decision to revoke was published on the Council's website on 28 January 2021. Comments or representations were not invited.

18. The decision was subject to the Council's Call-in procedure under the Council's Constitution. Under rule 10.4 of the Procedure Rules in the Constitution, the decision could not be implemented until five clear working days after the decision was made, recorded and published, pending a possible Call-in. The Call-in period commenced on 28 January 2021, and closed on 4 February 2021.

19. Twelve Councillors requested a Call-in for detailed reasons which criticised both the decision and the process. Among other matters, they complained that the consultation procedure was flawed as it was "advertised to be consulted from August 2020 to at least 21 February 2021", and "no rationale was given as to why it was felt necessary to withdraw the scheme early".

20. The Overview and Scrutiny Board was asked to review and scrutinise Councillor Greene's decision in the light of the reasons submitted in support of a Call-in. The

Board met on 1 March 2021. At a lengthy meeting, Councillor Hadley presented the reasons for the Call-in, and proposed a motion that the Board should "recommend a referral back to Cabinet for them to consider an extension as allowed under the legislation to 18 months, during which time the following items are to be considered – air pollution, congestion and journey times, consultation with schools, disability groups and community groups – and these are brought back to Cabinet for a final decision at the end of this period". Councillor Greene gave a detailed explanation and justification for his decision. Among other matters, Councillor Greene explained that "[t]he consultation was closed because a significant number of responses had already been received and nothing new had come out of the responses during this time to further inform the decision". By 8 votes to 7, the Board voted against Councillor Hadley's motion.

21. The Monitoring Officer advised the Board that Councillor Greene's decision could now be implemented with immediate effect. By rule 10.5 of the Procedure Rules, the decision could not be implemented until the Call-in Procedures had been followed.

22. Members of the public were able to view a livestream of the meeting of 1 March 2021, but they could not participate. In accordance with the Council's Constitution, there were strict deadlines for members of the public to submit questions, statements and petitions in writing prior to the meeting. Ms Smith sent her comments direct to Board members, and four other supporters of the Claimant sent representations which were posted on the Council's website and circulated to Board members. The representations were considered at the meeting.

23. On 30 January 2021, two members of the public (Mr and Mrs Phillips) responded to the consultation procedure, supporting the continued closure of the road. The Council replied, on 3 February 2021, stating that the Order had already been revoked, on 28 January 2021. Mr and Mrs Phillips lodged a complaint. In its response, the Council explained the process which had been followed. It said that:

> "The original intention was to run the experiment for 6 months and then review the measure after that 6 months had elapsed from 21st Feb 2021. This was the intention stated by the administration that was controlled the Council at the time the measure was implemented, however, that administration lost control of the Council in the Autumn of 2020. New administrations are not bound by their predecessors and the new administration took a decision to remove the measure earlier."

During the hearing, Councillor Greene informed his legal representatives that he had taken this response into account before the 1 March 2021 meeting, but I could not give any weight to this late informal communication which was not verified in a witness statement.

24. Dr K. Mew made a witness statement in support of the claim explaining that she had been ill in 2020 and subsequently sheltering at home in 2020 because of the COVID-19 pandemic and so she was unaware that there was an ongoing consultation. By the time she found out it, it was too late for her to submit a representation supporting the closure of the road because the consultation period had been curtailed and the Order revoked.

Statutory framework

The RTRA 1984

25. The Council is a traffic authority within the meaning of section 1 of the RTRA 1984 which provides:

> "(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)."

26. In exercising its powers under the RTRA 1984, the Council is under the general duty set out in section 122 RTRA 1984, which provides:

> "(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."

27. Section 9(1) of the RTRA 1984 provides that a traffic authority may "for the purpose of carrying out an experimental scheme of traffic control", make an order referred to as an "experimental traffic order" (an "ETO"). By sub-section (3), an experimental traffic order shall not continue in force for longer than 18 months.

28. Section 10(2) RTRA 1984 makes provision for the modification or suspension of all or part of an ETO by the authority on specified grounds, which were not employed in this case.

The 1996 Regulations

29. The procedural provisions relating to ETOs are set out in the 1996 Regulations.

30. Once an ETO has been made, the authority must publish a notice of making (regulation 17(2) of the 1996 Regulations) stating that the order has been made and containing the particulars listed in Parts I and III of Schedule 1 to the 1996 Regulations. By paragraph 7 of Schedule 1, these include a "statement that documents giving more detailed particulars of the order are available for inspection and a statement of the places at which they are so available and of the times when they may be inspected at each place."

31. An ETO may not come into force before seven days have expired from the publication of the notice of making: regulation 22(2) of the 1996 Regulations. By regulation 22(3) and (4), documents must be deposited and made available for inspection whilst the order is in force according to the requirements of Schedule 2 to the 1996 Regulations which provides (so far as is material) as follows:

> "1. Subject to paragraph 3, the documents specified in paragraph 2 shall, so far as they are relevant, be made available for inspection at the principal offices of the authority during normal

> office hours and at such other places (if any) within its area as it may think fit during such hours as it may determine for each such place.
>
> 2. The documents are-
>
> (a) a copy of the relevant notice of proposals and, if the order has been made, of the relevant notice of making;
>
> (b) except where the order is one to which paragraph 3 applies, a copy of the order as proposed to be made or as made (as the case may be);
>
> (c) except where the order is one to which paragraph 3 applies, a map which clearly shows the location and effect of the order as proposed to be made or as made (as the case may be) and, where appropriate, alternative routes for diverted traffic;
>
> (d) 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;"

32. Schedule 5 to the 1996 Regulations sets out the statements to be included in a notice of making relating to an ETO, in the following terms:

> "1. That the order making authority will be considering in due course whether the provisions of the experimental order should be continued in force indefinitely.
>
> 2. That within a period of six months-
>
> (a) beginning with the day on which the experimental order came into force, or
>
> (b) if that order is varied by another order or modified pursuant to section 10(2) of the 1984 Act, beginning with the day on which the variation or modification or the latest variation or modification came into force,
>
> any person may object to the making of an order for the purpose of such indefinite continuation.
>
> 3. That any such objection must-
>
> (a) be in writing;
>
> (b) state the grounds on which it is made; and

> (c) be sent to an address specified for the purpose in the notice of making."

33. Regulation 23 of the 1996 Regulations applies where an authority seeks to replace an ETO with a permanent order in the same terms. It provides as follows:

> "23. Orders giving permanent effect to experimental orders
>
> (1) This regulation applies where the sole effect of an order ("a permanent order"), which is not an order made under section 9 of the 1984 Act, is to reproduce and continue in force indefinitely the provisions of an experimental order or of more than one such order ("a relevant experimental order"), whether or not that order has been varied or suspended under section 10(2) of the 1984 Act.
>
> (2) Regulations 6 (consultation), 7 (notice of proposals) and 8 (objections) shall not apply to a permanent order where the requirements specified in paragraph (3) have been complied with in relation to each relevant experimental order.
>
> (3) The requirements are that-
>
> (a) the notice of making contained the statements specified in Schedule 5;
>
> (b) deposited documents (including the documents referred to in sub-paragraphs (c) and (e)) were kept available for inspection, subject to Part VI, in accordance with Schedule 2 throughout the whole of the period specified in regulation 22(4);
>
> (c) the deposited documents included a statement of the order making authority's reasons for making the experimental order;
>
> (d) no variation or modification of the experimental order was made more than 12 months after the order was made; and
>
> (e) where the experimental order has been modified in accordance with section 10(2) of the 1984 Act; a statement of the effect of each such modification has been included with the deposited documents.
>
> (4) In the application of regulations 10, 11 and 13 and Schedule 3 to a permanent order to which regulations 6, 7 and 8 do not apply by virtue of paragraph (2)-
>
> (a) the notices of making published in respect of each relevant experimental order shall be treated as the notice of proposals published under regulation 7(1)(a) in respect of the permanent order;

> (b) any objection made in accordance with the statement included by virtue of paragraph (3)(a) in the notice of making published in respect of a relevant experimental order shall be treated as an objection duly made under regulation 8 to the permanent order."

Legitimate expectation and consultation : the legal principles

34. A duty to consult may arise from a legitimate expectation of consultation, even in the absence of any statutory or other legal requirement to consult (*R (Moseley) v Haringey LBC* [2014] 1 WLR 3947, per Lord Reed at [35]).

35. A legitimate expectation may arise from an express promise or representation made by a public body. We are not concerned here with the class of legitimate expectation that may arise from custom and practice.

36. In order to found a claim of legitimate expectation, the promise or representation relied upon must be "clear, unambiguous and devoid of relevant qualification": *R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, per Bingham LJ at 1569G.

37. Bingham LJ's classic test has been widely approved and applied. In *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2009] AC 453, Lord Hoffmann said, at [60]:

> "It is clear that in a case such as the present, a claim to a legitimate expectation can be based only upon a promise which is 'clear, unambiguous and devoid of relevant qualification': see Bingham LJ in *R v Inland Revenue Comrs Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, 1569. It is not essential that the applicant should have relied upon the promise to his detriment, although this is a relevant consideration in deciding whether the adoption of a policy in conflict with the promise would be an abuse of power and such a change of policy may be justified in the public interest, particularly in the area of what Laws LJ called 'the macro-political field': see *R v Secretary of State for Education and Employment, Ex p Begbie* [2000] 1 WLR 1115, 1131."

38. The onus of establishing a clear, unambiguous and unqualified representation rests on the Claimant.

39. The Courts have given guidance on how Bingham LJ's test in *MFK* is to be applied. In *Paponette and Ors v Attorney General of Trinidad and Tobago* [2010] UKPC 32, Lord Dyson JSC, giving the judgment of the majority of the Board, said, at [30]:

> "As regards whether the representations were "clear, unambiguous and devoid of relevant qualification", the Board refers to what Dyson LJ said when giving the judgment of the Court of Appeal in *R (Association of British Civilian Internees:*

> *Far East Region) v Secretary of State for Defence* [2003] QB 1397, para 56: the question is how on a fair reading of the promise it would have been reasonably understood by those to whom it was made."

40. A paradigm case of procedural legitimate expectation was set out by Laws LJ in *R (Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755 at [29 – 30]:

> "29. The paradigm case arises where a public authority has provided an unequivocal assurance, whether by means of an express promise or an established practice, that it will give notice or embark upon consultation before it changes an existing substantive policy: see *CCSU* [1985] AC 374 at 408G-H (Lord Diplock's category (b)(ii)), *Ex p Baker* [1995] 1 AER 73 at 89 (Simon Brown LJ's category 4, acknowledged by him to equate with Lord Diplock's category (b)(ii): see p. 90), *Ex p Coughlan* at paragraph 57, p.242A — C: Lord Woolf's category (b)). I need not for present purposes set out these taxonomies.
>
> 30. In the paradigm case the court will not allow the decision-maker to effect the proposed change without notice or consultation, unless the want of notice or consultation is justified by the force of an overriding legal duty owed by the decision-maker, or other countervailing public interest such as the imperative of national security (as in *CCSU*). There may be questions such as whether the claimant for relief must himself have known of the promise or practice, or relied on it. It is unnecessary for the purpose of these appeals to travel into those issues; I venture only to say that there are in my view significant difficulties in the way of imposing such qualifications. My reason is that in such a procedural case the unfairness or abuse of power which the court will check is not merely to do with how harshly the decision bears upon any individual. It arises because good administration ("by which public bodies ought to deal straightforwardly and consistently with the public": paragraph 68 of my judgment in *Ex p Nadarajah* [2005] EWCA Civ 1363) generally requires that where a public authority has given a plain assurance, it should be held to it. This is an objective standard of public decision-making on which the courts insist. I note with respect the observations of Peter Gibson LJ on the importance of reliance in *Ex p Begbie* at 1124B — D; but that was a case (or a putative case) of substantive legitimate expectation, where different considerations may arise."

41. In *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363, Laws LJ explained the principled reasons why the courts will require a public authority to honour its promises, unless there is a good reason not to do so. He did not distinguish between existing and future rights. He said, at [68] – [70]:

> "68. The search for principle surely starts with the theme that is current through the legitimate expectation cases. It may be

> expressed thus. Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so. What is the principle behind this proposition? It is not far to seek. It is said to be grounded in fairness, and no doubt in general terms that is so. I would prefer to express it rather more broadly as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public. In my judgment this is a legal standard which, although not found in terms in the European Convention on Human Rights, takes its place alongside such rights as fair trial, and no punishment without law ……
>
> 69. This approach makes no distinction between procedural and substantive expectations. Nor should it. The dichotomy between procedure and substance has nothing to say about the reach of the duty of good administration…..
>
> 70. There is nothing original in my description of the operative principle as a requirement of good administration. The expression was used in this context at least as long ago as the *Ng Yuen Shiu* case, in which Lord Fraser of Tullybelton, delivering the judgment of the Privy Council, said this (638F):
>
> > "It is in the interest of good administration that [a public authority] should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty."
>
> ……"

42. Where a consultation is carried out the "Sedley" requirements will apply as endorsed by the Supreme Court in *Moseley*, per Lord Wilson, at [25]:

> "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."

Conclusions

Ground 1: breach of the 1996 Regulations

43. Despite some inconsistencies and inaccuracies in the documents issued by the Council when it made the Order in August 2020, I find that the Council undertook two procedures: a statutory objections procedure and a non-statutory consultation procedure.

44. The Council carried out a statutory procedure, pursuant to Schedule 5 to the 1996 Regulations, which by law ought to have been confined to inviting any objections to the Council making a permanent order in the same terms as the experimental order. In my judgment, the Council erred by inviting representations in support, as well as objections. Under Schedule 5, the period for making objections was 6 months, beginning with the date on which the experimental order came into force. The Order came into force on 14 August 2020, and so the period for making objections expired on 14 February 2021. In my judgment, the Council erred in treating the end date of the statutory consultation as 21 February 2021.

45. I accept Ms Olley's submission that neither the RTRA 1984 nor the 1996 Regulations impose a minimum time period of 6 months during which an ETO must remain in force and cannot be revoked. Section 10 RTRA 1984 makes specific provision for an ETO to be suspended or modified, but it does not prevent a traffic authority from exercising its general powers to revoke a traffic order. In particular, the objections procedure in Schedule 5 did not operate as a bar on the Council revoking the Order before the 6 month period had expired. The purpose of the objections procedure is to enable members of the public to object to the traffic authority introducing a permanent order in the same terms as the ETO. Where a traffic authority is seeking to introduce a permanent order, the 6 month period for objections must be allowed to run its course. But where a traffic authority merely decides to revoke the ETO, the Schedule 5 procedure ceases to have any relevance. In any event, as the ETO remained in force for over 6 months, from 14 August 2020 to 1 March 2021, because of the Call-in, the point is academic.

46. Finally, the thrust of the Claimant's complaint was that supporters of the Order were deprived of the opportunity of making representations because of the curtailment of the statutory objections period. However, as Schedule 5 only provides for the making of objections, not expressions of support, the Claimant did not suffer any prejudice by the curtailment of the opportunity to make objections during the 6 month period.

47. For these reasons, Ground 1 does not succeed.

Ground 2: legitimate expectation

48. The Council also carried out a non-statutory consultation, which was much broader in scope than the statutory objections procedure. It invited the public to express their views, either in support or opposition to the closure of the road to vehicles, and its objective of providing a safer environment for walking and cycling, to encourage sustainable modes of travel. The Information Document stated that the consultation

would commence on 7 August 2020. Comments received by 21 February 2021 would be considered as part of a review to be carried out 6 months after the works implementation date, which was in the week commencing 17 August 2020.

49. The Claimant submitted that, in the Information Document, the Council made clear and unambiguous promises to the public that (1) the ETO would operate for at least six months as a trial; (2) that the public would be able to make consultation representations on the ETO during the six-month trial; and (3) any consultation responses received by 21 February 2021 would be taken into account at the six-month review. These gave rise to a legitimate expectation.

50. Ms Olley submitted that the Information Document was ambiguous and unclear, pointing to the vague reference to a review "in early 2021" which was not consistent with a review after 21 February 2021, and the errors in the scope and end date of the statutory consultation, to which I have referred above. However, on a fair reading of the Information Document, I am satisfied that the Council did make clear and unambiguous representations, as summarised at paragraph 49 above, which gave rise to a legitimate expectation.

51. The Claimant submitted that the Council's promises were not honoured because of the curtailment of the trial and the consultation period. Ms Olley submitted that the Order and the trial did operate for more than 6 months and the public were able to make representations up until the Council upheld the decision to revoke the Order on 1 March 2021. The difference between what was promised and what was actually delivered was minimal and insignificant.

52. I accept Ms Olley's submission that the Council's representation that the Order would operate for more than 6 months from the date of the implementation of the works was honoured. The Order and the trial road closure continued until 1 March 2021, which was later than the date of 21 February 2021 given in the Information Document.

53. However, I do consider that the public consultation period was curtailed by the early decision to revoke. Councillor Greene made his proposed decision to revoke on 15 January 2021, which was some 5 weeks earlier than 21 February 2021. There was a brief opportunity to comment on the proposed decision to which a large number of residents (438) responded. However, once the decision was made on 27 January 2021, the only opportunity to comment was prior to the meeting on 1 March 2021. It was revealing that the Council rejected the consultation response by Mr and Mrs Phillips, dated 30 January 2021, on the grounds that the decision to revoke had already been made. In my view, only those like Ms Smith, who were following Council business very closely, would have been able to avail themselves of the opportunity to make representations for consideration at the meeting on 1 March 2021, because it was not published on the website as a public consultation and not widely publicised.

54. Furthermore, from 27 January 2021 onwards, the decision to revoke had been made (though not implemented) and so the *Sedley* consultation requirements (proposals must still be at a formative stage and the consultation responses conscientiously taken into account in finalising any proposals) were no longer met. Councillor Greene states that he took all responses conscientiously into account, before his decision to revoke and before the Call-in meeting, and there was nothing further to say on the matter.

However, the evidence indicates that he had already formed a view that the Order ought to be revoked at least by 15 January 2021, if not before.

55. Overall, I consider that the procedure which was adopted was significantly less favourable to the public, in particular to supporters of the closure of Keyhole Bridge, than the promised consultation running through to 21 February 2021, followed by a review, at which the decision-maker would consider all the consultation responses lodged by then and decide "whether the changes should be made permanent, retained ... or removed" or alternatively, whether the trial should be extended (Information Document).

56. A public body may be justified in resiling from a representation which has given rise to a legitimate expectation "by the force of an overriding legal duty owed by the decision-maker or other countervailing public interest" (per Laws LJ in *Bhatt Murphy* at [29]). Surprisingly, the Post Engagement Final Decision document did not address the reasons why the consultation period had been curtailed, which suggests that Councillor Greene did not pay sufficient regard to its legal duty to honour the legitimate expectation. However, Councillor Greene explained to the Board at the meeting on 1 March 2021 that "[t]he consultation was closed because a significant number of responses had already been received and nothing new had come out of the responses during this time to further inform the decision". In his witness statement, at paragraph 4, Councillor Greene referred to the "disquiet expressed by both ward councillors in a number of areas, and residents within certain areas, about the impact of the experimental orders and the inevitable speed with which they had been implemented".

57. In response to the complaint by Mr and Mrs Phillips, the Council said:

> "The original intention was to run the experiment for 6 months and then review the measure after that 6 months had elapsed from 21st Feb 2021. This was the intention stated by the administration that was controlled the Council at the time the measure was implemented, however, that administration lost control of the Council in the Autumn of 2020. New administrations are not bound by their predecessors and the new administration took a decision to remove the measure earlier."

58. In my judgment, these reasons did not amount to a countervailing public interest of sufficient weight to justify a departure from the requirement of fairness and good administration that public authorities should honour assurances which they have given to the public (see the judgments of Laws LJ in *Bhatt Murphy* and *Nadarajah* at paragraphs 40 and 41 above).

59. Accordingly, Ground 2 succeeds. I am not persuaded that relief should be refused under section 31(2A) of the Senior Courts Act 1981. Given the weight of public opinion in favour of the closure of the road, and the very close vote at the meeting of 1 March 2021, I am not satisfied that it is highly likely that the outcome would not have been substantially different if the conduct complained of had not occurred, that is to say, if the consultation and the review had been carried out in accordance with the promises in the Information Document.

Ground 3: material considerations

60. The Claimant submitted that, when deciding whether or not to revoke the Order, the Council failed to take into account material considerations, namely, consultation responses which might have been lodged in the remaining weeks of the consultation period if it had not been curtailed.

61. I accept Ms Olley's submission that, whilst the Council was under a duty to have regard to the material issues before making its decision, responses which were never made (such as from Dr Mew) could not amount to a material consideration as they had not come into existence. In my judgment, Ms Olley was correct to submit that this ground did not fit the circumstances of the case.

62. After Ground 3 was pleaded, it emerged that the response from Mr and Mrs Phillips which was made on 30 January 2021 was not considered. In the light of my conclusions on Ground 2, it ought to have been considered as a material consideration before the decision was made. To that extent, this ground succeeds. However, I accept that the issues raised by Mr and Mrs Phillips were considered as they were raised in other earlier consultation responses. In my view, relief should be refused under section 31(2A) of the Senior Courts Act 1981, as it is highly likely that the outcome would not have been substantially different if the conduct complained of had not occurred, that is to say, if the Council had taken into account the consultation response of Mr and Mrs Phillips before making the decision to revoke.

Ground 4: irrationality

63. The Claimant submitted that the Council acted irrationally when deciding whether or not to revoke the Order, because it relied on unevidenced assumptions about the detrimental effect of the ETO on air quality. In particular, that there was no direct evidence to establish that the closure of the road had a negative impact on air quality in Parkstone Road and Sandbanks Road because of the displacement of through traffic on to those roads.

64. I received evidence and submissions from the Claimant to the effect that the 2016 survey, relied upon by Councillor Greene, concerned a different road scheme and the 2017 Air Quality Report showed low nitrogen dioxide levels on Parkstone Road in July 2016 when the road in Poole Park was closed.

65. I received competing evidence and submissions from the Council to the effect that the closure of the Keyhole Bridge route had increased traffic volumes, queueing and congestion in Sandbanks Road and Parkstone Road. The 2016 Study, which also restricted through traffic in Poole Park (albeit at a different point), demonstrated the congestion caused in Parkstone Road by displacement traffic. As these roads were built up, the consequent reduction in air quality was likely to outweigh air quality improvements in Poole Park, which was extremely open. The results in the 2017 Air Quality report were based on a measuring device located at an open and exposed area, 5.8 metres from the edge of the carriageway, and 37 metres from the nearest property, so significant increases in traffic volume would be required before there would be any noticeable deterioration in air quality or impact on residents. Some measurements were taken during the summer school holidays when there was reduced peak-hour traffic.

66. In my judgment, the Claimant's case on irrationality was a disagreement with the merits of the decision, rather than a demonstration that it was perverse. There were genuine and weighty competing considerations, for and against the road closure. The experiences and views of local people did not need to be strictly evidenced or supported by formal studies in order to be taken into account and relied upon. Ultimately, the Council had to make an exercise of judgment, in its capacity as the local traffic authority, and whichever way it decided, it was bound to disappoint some residents. An exercise of judgment is not susceptible to judicial review. In my view, the Council's decision was rational; the Claimant has not come close to overcoming the high threshold required for a rationality challenge.

Conclusions

67. The Claimant has succeeded on Grounds 2 and 3 (in part only), but failed on Grounds 1 and 4. Relief is refused on Ground 3, as section 31(2A) of the Senior Courts Act 1981 applies.

68. As to relief on Ground 2, the Claimant submits that, in order to remedy the breach of legitimate expectation, the decision of 1 March 2021 ought to be quashed. It is common ground that quashing the decision of 1 March 2021 would have the effect of reviving the Order. The Claimant further submits that the entire trial closure and consultation should be re-run for a period of at least 6 months, and then a fresh review should take place.

69. The Defendant submits that an entire re-run goes far beyond what is required in all the circumstances of this case, and the Claimant's proposal is an opportunistic response by supporters of the road closure. The Defendant also submits that it would be confusing and unnecessary to close the road again, and any further period of consultation should be limited to completing the 6 month period, followed by a review.

70. Broadly, I agree with the Defendant's submissions. In my judgment, there is no justification for re-running the entire trial closure and consultation afresh. There was an effective trial closure for more than 6 months – from 14 August 2020 to 1 March 2021 – and it is inconceivable that local people will have forgotten how it operated in practice. In any event, the vast majority have already cogently expressed their views, between 14 August 2020 and 22 January 2021. The Court ought to have regard to the practicalities and the cost when considering what relief is appropriate.

71. In my judgment, in order to remedy the unfairness and unlawfulness which has occurred, it is not necessary to quash the decision of 1 March 2021, revive the Order and close the road. I consider that the Council ought to conduct a further non-statutory consultation to enable the public to give their views on the changes which were implemented by the Order, with effect from 14 August 2020 until its revocation on 1 March 2021. The Council should then conduct a review, which takes into account all the responses which have been received, including responses to the previous statutory and non-statutory consultations, and responses to the proposed decision to revoke, and the Call-in procedure. Those who have already responded ought not to send a further response, unless there is a genuinely new point to be made. In principle, the purpose of the review will be to decide whether the changes which were implemented by the

Order should be made permanent, retained with minor alterations, or removed. This reflects the promise made in the Information Document in August 2020.

72. In the light of my conclusions, the parties then reached an agreement for a further consultation and review, on the terms set out in the final order.