Neutral Citation Number: [2022] EWHC 2809 (Admin)

Case No: CO/1301/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09th November 2022

Before:

MR JUSTICE EYRE

- -

Between:

SOPHIA BOUCHTI	**Claimant**
- and -	
LONDON BOROUGH OF ENFIELD	**Defendant**

- -
- -

Andrew Fraser-Urquhart KC and Charles Forrest (instructed by **Harrison Grant Ring**) for the **Claimant**
Clive Sheldon KC and Zac Sammour (instructed by **London Borough of Enfield Legal Services**) for the **Defendant**

Hearing date: 25th October 2022

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Approved Judgment

MR JUSTICE EYRE:

Introduction.

1. The Defendant ("the Council") is the traffic authority for the borough of Enfield for the purposes of the Road Traffic Regulation Act 1984 ("the RTRA"). On 2nd March 2022 the Council made a series of related Permanent Traffic Orders under section 6 of the RTRA. The effect of these was to create a "Quieter Neighbourhood" or "Low Traffic Neighbourhood" in respect of Fox Lane, Enfield and the surrounding roads by restricting the flow of traffic through those roads as I will describe below. The relevant orders made permanent the arrangements which had been put in place by a series of Experimental Traffic Orders which had (subject to some modification) been in force since September 2020.

2. The Claimant lives a little outside the area subject to the orders but has been adversely affected by them. She challenges the orders by way of statutory review pursuant to paragraph 35 of schedule 9 to the RTRA.

3. The Claimant advances seven grounds of challenge to the orders. In summary she says that there were procedural failings flowing from the Council's failure to comply with the requirements laid down in the Local Authorities' Traffic Orders (Procedure) (England and Wales) Regulations 1996 ("the Regulations"); deficiencies in the consultation which the Claimant says the Council conducted; and a failure by the Council to have regard to its duties under sections 45 and 122 of the RTRA and/or a failure as required by the latter of those provisions to conduct a proper balancing exercise to assess the effect of the proposed orders on "the expeditious, convenient and safe movement of vehicular and other traffic". In addition it is said that the involvement of two of the Council's members and two of its officers in the Better Streets for Enfield campaign group meant that the decision was approached with a closed mind or that there was a real risk or appearance that such had been the case. Finally, there is said to have been irrationality in the decision linked with a breach of the Council's *Tameside* duty to obtain the necessary information to make the decision properly.

4. The Council accepts there were some errors in the process although it does not accept all of those asserted by the Claimant. However, it denies that such failings as there were caused substantial prejudice to the Claimant. The Council denies the other contentions saying that it was not required to disclose further information to the Claimant for the purposes of consultation; that it had proper regard to the relevant statutory duties and carried out an appropriate balancing exercise; that the decision to make the experimental orders permanent was approached with an open mind; and that there is no basis for the assertion of irrationality.

The Factual Background in Outline.

5. The area covered by the orders under challenge ("the QN area") is crossed by a number of unclassified roads and bounded by A roads. Fox Lane runs through the QN area from Green Lanes in the east to The Bourne on the north-west side of the area. A number of other roads run off Fox Lane and Meadway in a herring-bone pattern. The Council was concerned to address the use of those roads and of Fox Lane and Meadway by drivers cutting across between the A roads surrounding the QN area.

6. The effect of the orders has been to prohibit through traffic from the QN area. That result has been achieved by the placing of signs; by camera-enforced filter points; and by the installation of bollards and similar barriers. Traffic has been re-routed away from the inside of the QN area on to and along the surrounding A roads and the roads beyond.

7. The Claimant lives about 0.7 miles from the QN area. She operates a dog walking business and has a number of clients in or around the QN area. This means that she has to drive into and through the area to collect and return her clients' dogs and to take those dogs to local parks for exercise. The restrictions imposed by the orders mean that her journeys are longer than they would otherwise be and that she gets stuck in queues of traffic when driving on the roads on to which the vehicles which formerly crossed the QN area have been displaced. As a consequence the Claimant has had to stop working for a number of her clients because it takes too long for her to collect and return their dogs.

8. The Claimant is a member of the management committee of One Community which is a group of local residents and businesses formed in October 2020 to oppose the imposition of the restrictions.

9. On 26th August 2020 the Council made a series of Experimental Traffic Orders which gave effect to the restrictions and these came into force on 7th September 2020. That was at a time when many of the measures to address the Covid-19 pandemic remained in force and as a consequence the Council made, as it was required to do, alternative arrangements for inspection of the orders, statement of reasons, and plans. The orders said that those documents could be viewed online on a specified section of the Council's website and that copies could be obtained by emailing or writing to the Council. However, through an oversight on the part of the Defendant the relevant statement of reasons were not present on the website until 26th October 2020. In his witness statement David Taylor, the Council's Head of Traffic and Transportation, reports the statement of the officer responsible for monitoring emails to the relevant address to the effect that if a request for the documents in writing had been made in that period then the statement of reasons would have been sent by post or email. It is, however, to be noted that on 18th November 2020 (and so at a time by when the documents had been uploaded to the website) a member of the One Community group sent an email requesting a copy of the statement of reasons by return of email. The response which was only received on 30th November 2020 was to refer that person back to the Defendant's website.

10. On 12th October 2020 the Council began a non-statutory period of consultation which lasted to 11th July 2021 and which was conducted primarily through the provision of a survey form.

11. On 18th November 2020 and taking effect on 19th November 2020 the Council modified one of the Experimental Traffic Orders. The effect of that was to add a further access point at the junction of Conway Road with Fox Lane for ambulance and other emergency service and refuse collection vehicles. The modification took effect on the ground by the removal of bollards and their replacement by signs. This was shown on a map attached to the modification. The text of the notice of modification referred to the location being at "the north-eastern boundary of no. 11 Fox Lane". That was an error because the relevant property is in fact 111 Fox Lane.

12. On 30th June 2021 and taking effect on 12th July 2021 the Council made a further order superseding that modified on 18th November 2020. The statement of reasons accompanying this explained that the reference to 11 Fox Lane had been an error and altered the description of the relevant location to the junction of Conway Road and Fox Lane. The map attached to this order was in materially the same terms as that attached to the November 2020 notice of modification. The Claimant says that the June 2021 order was a modification or variation of the earlier order and triggered a fresh six-month period for making objections. The Defendant says that it was not a modification or variation but merely a correction of the description of the location identified in the earlier order.

13. From June 2021 to early November 2021 the Council's publicly stated position was that the order of 30th June 2021 did not reopen the six-month period save to the extent that objections could be made against the June 2021 order itself in the period to 12th January 2022. However, in November 2021 the Council changed its stance and accepted that objections could be made to the making permanent of all of the Experimental Traffic Orders in the period up to midnight on 11th January 2022.

14. On 26th January 2022 the Council published the report of Richard Eason, its Healthy Streets Programme Director ("the Officer's Report") recommending the making permanent of all the Experimental Traffic Orders. The report was accompanied by four annexes and nine appendices. The annexes were a plan of the proposed measures; the response from the London Ambulance Service; diffusion data; and a table setting out a summary of the objections which had been made and of the Council's response to them. The appendices included an Equalities Impact Assessment and an analysis of the consultation exercise together with more detailed documents dealing with matters such as air quality, noise, crime, and traffic data seeking to show the impact of the measures during the period the Experimental Traffic Orders had been in force. Of those annexes and appendices only the first annex (the plan) and the last appendix (the Equalities Impact Assessment) had been made public in advance of the publication of the Officer's Report. It follows that there had been no opportunity for the public to comment on the other annexes and appendices or for such comments to be taken into account in compilation of the Officer's Report.

15. On 7th February 2022 the Leader of the Council adopted the recommendation of the Officer's Report to make the Permanent Traffic Orders giving effect to the proposals. The Council's call-in process was triggered by two groups of councillors but in its decision of 28th February 2022 the Council's Overview and Scrutiny Committee confirmed the Leader's decision.

16. These proceedings were commenced on 11th April 2022.

The Legislative Framework.

17. The starting point in considering the Council's power to make the orders under challenge is section 6(1) of the RTRA which provides that:

> "The traffic authority for a road in Greater London may make an order under this section for controlling or regulating vehicular and other traffic (including pedestrians). Provision may in particular be made –
>
> (a) for any of the purposes, or with respect to any of the matters, mentioned in Schedule 1 to this Act, and

(b) for any other purpose which is a purpose mentioned in any of (paragraphs (a) to (g) of section 1(1) of this Act…"

18. The power to make Experimental Traffic Orders is provided by section 9 of the RTRA, the material parts of which are:

"9(1) The traffic authority for a road may, for the purposes of carrying out an experimental scheme of traffic control, make an order under this section (referred to in this Act as an "*experimental traffic order")* making any such provision –

(a) as respects a road outside Greater London, as may be made by a traffic regulation order;
(b) as respects a road in Greater London, as may be made by an order under section 6, 45, 46, 49, or 83(2) or by virtue of section 84(1)(a) of this Act.

...

9(3) An experimental traffic order shall not continue in force for longer than 18 months…"

19. The modification of an Experimental Traffic Order is addressed in section 10(2) and (3) in these terms:

"10(2) …An experimental traffic order may include provision empowering a specified officer of the authority who made the order, or a person authorised by such a specific officer, to modify or suspend the operation of the order or any provision of it if it appears to him essential –

(a) in the interests of the expeditious, convenient and safe movement of traffic,
(b) in the interests of providing suitable and adequate on-street parking facilities, or
(c) for preserving or improving the amenities of the area through which any road affected by the order runs.

The power conferred by such a provision shall be exercised only after consulting the appropriate chief officer of police and giving such public notice as the Secretary of State may direct.

(3) Any such power to modify an experimental traffic order as is mentioned in subsection (2) above does not extend to making additions of the order or to designating additional on-street parking places for which charges are made; but subject to that the modifications may be of any description…"

20. Section 45 of the RTRA gives a local traffic authority power to designate parking places on highways providing in the following terms at section 45(3) for the interests which such an authority is to consider and the matters to which it is to have regard when exercising that power:

"In determining what parking places are to be designated under this section the authority concerned shall consider both the interests of traffic and those of the owners and occupiers of adjoining property, and in particular the matters to which that authority shall have regard include –

(a) the need for maintaining the free movement of traffic;
(b) the need for maintaining reasonable access to premises; and
(c) the extent to which off street parking accommodation, whether in the open or under cover, is available in the neighbourhood or the provision of such parking accommodation is likely to be

encouraged there by the designation of parking places under this section."

21. The purpose for which the powers under the RTRA are be exercised is addressed in section 122 which provides that:

> "122(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.
>
> 122(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 Environmental 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…"

22. It is also relevant to note at this point the network management duty imposed on the local traffic authorities by section 16(1) of the Traffic Management Act 2004 in these terms:

> "It is the duty of a local traffic authority or a strategic highways company ("the network management authority") to manage their road network with a view to achieving, so far as may be reasonably practicable having regard to their other obligations, policies and objectives, the following objectives –
>
> (a) securing the expeditious movement of traffic on the authority's road network; and
> (b) facilitating the expeditious movement of traffic on road networks for which another authority is the traffic authority…"

23. By virtue of section 124(1)(f) of the RTRA the validity of orders made sections 6 and 9 is subject to the provisions of Part VI of Schedule 9 of the Act.

24. Paragraph 34(2)(a) and (b) of Schedule 9 define the relevant powers and the relevant requirements in these terms:

> "In this Part of this Schedule –
>
> (a) "*the relevant powers",* in relation to any such order as is mentioned in sub-paragraph (1)(a) above, means the powers with respect to such an order conferred by this Act, and, in relation to a designation

order, means the powers of sections 45, 46, 49 and 53 of this Act, and

(b) *"the relevant requirements",* in relation to any such order as is mentioned in sub-paragraph (1)(a) above, means any requirement of, or of any instrument made under, any provision of this Act with respect to such an order, and, in relation to a designation order, means any requirement of sections 45, 46, 49 and 53 of this Act or of Parts I to III of this Schedule or of any regulations made under Part III of this Schedule".

25. Statutory review of the relevant orders is provided for by paragraphs 35, 36, and 37 thus:

> "35 If any person desires to question the validity of, or of any provision contained in, an order to which this Part of the Schedule applies, on the grounds –
>
> (a) that it is not within the relevant powers, or
> (b) that any of the relevant requirements has not been complied with in relation to the order,
>
> he may, within 6 weeks from the date on which the order is made, make an application for the purpose to the High Court or, in Scotland, to the Court of Session.
>
> 36(1) On any application under this Part of this Schedule the court –
>
> (a) may, by interim order, suspend the operation of the order to which the application relates, or of any provision of that order, until the final determination of the proceedings; and
> (b) if satisfied that the order, or any provision of the order, is not within the relevant powers, or that the interests of the applicant have been substantially prejudiced by failure to comply with any of the relevant requirements, may quash the order or any provision of the order.
>
> (2) An order to which this Part of the Schedule applies, or a provision of any such order, may be suspended or quashed under sub-paragraph (1) above either generally or so far as may be necessary for the protection of the interests of the applicant.
>
> 37 Except as provided by this Part of this Schedule, an order to which this Part of this Schedule applies shall now, either before or after it has been made, be questioned in any legal proceedings whatever"

26. The approach taken by the court to a paragraph 35 statutory review is akin to that taken in judicial review proceedings but there are some differences (see *Hamnet v Essex CC* [2017] EWCA Civ 6, [2017] 1 WLR 115 per Gross LJ at [24]).Thus the grounds for quashing an order will be regarded as "broadly, [the] conventional public law grounds applicable in judicial review cases" (*Sheakh v Lambeth LBC* [2021] EWHC 1745 (Admin) per Kerr J at [22]). There is, however, no requirement for permission and a paragraph 35 review can be brought as of right. A failure to comply with the relevant requirements will only result in an order being quashed if the interests of the applicant have been "substantially prejudiced" by the failure. Save where there is interim suspension under sub-paragraph 36(1)(a) the schedule only provides for quashing of an order. I need not address the difference of view between counsel as to whether this meant that the court has no power to make a declaration in response to such a review because here the Claimant seeks a quashing order. Finally, the provisions of section 31(2A) – (2C) of the Senior Courts Act 1981 do not apply though a similar result is likely to follow from the requirement that for quashing to follow a failure to comply

with the relevant requirements there has to have been substantial prejudice coupled with the fact that the power to quash is discretionary with the consequence that regard can be had to the approach adopted in *Simplex GE (Holdings) Ltd v Environment Secretary* [2017] PTSR 1041.

27. The regulations made under Part III of schedule 9 are the Local Authorities' Traffic Orders (Procedure) (England and Wales) Regulations 1996.

28. Regulation 3(1) defines "deposited documents" as:

> "deposited documents" in relation to an order means such documents as are required in connection with that order to be kept available for public inspection in accordance with Schedule 2;"

29. The nature of the documents and their display is provided for in paragraphs 1 and 2 of schedule 2 of those regulations 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…
>
> (h) where applicable, the additional documents specified in regulation 23(3)(e).

30. It is to be noted that the orders with which I am concerned are not ones to which paragraph 3 of that schedule applied.

31. Regulations 6, 7, and 8 provide for consultation, publicity, and a twenty-one day period for the making of objections to a traffic order. However, those provisions do not apply if an experimental traffic order has been followed by a permanent traffic order provided that the procedure laid down in regulations 22 and 23 has been followed.

32. Regulation 22 provides that:

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

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

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

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

33. Regulation 23 provides that:

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".

34. For the purposes of regulation 23(3) the statements specified in schedule 5 are:

"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".

35. It will be noted that the six month period for objections derives from paragraph 2 of schedule 5.

36. I have already noted that the Experimental Traffic Orders were made at times when the country was subject to restrictions designed to address the Covid-19 pandemic. Regulation 31 was introduced to address those circumstances and provided that if for reasons connected with the effects of coronavirus including restrictions on movement it was not reasonably practicable to comply with the requirements for public inspection in its offices then the local traffic authority was to make "appropriate alternative arrangements" for making the schedule 2 paragraph 2 documents available for public inspection. It was pursuant to that provision that the Council stated that the documents were available to be viewed on its website and that copies would be provided in response to a request.

37. For the Claimant Mr Fraser-Urquhart KC described the regulation 23 procedure as a truncated procedure which cuts down on the publicity and consultation which would normally be required before the making of a traffic order. He said that as a consequence the requirements of that procedure should be interpreted strictly. For the Council Mr Sheldon KC said that the procedure should be regarded simply as a different route to the making of an order.

38. Mr Fraser-Urquhart was right to say that the regulation 23 procedure can be described as a truncated one and it was so described by Lang J in *Tomkins v City of London Corporation* [2020] EWHC 3357 (Admin) at [115]. It can be described in that way because when it is used the steps which would otherwise be required by regulations 6, 7, and 8 do not have to be taken. It does not, however, follow from that that the regulation 23 procedure is necessarily to be regarded as restricting the rights of potential objectors. It is important to note that the context in which permanent orders are made using the regulation 23 procedure is significantly different from that which exists when orders are made without a period of experiment. As Holgate J explained in *Williams v Waltham Forest LBC* [2015] EWHC 3907 (Admin) at [53]:

> "The upshot is that, where regulation 23 applies, a 6-month period is substituted for the normal statutory period of 21 days for the making of objections, so that the

public is able to make representations which are informed by practical experience of the effect of (or omissions from) the experimental order."

39. The position is that the requirements laid down in the regulations must be satisfied and the procedure provided for there followed. Paragraph 36 provides for there to be redress if that is not done. However, it does not follow in my judgement that the provisions of the regulations and in particular the requirements laid down in regulation 23(3) are to be interpreted either artificially strictly or artificially broadly. Instead the language used is to be interpreted in its context and in the light of its purpose applying the normal canons of statutory construction.

Grounds 1 and 2: Alleged Procedural Failings.

40. Grounds 1 and 2 raise similar issues and are conveniently considered together. It is said that the Council failed to comply with the requirements of the regulations and that this has caused substantial prejudice to the Claimant.

41. In the Statement of Facts and Grounds it was said that there was non-compliance in that the deposited map had not shown alternative routes for diverted traffic. Mr Fraser-Urquhart rightly did not pursue that matter at the hearing before me. The requirement under schedule 2 paragraph 2(c) is for such a map "where appropriate". In the circumstances of the orders with which I am concerned it was abundantly clear that the effect would be to divert traffic along the A roads surrounding the QN area and there was no need for this to be spelt out on a map.

42. It follows that there are two alleged failures to comply in issue. The first is the Council's failure to display the statement of reasons on its website for the period from 26th August 2020 to 26th October 2020 (which is the allegation in ground 1). The second is the stance taken by the Council in respect of the effect of the order of 30th June 2021. The Claimant says that that order was a variation triggering a further six month period for objections to the proposals as a whole and that the Council's initial stance which I have summarised at [13] above and which persisted to November 2021 was a failure to comply with the requirements of the regulations. It is also said that the latter non-compliance had the effect that the Council failed to undertake a lawful and fair consultation and I will consider that aspect of the ground and the prejudice said to have been caused when I address ground 3 below.

43. The Council accepts that through an oversight the statement of reasons was not displayed on its website for a period of two months. It says that it had also made provision for a copy to be requested and that anyone who had contacted the Council in that period by email asking for a copy would have been provided with one. As to the order of 30th June 2021 the Council says that it was not in truth a further modification or variation of the order which had been modified on 18th November 2020. The effect of the November 2020 modification was unchanged and the later order simply corrected a misdescription in the earlier notice of modification. Then the Council says that even if there is found to have been a failure to comply with the relevant requirements it has not caused substantial prejudice to the Claimant.

44. I am satisfied that the failure to display the statement of reasons on the Council's website for a period of two months was a failure to comply with the requirements. The statement of reasons was a significant document and was one of those which was

required by regulation 22(3) and schedule 2 to be made available for inspection at the Council's offices. In circumstances where the impact of the Covid-19 pandemic meant that it was not reasonably practicable to make the documents available in that way the Council was required by regulation 31(5) to make appropriate alternative arrangements. The Council purported to make such arrangements by informing members of the public that the relevant documents were available on its website and would also be provided in response to requests. Those elements together formed what were said to be appropriate alternative arrangements. Having taken the view that both elements were necessary to constitute appropriate alternative arrangements it is not now open to the Council to say that having only one element in place was sufficient. It is also of note that in the period after the statement of reasons had been placed on the website the Council responded to an email request for documents not by providing those documents but by (twelve days after the request) directing the enquirer to its website. I have noted above the Council's evidence that those enquiring during the period when the statement of reasons was not on the website would have been provided with a copy. However, the Council's evidence does not say that there was a deliberate change of approach after the statement of reasons was restored to the website at the end of October 2020 nor does it say that any enquirer in that period was in fact provided with a copy. A deliberate change of approach seems unlikely given that the failure to place the statement of reasons on the website was the result of an oversight. I accept that the Council's intention was that those requesting a copy of the documents by email would be provided with a copy but I cannot be confident that this would in fact have happened in the period to October 2020. The actions which in fact took place subsequently are at least an indication that this might not have happened. In any event there was a failure to comply in circumstances where the Council had taken the stance that for there to be appropriate alternative arrangements there should be both display on its website and provision for the supply of copies to those who requested them but for two months (in the context of a six month period for objections) one at least of those elements was deficient.

45. As to the order of 30th June 2021 there is considerable force in the Council's argument that it was simply a correction of a misdescription of an address in the earlier order. There was no alteration of the operative provisions; the position on the ground was unaltered; and the correct location was shown on the map which was in the same terms for both orders. The difficulty with this argument is, however, the approach which the Council adopted in June 2021. It corrected the misdescription by issuing a new order which said in terms that it was to "supersede the existing experimental closure … introduced by [the 18th November 2020 order]". The later order did go on to say that it was superseding the earlier order "so as to correct a technical error in [the 18th November 2020 order], reiterating the substantive prohibition…" but that does not detract from the fact that the earlier order was expressly superseded. Having chosen to proceed by a formal order expressly superseding the previous order the Council cannot now say that the later order was not a variation and it follows that the stance it initially adopted was a failure to comply with the relevant requirements.

46. The question then becomes one of whether either or both of these failures caused substantial prejudice to the interests of the applicant.

47. The Claimant's argument was that these failures to comply with relevant requirements meant that the Council was not entitled to use the regulation 23 procedure to make the orders permanent. In this regard Mr Fraser-Urquhart again emphasised his

characterisation of the regulation 23 procedure as a truncated procedure. It was said that there was substantial prejudice to the Claimant by the action of the Council in using that procedure when it was not entitled to do so and thereby depriving her of the benefits of what was said to be the normal procedure.

48. For the following reasons I do not accept that analysis and do not accept that these failures caused the Claimant substantial prejudice.

49. Mr Fraser-Urquhart placed considerable emphasis on the decision of Lang J in *Tomkins v City of London Corporation.* There Lang J was considering a challenge to an experimental traffic order. At [110] – [113] the judge explained that the defendant's failure to make the deposited documents available for inspection was a breach of the relevant requirements. At [114] Lang J explained in the following terms that although this was a significant failure to comply it could not result in the quashing of the experimental order in question because the combination of the claimant's close engagement with the matter; his ability to obtain the information; and his ability to make an objection meant that he had not been substantially prejudiced.

> "In my view, there was a significant failure to comply with the statutory requirements. However, my powers to quash the ETO because of a failure to comply with any of the relevant requirements only arise if I am satisfied that the Claimant has been substantially prejudiced by the failure to comply (paragraph 36(1)(b) of Schedule 9 to the RTRA 1984). I do not consider that the Claimant was substantially prejudiced by being unable to inspect the deposited documents, or see the ETO online because he closely followed the making of the ETO and was able to source the information which he needed to make his objection and this claim in good time".

50. At [115] Lang J went on to say:

> "Nonetheless this was a significant breach of the statutory requirements which could well have prejudiced others. Therefore, I propose to make a declaration stating that the City failed to comply with the requirement in Schedule 2 to the 1996 Regulations to make the deposited documents available for public inspection, and therefore the requirement in regulation (23)(3)(b) of the 1996 Regulations has not been met. This will prevent the City from relying upon the truncated procedure for making an ETO permanent, as that is conditional upon the requirements in regulation 23(3) being met".

51. It is apparent from [144] that a declaration was then made in relation to that ground.

52. I need not address the question of whether the court has a power to make a declaration in such circumstances as to which the parties before me disagreed but as to which there was no argument before me. That is because the passage clearly expresses Lang J's understanding of the law and is to be considered on that footing. Similarly, I do not accept Mr Sheldon's contention that the passage at [115] was obiter. It is apparent that it was the analysis there which caused Lang J to make a declaration.

53. Mr Fraser-Urquhart relied on the passage at [115] saying that it was authority for the proposition that a failure to comply with the requirements of regulation 22 in respect of an experimental order (or at least any substantial failure) meant that a subsequent use of the regulation 23 procedure to make the experiment permanent would be unlawful. If that is a contention, as it appeared at least in part to be, that in those circumstances an order made under the regulation 23 procedure is not within the relevant powers and is liable to be quashed even in the absence of substantial prejudice then I disagree: such

a conclusion does not follow from a proper reading of Lang J's judgment in *Tomkins* and is not tenable as an interpretation of the legislation. If it is a contention that a failure to comply with the requirements of regulation 22 means that a subsequent order made using regulation 23 procedure will have involved a failure to comply with the relevant requirements then I agree but it then becomes necessary to consider what the effect of such a failure is.

54. Lang J's words must be considered carefully and in context. It is to be noted that the judge was not just of the view that there had been a significant breach of the requirements but also that it "could well have prejudiced others" (namely other than the claimant before her). It is also significant that Lang J was addressing the position before a permanent order had been made. It was in that context that Lang J made the declaration and said that the defendant could not use the regulation 23 procedure to make the experimental order permanent. It can readily be understood that using the regulation 23 procedure to make a permanent order in those circumstances would itself necessarily involve a failure to comply with the relevant requirements. It follows that the defendant in that case would have been acting unlawfully in the sense of failing to comply with the statutory requirements if it made a permanent order using the regulation 23 procedure. Moreover, such an order would be liable to be quashed in circumstances where there would have been substantial prejudice to potential applicants.

55. When her words are seen in that context Lang J was not saying that when an order has already been made using the regulation 23 procedure in circumstances where doing so has involved a failure to comply with the relevant requirements that order falls to be quashed as not having been made within the relevant powers. Not only did Lang J not say that but the proposition does not follow from her analysis of the law. Lang J was concerned with the situation which appertained when there had been a failure to comply with the relevant requirements under regulation 22 but where the traffic authority in question had not yet purported to make the experimental orders permanent whether under regulation 23 or at all. In those circumstances it is not surprising that her judgment did not address the situation with which I am faced namely that where a permanent order has been made under the regulation 23 procedure but where there has been a failure to comply with the relevant requirements.

56. The proposition that in circumstances such as those here the order is to be quashed as not having been within the relevant powers cannot be correct in the light of the provisions of schedule 9. That schedule distinguishes between relevant powers and relevant requirements both as to the meaning of those terms and also as to the consequences of a failure to comply. It provides moreover that challenge under the schedule is the only route for challenge of such an order. The effect is that a permanent order made in such circumstances (namely where there has been a failure to comply with the regulation 22 requirements in respect of the prior experimental order) is an order the making of which will have involved a failure to comply with the relevant requirements. It then becomes necessary to consider the consequences which follow from such non-compliance and those are that the order will be liable to be quashed if such failure of compliance has caused substantial prejudice to the interests of the applicant seeking the quashing of the order.

57. I turn, accordingly, to the question of whether the Claimant's interests have been substantially prejudiced.

58. There is no suggestion that the Council's failures prevented the Claimant herself from learning fully about the proposals or from advancing her objections to them. Like the claimant in *Tomkins* the Claimant has been fully engaged in this matter and has made repeated submissions to the Council. The Claimant does not suggest that her own actions would have been any different if the statement of reasons had been on the Council's website between 26th August 2020 and 26th October 2020 or if the Council had not sought to limit the scope of objections to the June 2021 order.

59. Instead of asserting prejudice of that kind the Claimant, through Mr Fraser-Urquhart, says that she has an interest in the proper procedure being followed and in the regulation 23 procedure not being used other than when the requirements for its use are satisfied and that there has been substantial prejudice to that interest. I do not accept that is a relevant interest for the purposes of paragraph 36. The interests which are relevant for those purposes are the interests of the applicant in question to obtain information about the proposals and to exercise the right to object to them if he or she chooses to do so. If Mr Fraser-Urquhart's analysis were correct every failure to comply with the relevant requirement would give rise to substantial prejudice because in every such case the applicant's interest in having the proper procedure followed would have been prejudiced. In his submissions Mr Fraser-Urquhart said that regard need only to be had to significant breaches because the breaches with which I am concerned were significant but the logic of his interpretation of prejudice to an applicant's interests must apply to any non-compliance. That is because every failure to comply would mean that the regulation 23 procedure was being used in circumstances where the requirements for its use had not been met. Such an approach would in practice render otiose the requirement for substantial prejudice and would instead create the position where any breach of a relevant requirement would result in an order being quashed. That is not what is provided for by schedule 9. Mr Fraser-Urquhart's analysis is influenced by his characterisation of the regulation 23 procedure as a truncated procedure but as explained at [38] above although the regulation 23 procedure can be described as truncated there remains real scope for the expression of objections and for those objections to be informed by practical experience of the proposed measures in operation.

60. It follows that although the Claimant has shown that the Council failed in particular respects to comply with the relevant requirements these failures did not cause substantial prejudice to her interests and (subject to the consultation element of ground 2 which I will consider below) grounds 1 and 2 fail.

Ground 3: the Allegation that the Defendant failed to conduct a Fair Consultation.

61. From October 2020 to July 2021 the Council conducted a non-statutory consultation by way of a survey questionnaire. In addition after each of the Experimental Traffic Orders there was a six month period for objections as provided for by paragraph 2 of schedule 5. I have already noted the stance which the Council took from June to November 2021 and the change of approach in the latter month.

62. The Claimant says that the Council conducted a further non-statutory consultation after July 2021 because it invited comments on the orders and in doing so went beyond the scope of the regulations which only provided for objections to be made. The Claimant relied in that regard on the analysis at [43] – [46] of *R (Keyhole Bridge User Safety Group) v Bournemouth, Christchurch and Poole Council* [2021] EWHC 3082 (Admin)

which led Lang J to conclude that by inviting representations which went beyond objections and which potentially included neutral or positive representations in respect of a traffic order the council in that case was undertaking a non-statutory consultation. The Council did not accept that analysis. Mr Sheldon referred me to the passage from Holgate J's judgment in *Williams v Waltham Forest LBC* which I have quoted at [38] above and contended that Holgate J's reference there to "representations" indicates that under the statutory procedure the responses to the experimental orders need not be confined to objections. I do not accept that such an inference follows from that passage of Holgate J's judgment. In that passage he was concerned to explain the general effects of the regulation 23 procedure and was not addressing this question. However, I note that in the *Keyhole Bridge User Group* case the experimental traffic order had been accompanied by an "Information Document" which had referred to a "consultation"; which had invited those receiving the document to "have your say"; and which had asked for the "views" of those concerned and their "feedback" (see Lang J's judgment at [8] and [9]). In those circumstances Lang J's conclusion that a non-statutory consultation was running alongside the regulation 23 procedure was unsurprising. In the light of that I do not read the passage on which Mr Fraser-Urquhart relies as indicating that by accepting positive or neutral responses to an experimental order as well as objections a traffic authority is necessarily thereby engaging in a non-statutory consultation.

63. Interesting though analysis of that issue might be it is academic in the circumstances of this case. This is because, as both counsel accepted, it does not matter whether the Council was engaged in a further non-statutory consultation or was solely proceeding in accordance with the procedure in regulations 22 and 23. If a consultation is undertaken whether statutory or non-statutory it must be conducted fairly and properly (see *R (Easyjet) v Civil Aviation Authority & another* [2009] EWCA Civ 1361 per Dyson LJ at [46]). The question for me is whether the way in which the procedure was undertaken was flawed so as to cause substantial prejudice to the Claimant.

64. The Claimant says that the Council was obliged to conduct the various consultation exercises and the statutory procedure fairly and that it failed to do so in three principal respects. First, the statement of reasons was not available for the period from 26th August 2020 to 26th October 2020. Second, from June to November 2021 the Council limited the scope of the objections which it regarded as permissible. Finally, only a limited part of the material on which the Officer's Report was based was provided to the public in advance of that report and in particular the detailed analyses and survey reports contained in the appendices were not published.

65. The Claimant says that these failings distorted the response to the consultations. They had the effect causing at least some of those who would have objected not to do so because they were misled as to their entitlement to object to the scheme as a whole. In addition the failure to disclose the material in the annexes and appendices deprived those objecting of the opportunity to analyse and to comment on the material on which the report was based. In that regard the Claimant says it is significant that the One Community group has shown itself to be well-resourced and committed and prepared to obtain its own expert analysis of this material. It has demonstrated its willingness to do this and the consequences of doing so by the analysis which has been undertaken of the traffic count data which revealed that the count was flawed in its failure to take proper account of vehicles travelling at low speed. There is said to have been substantial

prejudice to the Claimant in that those who would have supported her stance and/or who would have updated their objections were prevented from doing so. Further objections supplemented by the detailed analysis of the data could have resulted in the permanent orders either not being made or being made in a different form or in the Council proceeding by way of a public inquiry.

66. The basic requirements for a lawful consultation are the four elements derived from the submissions of counsel in *R v Brent LBC ex p Gunning* (1985) 84 LGR 168 and approved by the Supreme Court in *R (Stirling) v Haringey LBC* [2014] UKSC 56, [2014] 1 WLR 3947 at [25] namely:

> "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."

67. In *R (Save our Surgery Ltd) v Joint Committee of Primary Care Trusts* [2013] EWHC 439 (Admin) Nicola Davies J analysed the authorities. As a result she set those four elements in the context of the principles governing their application and summarised the approach to be taken thus at [27]:

> "In considering the authorities cited by the parties I have paid particular attention to and given weight to those which consider a challenge to the consultation process. Find the authorities the following principles can be identified:
>
> *i.* The issue for the court is whether the consultation process was "so unfair it was unlawful" – *Devon County Council;*
>
> ii. Lawful consultation requires that: i) it is undertaken at a time when proposals are still at a formative stage; ii) it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; iii) adequate time must be given for this purpose; iv) the product of the consultation must be conscientiously taken into account when the ultimate decision is taken;
>
> iii. Disclosure of every submission or all of the advice received is not required. Save for the need for confidentiality, those who have a potential interest in the subject matter should be given an opportunity to deal with adverse information that is credible, relevant and significant to the decision to be made. The degree of significance of the information is a material factor;
>
> iv. The fact that the information in question comes from an independent expert or from the consultee is relevant but it is a combination of factors including fairness, the crucial nature of the advice, the lack of good reason for non-disclosure and the impact upon consultees which are to be considered upon the issue of fairness;
>
> v. What fairness requires is dependent on the context of the decision; within that the court will accord weight and respect to the view of the decision-maker;
>
> vi. If the person making the decision has access to information but chooses not the consider it, that of itself, does not justify non-disclosure; it will be for the court to consider the reason for non-disclosure;

vii. A consultation process which demonstrates a high degree of disclosure and transparency serves to underline the nature and importance of the exercise being carried out; thus, non-disclosure, even in the context of such a process, can limit the ability of a consultee to make an intelligent response to something that is central to the appraisal process;

viii. The more intrusive the decision the more likely it is to attract a higher level of procedural fairness;

ix. If fairness requires the release of information the court should be slow to allow administrative considerations to stand in the way of its release.

68. It is important to keep in mind that the ultimate issue is the fairness of the consultation process and that what is required for the consultation process to be fair is highly dependent on the context including the nature of the decision to be taken and the form and purpose of the consultation process. That appears from principles (i) and (v) of the *Save our Surgery* summary. In addition I have regard to the explanation by Richards LJ in the following terms in *R (Eisai Ltd) v NICE* [2008] EWCA Civ 438 at [27]:

> "What fairness requires depends on the context and the particular circumstances: see, for example *R v Secretary of State for Education, ex parte M* [1996] ELR 162, at pp.206-207, where Simon Brown LJ emphasised the need to avoid a mechanistic approach to the requirements of consultation. It seems to me that the various cases cited to us provide illustrations of that, without adding materially to the statements of principle in *ex parte Coughlan".*

69. Similarly in *R (Easyjet) v Civil Aviation Authority & another* Maurice Kay LJ explained at [74] that the "starting point" was to be found in the words of Lord Mustill in *R v Secretary of State for the Home Department ex p Doody* [1994] AC 531 at 560D that "what fairness demands is dependent on the context of the decision".

70. Whether fairness requires particular documents to be disclosed to the consultees in advance of the decision will depend on the circumstances. A failure to disclose can limit the opportunity for an intelligent response and thereby undermine a central element of the consultation process (see *Save our Surgery* principle (vii)). Nonetheless what is necessary is that there has been sufficient disclosure to enable those being consulted to make an intelligent response. That may mean that it is not necessary to disclose before the decision all the information available to the decision-maker even if the information which is not disclosed is significant. See in that regard *Save our Surgery* principle (iii) and *R (Easyjet) v Civil Aviation Authority & another* at [25] – [26] per Richards LJ.

71. The nature of the exercise being undertaken by the Council here is very significant. It was considering objections in the context of an experiment. The explanation given by Holgate J in *Williams v Waltham Forest LBC* which I have quoted at [38] above is also relevant here. The purpose of the six month period for objections following the making of an experimental traffic order is to enable those affected by the order to make objections informed by their practical experience of the measures. The statutory period for objections and the non-statutory consultation exercise were both aimed at obtaining a response based on the actual impact of these measures. It is to the impact of the measures on those affected by them that the intelligent response is to be directed. The decision making exercise here was to be that of assessing the experiment in the light of the practical experience of the measures. As will also be relevant when considering ground 7 (where the Claimant alleges a breach of the *Tameside* duty) it is to be noted

that the central issue for the Council as decision-maker can be stated shortly. The issue was whether it was appropriate to reduce the amount of traffic using the unclassified roads in the QN area and in particular to reduce the amount of traffic using those roads to cross the area and to act with a view to diverting that traffic to the surrounding A roads. Similarly, the advantages and disadvantages of taking that course could be readily identified in general terms. The task of balancing of those advantages (primarily to those living in the area) and disadvantages (primarily but not exclusively to those who sought to cross the area or to drive in and out of it) was a matter of broad judgement rather than of precise mathematical analysis.

72. In those circumstances the Council's failure to disclose the traffic count results and the related surveys and to invite comment thereon before compiling the Officer's Report did not render the consultation process unfair. Such disclosure would, indeed, have enabled the figures to be subject to critique by the One Community group and others. As has been shown by the result of the subsequent analysis such a critique would have revealed some flaws in the analysis set out in the surveys. However, that did not render the process unfair in circumstances where the experimental orders had been in force for some time; where the balance between the advantages and disadvantages of the proposals was a matter of broad judgement; and where those affected were able to give an intelligent response setting out the effects good or bad on them of the experiment. Turning to specifics: the Claimant's ability to give a response identifying the adverse effect on her business activities was not dependent on having sight of the data from the surveys rather it was informed by her practical experience.

73. The procedure adopted by the Council was deficient in that there was a period of two months when the statement of reasons was not displayed on the Council's website and by the stance taken in the period from June to November 2021. That latter element was mitigated to some extent by the Council's change of stance. I am not, however, persuaded that the Claimant has shown any substantial prejudice to her interests caused by those matters. The Claimant was able to object to the proposals and to explain the way in which they harmed her. It is clear that a considerable number of others objected in similar terms. The Council was, as a consequence, aware that there was a significant number of people who were adversely affected by the measures. Indeed, that was inherent in the proposals and would have been apparent even if no objections had been made and even if there had not been a consultation. It cannot be said that the Claimant's interests were prejudiced by the fact that others who would have made objections in similar terms did not do so because of the deficiencies in the Council's processes. The exercise of deciding whether to make the experimental measures permanent was not a matter of counting heads but of considering the arguments. The arguments were clearly identified and were considered. In those circumstances no substantial prejudice has been shown and this ground fails.

74. For the sake of completeness I add that I am satisfied that Mr Sheldon was correct to say that it was not open to the Claimant to say that there was prejudice on the basis that a greater number of objections might have caused the Council to hold a public inquiry and that she was prejudiced in that regard. As already noted the relevant exercise was one of assessing arguments and not of counting heads and there is no basis for concluding that further objections to the same general effect as those already made would or should have caused the Council to exercise its discretion to hold a public inquiry. In addition if the Claimant wished to contend that there was a breach of the

relevant requirements or some other public law ground of challenge arising from the failure to hold a public inquiry then that should have been advanced as a separate ground of challenge.

Grounds 4 and 5: the Alleged Failure to have regard to the Relevant Duties and/or to conduct the Necessary Balancing Exercise.

75. These grounds raise related issues and can conveniently be considered together. The Officer's Report did not refer to the Council's duty under section 45 but it did refer to the section 122 duty. The provisions of that section were summarised at paragraph 147 of the report and it was noted that "in taking a decision as to whether to make the experimental measures permanent, regard needs to be had to this duty".

76. The question I have to consider is not whether the duty in question was expressly mentioned but whether the Council complied with the duty as a matter of substance and not form. Compliance required the Council to undertake a balancing exercise having proper regard to the interests addressed in these sections.

77. The Court of Appeal considered the position in *Trail Riders Fellowship v Hampshire CC* [2019] EWCA Civ 1275. At first instance Sir Ross Cranston had set out his understanding of the position in relation to section 122 in the following way as summarised by Longmore LJ at [26]:

> "The judge [2018] EWHC 3390 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".

78. The members of the Court of Appeal did not accept the second limb of Sir Ross's fourth proposition but approved the balance of his analysis placing emphasis on the third proposition. As Longmore LJ explained at [35] – [40]:

> "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 QC'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 (para 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 country'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 Syke's report to Mr Jarvis and in section 3 of Mr Jarvis's own decision of 26 February 2018. Appendix C of Mr Sykes's 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 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 this 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 not should it be".

79. Lewison and Coulson LJJ delivered judgments agreeing with Longmore LJ. It is to be noted that at [49] Lewison LJ expressed his understanding that "the statutory requirement is capable of being fulfilled whether or not the decision-maker knows that the requirement exists."

80. A failure to undertake the necessary balancing exercise will mean that the order is "not within the relevant powers" for the purposes of paragraph 36 of schedule 9. Such a failure would mean that the resulting order would be liable to be quashed, subject to any exercise of judicial discretion, regardless of whether substantial prejudice to the applicant has been shown. Mr Sheldon sought to argue against that analysis. He submitted that a failure to undertake the necessary balancing exercise was instead to be seen as a failure to comply with a relevant requirement. I disagree. Sections 45 and 122 set out the purposes for which the powers provided in the RTRA are to be used. It is trite law that statutory powers must be used for the purposes for which they have been granted. A purported exercise of the powers other than for those purposes would result in an order which was not within the powers given by the RTRA. I note that there is some support for Mr Sheldon's contention in the fact that paragraph 34 of schedule 9 makes reference to the powers deriving from section 45 when defining "the relevant powers" but also refers to "any requirement of section 45" when defining "the relevant requirements". That point cannot prevail against the consequences flowing from the general principle which I have just rehearsed. This is particularly so with regard to section 122 which is expressly directed at the purpose for which the statutory powers are to be used but, by its stipulation as to the matters to be considered, section 45 has the same effect. Accordingly, a failure to act in accordance with section 45 or section 122 means that a traffic order is liable to be quashed even in the absence of substantial prejudice to an applicant. However, the absence of such prejudice may well be relevant to the court's exercise of its discretion and/or to the consideration of the issue flowing from *Simplex* of whether it can be said that the decision would have been the same even if there had been compliance with the duty in question.

81. The Claimant says that here the balancing exercise was not performed in reality.

82. In relation to the section 122 duty the Claimant places particular emphasis on what is said to have been a failure to address the danger posed by long vehicles entering the QN area and having to reverse for long distances after having found that they could not pass through the area or turn round. The Claimant also says that there was inadequate consideration of the possibility of having filters enforced solely by cameras which would accord with the approach preferred by the London Ambulance Service and would facilitate the passage of emergency vehicles. The Claimant says that there was a failure to make a risk assessment or road safety audit directed at those issues. More generally she says that there was "no proper consideration or balancing of the amenities of those who live on and around the boundary roads" or of other wider considerations.

83. As to section 45 the Claimant says that not only was that provision not mentioned expressly but there was no consideration in fact of the effect of the changes proposed in terms of the parking spaces in Devonshire Road.

84. The Council points to the reference which was made to the problems of long vehicles in Annex 4. Objections pointing to the making of dangerous manoeuvres by such vehicles were noted at 2.25 and 2.28 and the Council's response was expressed by reference to the use of double yellow lines. The Council says that the matters relevant to section 122 were considered as part of the balancing exercise demonstrated by the terms of the Officer's Report. The Council accepts that there was no express mention of the section 45 duty and no express analysis of the effect on the parking spaces in Devonshire Road. However, it says that it was sufficiently obvious that there would be some, the Council says modest, effect from this and that it should be regarded as having been considered as part of the general exercise of assessing the advantages and disadvantages of the proposals.

85. I am satisfied that there is no substance in ground 5: the contention in respect of the section 45 duty. There is force in the Council's argument that the impact was so obvious that it did not need to be spelt out in the report for account to be taken of it in the balancing exercise. Even without that point this was a very minor aspect of the proposals. There is no suggestion that either the proposal in relation to these parking spaces or the failure to spell that out in the Officer's Report affected the Claimant in any way. Moreover, it is clear that not only was this a minor matter but also that in any assessment of the point the Council would be bound to regard the modest changes as amply justified by the need to facilitate traffic flow along the road with the same result as was in fact achieved. In those circumstances even if I were persuaded that there had been a failure to undertake the necessary balancing exercise in this respect it would still be appropriate to decline relief as a matter of discretion and so such a failure would not result in the quashing of the order either in whole or in part.

86. The issue of the section 122 duty and whether the Council in reality undertook the necessary balancing exercise has given me more pause for thought.

87. I am satisfied that there was sufficient consideration of the long vehicle issue and of road safety matters generally. The treatment of the former was short but sufficient to show that the necessary exercise was being undertaken. Similarly, it is apparent that adequate regard was had to questions of road safety.

88. I have had more concern as to whether the Council in reality and in substance undertook a proper exercise of balancing the harmful effects on those in a position akin to that of the Claimant against the benefits which were perceived as flowing from the proposals. The thrust of the Officer's Report is that the proposals are beneficial and the disadvantages to those in the Claimant's position were stated in very short terms and similarly dismissed in short terms. However, I remind myself that provided the balancing exercise is undertaken in substance it is for the Council as the decision-maker to decide where the balance falls and to determine the relative weights to be given to the different matters going into the balance. What is necessary is for the Council to have been aware of the considerations for and against the proposals and to have made an assessment of whether those in favour of making the measures permanent outweighed those against doing so. It is apparent from the body of the Officer's Report and, more particularly, the annexes and appendices that the Council noted that the impact of the measures on those in the Claimant's position had been and would continue to be adverse and that there had been objections on that footing. The Council was entitled to conclude that the benefits of the proposals outweighed those adverse effects. It expressed that

conclusion in short terms but it cannot be said that the necessary balancing exercise was not undertaken.

89. The consequence is that grounds 4 and 5 fail.

Ground 6: the Allegation that the Defendant considered the Issue with a Closed Mind or that there was a Real Risk that it had done so.

90. This ground derives from the relationship between some members and officers of the Council and the Better Streets for Enfield ("BS4E") campaign group.

91. BS4E is a campaign group which maintains a website and a Facebook group page. It campaigns for, in its words, "healthier, safer, better streets that work for everyone in the borough". The group's website sets out the following "asks":

> "Low traffic neighbourhoods in every ward.
> A joined up network of safe, direct walking and cycling routes.
> Pedestrian-friendly high streets to boost local business.
> 20 mph as the default speed limit.
> Traffic-free school streets at school run hours."

92. Those who support the "asks" are said to be welcome to join the Facebook group and the page makes it clear that membership of the Facebook group is intended for those who support the "asks" and not for those merely seeking information.

93. Richard Eason and Sarah Cary are both council officers who are members of the Facebook group. As already noted Mr Eason was the author of the Officer's Report and is the Council's Healthy Streets Project Manager and Miss Cary is the Council's Executive Director for Place and as such responsible for implementing the proposals relating to the QN area. In the Council's evidence Mr Taylor reports Mr Eason and Miss Cary as saying that they have not posted on or actively engaged on the Facebook page. He reports Mr Eason as saying that he believed that he had joined the group "in order to gain visibility" of its activities and that he believed that to see the group's activities he had to join the group's Facebook page. Mr Eason is said to have "joined other local community Facebook groups for the same reason".

94. Cllrs Ian Barnes and Ergin Erbil are also members of the Facebook group and have posted on the page. Cllr Erbil told Mr Taylor that he made a small number of posts about cycling issues and that he has never posted about low traffic neighbourhoods.

95. Cllr Barnes was Deputy Leader of the Council. His was the initial decision to make the Experimental Traffic Orders. Although the initial intention was that Cllr Barnes would make the decision as to making them permanent he did not do so and that decision was taken by the Council's Leader who was not a member of the Facebook group. It follows that Cllr Barnes's membership of the Facebook group does not advance matters.

96. Cllr Erbil was a member, by substitution, of the Oversight and Scrutiny Committee. The Claimant says that his participation in the decision here was significant because he voted to confirm the Leader's decision in circumstances where the committee was split 4:2 in favour of confirmation. Cllr Erbil told Mr Taylor that he neither has nor had pre-determined views about the utility of low traffic neighbourhoods nor as to whether the orders affecting the QN area should be made permanent. Although doubtless genuinely

expressed Cllr Erbil's own assessment of how he approached the matter can carry little weight.

97. The Claimant accepts that she has to surmount a high hurdle to show that the matter was approached with a closed mind such as to amount to pre-determination or to give rise to a real risk of that but says that the involvement of the officers (in particular Mr Eason) and of Cllr Erbil in the BS4E Facebook group shows that was the position.

98. In considering whether there was pre-determination such as to vitiate a decision by elected councillors regard has to be had to their position as elected representatives. As such they are expected and entitled to promote particular views; to seek support for such views; to engage with the public; and to explain to members of the public their stance on matters of public concern. In the light of those aspects of the role of an elected councillor evidence that a particular councillor is pre-disposed to support policies and proposals having certain effects is not sufficient to demonstrate that a particular decision was made with a closed mind such as to vitiate the decision. In short terms councillors will be elected to some extent on the footing that they will approach issues of a particular kind from a certain pre-declared standpoint and their electors will have chosen them because of their support for that standpoint. For a decision made by an elected member to be vitiated by pre-determination regard has to be had to the actual decision and not just to the member's stance as to matters of that kind. It is necessary for the court to find at the least a real risk that the member approached the decision in question not just with a pre-disposition in favour of a particular course but with a determination to approve the actual decision in question and with a mind closed to arguments to the contrary in relation to that decision.

99. The preceding is a summary of my understanding of the effect of the decision of the Court of Appeal in *R (Lewis) v Redcar & Cleveland BC* [2008] EWCA Civ 746, [2009] 1 WLR 83. Thus Pill LJ addressed the matter at [63] – [71] saying that the court must decide "whether there is a real risk that minds were closed" and that, at [69]:

> "65 Central to such a consideration, however, must be a recognition that councillors are not in a judicial or quasi-judicial position but are elected to provide and pursue policies. Members of a planning committee would be entitled, and indeed expected, to have and to have expressed views on planning issues..."

100. Rix LJ set out the position to similar effect at [93] – [97] and in particular in the following terms at [95] and [96]:

> "95 The requirement made of such decision-makers is not, it seems to me, to be impartial but to address the planning issues before them fairly and on their merits, even though they may approach them with a predisposition in favour of one side of the argument or the other. It is noticeable that in the present case no complaint is raised by reference to the merits of the planning issues. The complaint, on the contrary, is essentially as to the timing of the decision in the context of some diffuse allegations of political controversy.
>
> 96 So the test would be whether there is an appearance of predetermination in the sense of a mind closed to the planning merits of the decision in question. Evidence of political affiliation or of the adoption of policies towards a planning proposal will not for these purposes by itself amount to an appearance of the real possibility of predetermination or what counts as bias for these purposes. Something more is required, something which goes to the appearance of a predetermined, closed mind in the decision-making itself. I think that Collins J put it well in R (*Island Farm Development Ltd) v Bridgend County Borough Council* [2007] LGR *60* when he said, at paras 31-32:

> `31. The reality is that councillors must be trusted to abide by the rules which the law lays down, namely that, whatever their views, they must approach their decision-making with an open mind in the sense that they must have regard to all material considerations and be prepared to change their views if persuaded that they should … unless there is positive evidence to show that there was indeed a closed mind, I do not think that prior observations or apparent favouring of a particular decision will suffice to persuade a court to quash the decision.
>
> 32. It may be that, assuming the *Porter v Magill* test is applicable, the fair-minded and informed observer must be taken to appreciate that predisposition is not predetermination and that councillors can be assumed to be aware of their obligations'".

101. Similarly at [106] and following Longmore LJ explained that pre-disposition towards a particular outcome is "not objectionable" provided that it does not lead to pre-determination in the sense of not being open to new arguments about the actual proposal.

102. In respect of Cllr Erbil's involvement in the decision the Claimant has not come close to establishing a real risk that the councillor adopted an improperly closed mind to the proposal. It is important to note that the question being determined by the Council was the approval of a particular Quieter Neighbourhood proposal and not the principle of such arrangements in general. It is perfectly possible for a person to be in support of such arrangements in general terms – even to be strongly supportive – and still to have an open mind about a particular proposal. There is no material showing that Cllr Erbil had anything other than an open mind on this proposal. The councillor was a member of the BS4E Facebook group and as such supportive of the five "asks". However, although those "asks" included a low traffic neighbourhood in each ward they did not include support for the particular proposals which were in issue here. At most the Claimant has shown that Cllr Erbil can be regarded as having approached the question of making the Experimental Traffic Orders permanent from the standpoint that such proposals were desirable and in general terms "a good thing" but that does not amount to predetermination of the issue of whether these particular arrangements should be made permanent.

103. The position of council officers is different from that of elected members. The former are not elected and are not in post by reason of having obtained public support for a particular raft of views or proposals.

104. In *R (Legard) v Kensington & Chelsea Royal LBC* [2018] EWHC 32 (Admin), [2018] PTSR 1451 Dove J summarised the law in respect of pre-determination by elected members at [143]. He was, however, concerned also with an allegation of bias against council officers. The contention there differed from the position here. It was not said that the officers were improperly committed to a particular cause because of their personal inclinations. Rather the contention was that the access which had been given to an interested party meant that the relevant officers came under the influence of that party and that this caused them to adopt an approach favourable to his interests: see at [109] and [141]. Dove J set out his understanding of the approach to be taken in these terms at [142]:

> "In seeking to form a view in relation to the question if whether or not the claimant has established that the defendant was apparently biased towards the second interested party, in my view it is necessary to have regard to the following features which would be part of the context known to the well-informed and fair-minded observer. Firstly, so far as the defendant's offices are concerned, they are public officials who have a responsibility to seek to take account of legitimately expressed interests raised with them by the members of the public who they are employed to serve. It is part and parcel of this role to have a listening ear to representations that are made to them. Of course, from time to time there will be a necessity to turn representations away: they may be representations which are illegal or vexatious. There also may be the need from time to time, akin to the observations of the Court of Appeal in the *Broadview Energy Developments Ltd* case [2016] JPL 1207 in respect of the conduct of the Secretary of State, to politely observe that there is no purpose in making further repetitious representations. None the less, in the context of modern public administration there will be an expectation that local government officers will engage with representations which are made to them by all members of the public, since failing to do so may give rise to justifiable complaint".

105. The circumstances with which Dove J was concerned differed from this case but I respectfully agree that the question of whether council officers were improperly committed to an approach so as to taint a decision must have regard to the "context of modern public administration" and to the expectation that council officers will have a degree of engagement with the public and with community groups.

106. There is no suggestion that Miss Cary had an influence on either the terms of the Officer's Report or on the decision and so her membership of the Facebook group is immaterial. Mr Eason was not himself the decision-maker but he was the author of the Officer's Report. The Claimant is right to say that as such Mr Eason was responsible for weighing the evidence and assessing the representations so as to provide a fair and proper analysis of them to the Council's Leader and to the members of the Oversight and Scrutiny Committee. I accept subject to the reservation I will express shortly that there would be scope for the decision to be vitiated on public law grounds and accordingly to be outside the Council's powers if Mr Eason were shown to have approached the matter with a closed mind such that his analysis of the evidence or of the representations was distorted so as to result in a report which was not based on a proper assessment of the particular proposal. I have, however, a degree of reservation in making such an acceptance because the terms of the Officer's Report are available to be considered (unlike the internal workings of an elected member's mind) and the decision is taken to have been on the footing of the reasons provided in the report. In those circumstances it is hard to see what of substance the contention that Mr Eason had a pre-determined view adds to grounds 4 and 5 which were to the effect that in making the decision for the reasons in the report the Council failed to have regard to the applicable duties and/or failed properly to undertake the necessary balancing exercise. If the report had that effect it would not matter whether it came about because of a genuine error or from a closed mind on the part of the author of the report. Similarly, there would be scope for a related challenge on the footing that the report had been materially misleading by analogy to the approach to the reports of planning officers set out in *R (Mansell) v Tonbridge & Malling BC* [2017] EWCA Civ 1314, [2019] PTSR 1452. There also it would not matter whether the report was materially misleading because of genuine error or because of pre-determination.

107. However, even on the footing that pre-determination by Mr Eason could be a vitiating factor the Claimant has failed to establish that there was such pre-determination. The

highest the argument can be put is that by signing up as a member of the Facebook group Mr Eason was indicating his support for the "asks". The force of that argument is substantially weakened by the explanation which has been given for Mr Eason's membership of the group and by the fact that he has never posted on the page. Moreover, even if such membership is to be seen as indicative of support for an increase in the number of low traffic neighbourhoods in general terms it does not demonstrate that Mr Eason approached his task in relation to the QN area with which I am concerned with a closed mind. Even allowing for the difference between the positions of a council officer and an elected member an officer's personal predisposition in favour of an approach in general terms does not mean that the officer failed to approach his or her task in relation to a particular proposal in a proper and professional way.

108. It follows that ground 6 fails.

Ground 7: Irrationality and the alleged Breach of the Defendant's *Tameside* Duty.

109. This ground is advanced in somewhat broad terms. It is said that the Council's decision was made on the basis of data which was and which should have been seen to be too limited to justify the decision. This is said to have amounted to irrationality and/or to failure to undertake sufficient inquiries in breach of the obligations said to derive from *Secretary of State for Education v Tameside MBC* [1977] AC 1014. In the Statement of Facts and Grounds there is said to have a failure to comply with guidance issued by the Secretary of State under section 18 of the Traffic Management Act 2004 but the effect of the guidance (the terms of which are not set out and which have not been put before me) is summarised as being a requirement to make decisions based on robust and empirical data combined with proper public engagement. Accordingly, that adds nothing to the earlier elements of the ground: if the decision was based on adequate data then there will have been compliance with the guidance and if it was not then the decision will be flawed by reason of irrationality.

110. Particular reference is made to deficiencies in the traffic surveys undertaken in respect of the proposals. Those were in March 2019 and September 2021. The Claimant points out that they were at different times of the year and that the latter was, moreover, at a time when the effects of the Covid-19 pandemic were to a degree still present and shortly after a fuel shortage had affected traffic numbers. The effect was that there was not a proper basis for comparison of the position before and after the experimental measures were put in place. In addition the Council lacked any baseline pedestrian data from before the experimental measures were put in place. These deficiencies affected, the Claimant says, the other elements of the Council's analysis by undermining the weight which could be attached to matters such as the noise modelling and air quality assessment. This criticism of the Council's approach derives support from the material in the Claimant's third witness statement (albeit there it is advanced in support of ground 3). This is to the effect that having been provided with the annexes and appendices to the Officer's Report the Claimant and the other members of One Community have been able to analyse that material. This analysis has shown flaws in the approach taken to compiling the figures for the counts of vehicle numbers and speeds with consequent further impact on matters such as the air quality and noise pollution assessments.

111. The *Tameside* duty is now properly to be seen as an aspect of the question of rationality. The approach to be taken was explained thus by Underhill LJ delivering the judgment

of the court in *R (Balajigari) v Home Secretary* [2019] EWCA Civ 673, [2019] 1 WLR 4647 at [70]:

> "The general principles on the *Tameside* duty were summarised by Haddon-Cave J in *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2015] 3 A11 ER 261, paras 99-100. In that passage, having referred to the speech of Lord Diplock in *Tameside*, Haddon-Cave J summarised the relevant principles which are to be derived from authorities since *Tameside* itself as follows. First, the obligation on the decision-maker is only to take such steps to inform himself as are reasonable. Secondly, subject to a *Wednesbury* challenge (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] I KB 223), it is for the public body and not the court to decide upon the manner and intensity of inquiry to be undertaken: see *R (Khatun) v Newham London Borough Council* [2005] QB 37, para 35 (Laws LJ). Thirdly, the court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision. Fourthly, the court should establish what material was before the authority and should only strike down a decision not to make further inquiries if no reasonable authority possessed of that material could suppose that the inquiries they had made were sufficient. Fifthly, the principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant but rather from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion. Sixthly, the wider the discretion conferred on the Secretary of State, the more important it must be that he all the relevant material to enable him properly to exercise it".

112. The Council accepts that there were limitations in the data it had. It took steps to address a number of those limitations and those steps included excluding data obtained during the period of the fuel crisis and applying a sensitivity test to mitigate any distortion to the data resulting from the effects of the Covid-19 pandemic. The Council has also accepted that there will need to be further monitoring of the effects of the orders.

113. It will almost always be the position that there is more information which could be obtained or further investigations which could be undertaken before a public body makes a particular decision. The test is not whether a reasonable council could have decided to obtain more information before taking the decision to make the experimental orders permanent but whether a reasonable council could have been satisfied that it had sufficient information on which properly to take the decision. As Underhill LJ explained the test is not even whether "further inquiries would have been sensible or desirable" but whether "no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision".

114. I do not minimise the adverse impact on the Claimant and on others of the restrictions which apply to the QN area. That is relevant to the question of whether more information should have been obtained. I also take account of the deficiencies in the data which the Council had. Against that it is relevant that the decision was made in February 2022 after an experiment had been running since September 2020. As I have noted at [71] above the central issue was, moreover, one capable of being stated shortly; the advantages and disadvantages of continuing the measures could be readily identified in general terms; and the task of balancing of those advantages and disadvantages was a matter of broad judgement rather than of precise mathematical analysis. In those circumstances it cannot be said that the Council's decision to proceed on the basis of

the data it had in January 2022 was not open to it acting rationally. In those circumstances this ground also fails.

Conclusion.

115. I have found against the Claimant on each of her grounds and the claim must, therefore, be dismissed.