

Trail Riders Fellowship v Peak District National Park Authority
2012 WL 5995921

Neutral Citation Number: [2012] EWHC 3359 (Admin)

Case No: CO/8610/2011

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 30/11/2012

Before :

MR JUSTICE OUSELEY

Between :

TRAIL RIDERS FELLOWSHIP

Claimant

- and -

PEAK DISTRICT NATIONAL PARK AUTHORITY

Defendant

(Transcript of the Handed Down Judgment of
WordWave International Limited

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165 Fleet Street, London EC4A 2DY

Tel No: 020 7404 1400, Fax No: 020 7831 8838

Official Shorthand Writers to the Court)

Mr Adrian Pay (instructed by Brain Chase Coles Solicitors) for the Claimant

Mr Colin Green (instructed by the Solicitor to the Peak District National Park Authority) for
the Defendant

Hearing dates: 7th November 2012

Judgment

As Approved by the Court

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MR JUSTICE OUSELEY:

1. The Trail Riders Fellowship, the Claimant, is a reputable national body which seeks to preserve the rights of motorcyclists and others to use vehicular green lanes. It recognises the controversy to which the use of such lanes by mechanically-propelled vehicles gives rise.

2. On 10 August 2011, the Peak District National Park Authority, the Defendant, made an Experimental Traffic Regulation Order, ETRO, known as The Peak District National Park Authority (Chapel Gate) (Prohibition of Mechanically Propelled Vehicles) Experimental Order 2011. The ETRO prohibited the use of Chapel Gate by mechanically propelled

vehicles, both 4 wheeled and 2 wheeled, for a period of 18 months. Chapel Gate is a Byway Open to All Traffic, a BOAT, within the Peak District National Park. It is about 2.7km long, running over moorland from near Chapel En Le Frith towards Edale. Although Derbyshire County Council is the Highway Authority for this highway, the PDNPA has power under the Road Traffic Regulation Act 1984 to make Road Traffic Regulation Orders in certain circumstances.

3. The Claimant brings a statutory challenge to the ETRO under Part VI of Schedule 9 to the RTRA 1984. Although the ETRO could only be made for a maximum of 18 months and so there is only about 3 months life in it, there was no Order for interim suspension. If valid, the procedure for making it permanent is also simpler than for making a full TRO from scratch. The challenge is brought on the grounds that the making of the Order was not within the relevant powers, rather than because any procedural requirements had not been complied with. The Claimant alleges that it was not within the relevant powers because in reality the ETRO was not made for the purposes of an experiment but instead for the purposes of preventing the use of the BOAT by mechanically-propelled vehicles. That required a full TRO with a different and more extensive procedure. No genuine experiment underlay the ETRO. The Defendant says that this was a proper use of the powers because the Order was indeed made for an experimental purpose. That issue is essentially one of fact.

4. The Claimant also contends that the Defendant took account of an irrelevant factor: the cost of repairing the BOAT so that MPVs could use it. The Defendant also failed to consider a ban only on 4 wheeled MPVs, or a ban on all MPVs for less than the full period of the ETRO. Finally, the Claimant submitted that the Defendant had failed to discharge its duty under section 122 of the 1984 Act properly in relation to the expeditious, safe and convenient movement of all vehicular traffic.

5. The Natural Environment and Rural Communities Act 2006, in some complicated provisions, had removed the rights of mechanically-propelled vehicles to use certain minor routes in the countryside but had not done so in respect of BOATS. Mr Pay, for the Claimant, said that its wider concerns were with the use of TROs to close to MPVs those BOATs which were not properly maintained. The 1984 Act provided procedures and rules for the exercise of this powerful tool, which should be adhered to.

The legislative framework

6. The Defendant can make a TRO in respect of a BOAT in a National Park by virtue of section 21 BB of the 1984 Act. By s22 BB(2)(A), it can do so for any of the purposes set out in s1(1)(A-G) or s22(2) of the 1984 Act. These purposes cover, amongst other matters, preventing damage to the road, preventing its use by vehicular traffic which is unsuitable for its existing character and preserving or improving the amenities of the area through which it runs. Section 22 is important; it adds in effect by subsection (2) a further purpose to s1 which is "conserving or enhancing the natural beauty of the area, or of affording better opportunities for the public to enjoy the amenities of the area or recreation?in the area".

7. By s22 BB a National Park Authority may make a TRO, an ETRO and a temporary TRO, TTRO. Section 9 provides that an ETRO may be made "for the purposes of carrying out an experimental scheme of traffic control;" and by subsection (3) such an Order shall not continue in force for longer than 18 months. Any Order may prohibit the use of the road by vehicular traffic of any class specified in the Order; s2(1). The ETRO could have treated 2 and 4 wheeled MPVs as separate classes. A TTRO can be made for the purposes set out in s14, where works are proposed to be executed on a road or because of the likelihood of danger to the public or of serious damage to the road. They can only last for 6 months.

8. S122 of the 1984 Act makes it the duty of every authority exercising powers 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)?". Subsection (2) specifies the following matters: maintaining reasonable access to premises, the effect on the amenities of any locality affected and "any other matters appearing to?the

local authority?to be relevant".

9. The procedures for making Road Traffic Orders vary with the type of Order. This is governed by the National Park Authorities Traffic Orders (Procedure) England Regulations 2007 SI No. 2542. As might be expected, the procedural requirements are more extensive for a TRO than for an ETRO or TTRO. Regulations 4-14 deal with a TRO. They require consultation with specified persons. The persons specified included the Land Access and Recreation Association through which the Claimant is informed of proposals for TROs. Notice has to be given in the Press and appropriate steps taken to ensure that adequate publicity is given to those likely to be affected. The documents specified in the Regulations have to be made available for inspection at various places. Importantly, by Regulation 7 any person may make representations to the National Park Authority about the making of the Order, and by Regulation 11 the National Park Authority has to consider them before deciding whether to make an Order. The Authority may cause a public inquiry to be held, giving notice to the statutory consultees and in certain instances to those who have made representations under Regulation 7. By Regulation 14 where the Authority makes an Order, it has to give notice to those who have made representations under Regulation 7 objecting to the Order, giving its reasons for not acceding to the objections.

10. ETROs are governed by Regulations 17-18. The same specified persons have to be consulted but there is no equivalent obligation to consult others as is found in Regulation 7. Specified documents must be made available. The documents to be made available include by Regulation 18(3)(c) and (d) "a statement setting out the reasons why the Authority proposes to make the Order, including its reasons for proceeding by way of experiment" and "a statement as to whether the Authority intends to consider making a Traffic Regulation Order having the same effect as the Experimental Traffic Order." As there is no equivalent to Regulation 7, there is no equivalent to Regulation 11 requiring those representations to be taken into account. There is no provision for a public inquiry to be held, nor for a statement as to why objections have been rejected.

11. After the conclusion of the experiment, the restrictions in the ETRO can be made the subject of a permanent Order. There is however an abbreviated procedure where that happens. Regulation 16 disapplies certain parts of Regulations 4-14 which would otherwise apply to the making of the Order. Where what is called a Continuation Order is made, the sole effect of which is to reproduce and continue in force indefinitely the provisions of an Experimental Order in force, Regulations 7, 11 and 14 so far as I have referred to them, do not apply. A public inquiry may still be held but the notification provisions are reduced consistently with the disapplication of Regulation 7. I note that this only applies if the Continuation Order is made while the Experimental Order is in force.

The Experimental Traffic Regulation Order

12. The crucial document in this case is the Statement of Reasons for the making of the Order. I note that it is the same as in the draft Statement of Reasons published on 10 December 2010, although between the draft and the final Statement of Reasons, and of some importance, Derbyshire County Council as Highway Authority made a 6 month Temporary Traffic Regulation Order on 24 February 2011, without warning to the NPA. It was made to enable repairs to be made to the surface of the BOAT over most of its length and included the part in worst condition where it traverses a steep hillside.

13. The Statement of Reasons says that the Order is made "for the purposes of preserving the amenity and conserving the natural beauty of the area through which the route passes". It refers to the December 2009 Route Management Plan which looked at the damage "on and adjacent to the route", the effect on character and use, and complaints which showed how serious the management problems were. Various management options were considered including the making of a TRO. The Peak District Local Access Forum advised the NPA on 18 September 2010 to seek a temporary closure of the route to vehicles, but only after repairs had become an inoperable solution. The Statement expressed the view that the feeling of wildness and tranquillity would be preserved by the Order as the noise and presence of recreational motor vehicles detracted significantly from those qualities. The proposal would also conserve the natural beauty of the area.

14. An appendix described ecological impacts by section of route. In section A the surface had been degraded and in places worn down to the bedrock. A series of low steps had been worn in the rock making passage by cycles and motorcycles more difficult and encouraging the use of alternatives. Water flowed down the line of the track adding to the erosion of the track bed. In consequence, a foot route had developed on top of the bank, now showing as a narrow bare strip, which bikes and motorbikes also appeared to use to avoid the awkward surface of the track itself. This use was expected to increase as the track surface would deteriorate further under continued vehicle use and the effects of water erosion. In section B, deep wheel ruts were cut into the peat on a line parallel to the surface of the BOAT. Various areas had been bypassed on each side by people on foot, cycle and motorcycle, extending the boggy, trampled degraded section. In Section C, an informal footpath had developed along the bank of the BOAT where there was very severe damage from the combined effects of vehicle use and water erosion which had degraded the track surface and damaged the footpath. The roughness and erosion of the track surface had meant that motorcycles used the footpath along the top of the bank, widening and deepening it, opening it to further erosion. The ecological impact concluded that "continued 4WD and motor cycle use can only increase destruction of the surface and erosion and consolidated the diversion of water from its direction and flow; increased use of the footpath by motorbikes will quickly lead to further rutting, widening of bare areas and soil erosion and possibly the collapse of sections of bank". This worsened if 4 wheel drive vehicles also attempted to navigate the bank and footpath to bypass the most damaged sections, and walkers and horse riders were also likely to avoid the path, creating parallel new routes.

The Statement of Reasons then turned to Section 122 of the 1984 Act. It said:

"In balancing the duty in s122(1) and the factors set out in S122(2) the Authority recognises that Chapel-Gate passes through an area where users can experience feelings of wildness, remoteness and associated tranquillity. There are no man-made detractors that take away this feeling in the vicinity of the route. If recreational motor vehicles are present in this setting they are likely to diminish the experiences of these qualities for non-motorised users. Research by Defra (2005) 'Report of a research project on motor vehicles on byways open to all traffic' shows the presence of a recreational motor vehicle impacts more on amenity than an agricultural vehicle. There is also an impact on these experiences when vehicles are not present but there are obvious signs of motor vehicles passing eg vehicle ruts are present.

The Authority believes preservation of the amenity and conservation of the natural beauty of the route outweighs recreational motor vehicular use of the route at any time of year notwithstanding that such a restriction will effect the expeditious and convenient use by mechanically propelled vehicles of the route. ?

On balance the Authority proposes to make a full-time 18 month Experimental Traffic Order for preserving and improving the amenities of the area through which the byway runs ((S1(1)(f) RTRA 84)) and for the purpose of conserving the natural beauty of the area ((S22(2) RTRA 84)).

In coming to this proposal the Authority considered the longer-term management of the route. It is considered necessary to introduce these proposals on an experimental basis so that the effect of the order on the condition of the route can be assessed and to ascertain whether this prohibition on mechanically propelled vehicles should become permanent.

The Authority will work with the Highway Authority (Derbyshire County Council) to ensure the route is maintained and any future use is sustainable. Use and condition of the route will be monitored, as will the effects on other routes nearby.

At the end of the 18 month period, the Authority, in consultation with the Highway Authority, will decide whether to make a Traffic Regulation Order, extend this experimental order, reduce it or discontinue it, based on the evidence of the monitoring."

15. Although the Order refers to a number of other documents and decisions, they were not part of the Statement of Reasons, nor appended to it, albeit that they were publicly

available.

The background to the making of the Order

16. This is set out in the report to the Audit, Resources and Performance Committee of the PDNPA dated 3 June 2011. Long usage had caused parts of the way to sink and, with a poor track surface, this had led to various groups of users dispersing on to the adjacent land causing significant damage to areas of conservation interest. This BOAT was one of the worst in the Park for condition, dispersal, damage and complaints. In 2009 a Route Management Plan had proposed action to restore and maintain the route. In 2010, the Local Access Forum, LAF, advised that a temporary TRO be made closing the BOAT to MPVs since there were no repair funds from the highway authority. For this reason, officers evaluated the possibility of making an 18 month ETRO "to enable a proper investigation of the causes of the displacement along the route". The report continued:

"Even where a highway is properly maintained it does not mean that the problem of 'displacement' of other categories of user will not continue to take place, particularly at the 'hollow-way' sections. It is believed that the openness of the adjacent land, together with the presence of motor vehicles on the route is resulting in other categories of user i.e. horse-riders, cyclists and walkers, avoiding the track altogether. Although this has obviously been compounded by the extremely poor surface to date, the improved surface will enable a much fairer assessment of an Experimental Order to be made. This is because other factors (such as surface condition) should have been resolved, and the only other factor remaining will be the presence of motor vehicles."

17. The report noted that during the consultation process, the highway authority had made a temporary TTRO closing the route while surface repairs were carried out. The officer then commented on the results of the public consultation on the draft ETRO:

"The proposal to prohibit motor vehicles on any route is only made as a last resort, and after other solutions have been considered. It is clear however, that the situation on Chapel Gate is so urgent that only an experiment to prevent motor vehicular use will provide answers to the question of longer-term sustainability of this route. All options will be considered before the end of the 18 month restriction period."

18. On two occasions, the officer responses referred to the need to have an experiment to determine what environmental effect the restriction would have, without being more specific. In paragraph 24, dealing with s122 of the 1984 Act, the officer commented that the wildness and tranquillity of the area through which the BOAT passes were recognised, and that recreational motor vehicles were likely to diminish the experience of those qualities for non-motorised users, both when present and from the rutted ground they created. The preservation of the amenity and conservation of the natural beauty of the area outweighed the recreational motor vehicle use of the BOAT at any time of year. It was not NPA policy to consider a TRO solely as a result of the highway authority failing to carry out its maintenance duties.

19. The report also showed that among alternatives put forward by consultees was a ban on 4x4 vehicles alone and not on motorbikes. But the response to whether a less restrictive order would suffice was uninformative: the ETRO would enable the effects of a restriction on MPVs on the worst section of the BOAT to be assessed and the most appropriate option could be determined at the end of the 18 month period. Three other specific responses were relied on by Mr Pay: What aspect was being tested? "The use and condition of the lane will be monitored before, and during and restraint on use, to determine whether its condition has improved. [sic]". If condition really is a significant factor why could not the BOAT be closed under a temporary TRO to allow for repairs? "It is considered necessary to introduce these proposals on an experimental basis so that the effect of the order on the condition of the route can be assessed, and allow maximum flexibility in determining the future course of action." What objective criteria would be used to evaluate the success of the ETRO? "The Authority will be recording the use of the lane electronically and monitoring its condition photographically both before and after and proposed changes."

20. A Committee Member in May 2011 recognised that these were questions of importance

and was uncertain that the answer to the last one cited would not raise questions for the strength of the evidence base for the ETRO.

21. Mr Pay relied on further documentation which he submitted showed that the LAF had sought a TTRO for 18 months but when the NPA pointed out that that could not be done, the NPA had chosen the ETRO which did last 18 months.

22. The 2009 Route Management Plan had recorded the views of the Local Access Forum which put forward temporary and longer term solutions: TTRO until the surface was repaired; for the longer term, the solutions included a ban on 4x4 vehicles and speed limits on the steeper parts.

23. In August 2010, the LAF Sub Group, at a meeting attended by NPA officers, had recommended that the LAF ask the NPA for a TTRO for 18 months to prevent further deterioration in the condition of the BOAT in the short term, while investigating what action could be taken, and to assess the resources necessary to create a bridleway adjacent to it. The terms of its conclusion was that "in the light of vehicles leaving the highway and damaging the protected land nearby, that the National Park authority be asked to consider implementing a temporary TRO for 18 months on the following grounds: Damage to protected landscape due to the domination of the highway", and the safety of users. It had considered a variety of points before reaching that recommendation, none of which were for a ETRO. Its thinking was clearly that only an immediate cessation in MPV use could protect the BOAT from further damage, and only the NPA could achieve that, since the highway authority could only make a TTRO if it were to make available the resources necessary for repair.

24. The LAF meeting in September 2010, again attended by PDNPA officers, demonstrated growing local concern about the state of the BOAT. The officers were considering a TRO but warned that its basis had to be clear.

25. Mr Pay also put considerable weight on a letter dated 6 October 2010 from Mr Folkard, a member of the LAF, to another member of the LAF and not an NPA officer. It is relied on because it appears to have been Mr Folkard who pointed out that a TTRO would be more difficult to justify under the NPA's current policies, which would require more of an examination of safety and maintenance, and it could only be for a period of 6 and not 18 months, unlike an ETRO.

26. Mr Prendergast, Head of Field Services at the NPA, added further explanation in his October 2011 witness statement. There was a debate about whether this evidence was admissible to elaborate, as Mr Green for the NPA contended, or inadmissible to contradict, as Mr Pay contended, the reasons for making the Order as set out in its accompanying Statement of Reasons.

27. After explaining that the fact that a road in the Park was out of repair was not necessarily a matter of concern for the NPA where it had no effect on the qualities of the Park, which were its concern, Mr Prendergast continued:

"In the case of Chapel Gate, the real cause for concern was the displacement of users off the line of the route onto adjoining land. Given the environmental importance of the area of SSSI/SAC/SPA through which the route passed, and the natural beauty of the area as a whole, it was in our view important that the cause or causes of the displacement should be identified.

?

There seemed to me to be no doubt that users of the route were deviating from it, in places by a substantial margin, and I do not understand the claimant to contest this. I and other officers considered that an experimental traffic management order was appropriate because we did not know why users of Chapel Gate were straying from its proper route. Part of this displacement might well have been because of the state of sections of the route, but I suspect that walkers, cyclists and horse riders were also displaced because of concerns about the use of the route by recreational motorcycles and cars. In my experience it is natural for people to be wary of following the centre line of a highway if they know it is also used by motor vehicles, particularly by recreational vehicles. Where there is

land next to the highway, I would expect more vulnerable users to leave some space between themselves and the highway, depending on the condition of the adjacent land. Over time, this can result in a widening of the highway, or the creation of parallel tracks."

28. He explained that motorcycles, perhaps louder and faster than cars, were likely to displace non-motorised users as much as cars did.

"With the route partially repaired, and a temporary prohibition on motor vehicles in place, it would be possible to see whether other uses of the way still chose to deviate from the true line of the route, and, if they did, whether this was due solely to the physical state of the route. This, in essence, is the experiment of the Authority wishes to carry out."

29. This would be monitored, and he explained how. The results were not a foregone conclusion since displacement might continue to occur in the absence of MPVs.

Ground 1: the existence of an experiment

30. Crucial to this ground, and of importance for the other grounds, is whether the ETRO was made for an experimental purpose. The statutory provisions clearly require that an experiment should underlie the ETRO, and that it should be identified in the Statement of Reasons. It would be difficult, for these purposes, to explain that an experiment was being undertaken without explaining, or it being obvious from the description of the experiment, what the purpose of the experiment was. If no experiment is identified and no purpose for it is given, the draft Statement of Reasons would fail in its function of providing adequate information for the purpose of consultation, and the final Statement would fail in its function of enabling those affected to decide whether what was proposed was lawful or not. Whatever may be the limits on considering further material when deciding whether there was an experiment and, if so, what it was, the primary place to expect to find the answers is the draft and then final Statement of Reasons. In this case, the two did not change.

31. The Order-making authority simply has to identify what the experiment is and its purpose. I am satisfied that the two documents do disclose that the Order has an experimental purpose, short though the description of it is in the Statement of Reasons, a Statement which is long on the history of how the current problems came about. The essence of it is contained in the words that the ETRO is introduced "so that the effect of the order on the condition of the route can be assessed". The remainder of the sentence merely confirms that there is an experiment without enlarging on its nature or purpose. The rest of the Statement does not enlarge helpfully on the experiment, but it provides useful contextual material for working out its nature and purpose.

32. The "condition" referred to is the physical condition of the surface of the BOAT, since its poor condition makes it very unattractive in the National Park, detracting from its beauty. The passage of motor vehicles, 2 and 4 wheeled, has done damage to it, which poor drainage and surface water have exacerbated. Although it appears that the very presence of MPVs is thought to be damaging, the discussion of the experiment, such as it is, is concerned with the physical condition of the surface of the BOAT.

33. I do not accept Mr Green's submission that the surface at issue is not the surface of the BOAT but the surface of the adjacent areas, since that is not the language used in the description of the experiment, and indeed earlier in the Statement of Reasons the BOAT itself and the adjacent areas are distinguished. There was concern expressed in the Statement, particularly in the ecology appendix, about the effect which the poor condition of the surface of the BOAT had on the surface of adjoining land. But that is why the condition of the surface of the BOAT itself was the cause of concern. The language of Mr Prendergast in the passages quoted above also draws the distinction between the route of the BOAT and the adjacent land.

34. The experiment, such as it is, is to see what effect a prohibition on MPVs using the BOAT would have on its surface condition. A secondary purpose was to see what effect there would be on the usage of other recognised routes to which the MPVs might divert; it was not concerned with them using the informal routes scarred into the surface of the land adjoining the BOAT, since it was clearly assumed that they would not use that land as a result of the ETRO.

35. Mr Pay's criticisms of that as an experiment are to my mind well founded in law. I accept Mr Green's point that it is not for the Court to decide whether the experiment is a valuable one, or whether a more sophisticated one would be better. But the criticisms go rather beyond that. First, I accept that it is irrational to have an experiment to see what effect the prohibition would have, when the surface of much of the BOAT has been repaired to some degree, since the ETRO came into force. This experiment cannot test what effect the prohibition will have, because MPVs have not used the repaired surface. It would have been possible to devise a partial ban to measure that effect. The experiment became incapable of answering the question it had been purportedly set up to test. The fact that the surface would be repaired early on in the period of prohibition introduced by the ETRO did not change the express justification for the ETRO; the draft and final Statements of Reasons are identical in this respect. If, on the other hand the experiment was intended to be independent of the repair to the surface, it is impossible to discern from the Statement of Reasons what that experiment might be. The experiment which I discern from the Statement of Reasons has no rational basis.

36. Second, ignoring the repairs, it is impossible to avoid the conclusion that the NPA was already very well aware of the harmful effect which the MPVs had had on the surface of the BOAT; that usage had been going on for a number of years over which time the damage had become evident, albeit exacerbated by the effect of water draining down the surface. The serious rutting is caused by the tyres of MPVs rather than pedal bicycles. There is no indication that this was an experiment to see if the surface could regenerate itself naturally if MPVs were banned, and it would not make much sense to do so if it were repaired anyway. So again, the experiment described can clearly be seen to be no experiment at all.

37. Both sides relied on further material to support their cases. I accept that Mr Pay is entitled to look to other material to show that the stated purpose of the ETRO is not the real purpose; Mr Green is at least entitled to refer to other material to refute that point, even if it may not be admissible to contradict the reasons in the Statement of Reasons.

38. However, I am not persuaded that the ETRO was made for the purpose of putting in place a permanent TRO prohibiting MPVs faster than the proper procedures would allow. I accept that whatever may have been the views expressed by the LAF, the relevant views are those of the NPA expressed through its Audit, Resources and Performance Committee accepting the report of 3 June 2011. I do not see in that report any basis for suggesting that the NPA was seeking to subvert the law in that way. Nor do I see question marks over the responses to consultation as supporting that contention. The NPA may have had a longstanding view that MPVs using this BOAT were harmful to the qualities of the National Park which it had to advance, but that again does not persuade me that it acted unlawfully in the way suggested.

39. There remains some lack of clarity in that report about what the intended experiment is, its nature and purpose. Mr Campen's speaking note, as the officer responsible for the report, and relied on by Mr Prendergast, referred to the purpose of the ETRO: "It is about the nature of the route and the displacement either side of it that we are concerned and not the surface"; the strategy was to test whether the removal of MPVs would resolve "the issues relating to the negative environmental impacts associated with the route and its current usages". However, I conclude that there is sufficient in the report to show that the experiment concerned displacement of non-MPV users from the BOAT on to the surface of adjacent land where they added to the damage. The purpose was to see if the prohibition on MPV users, allied to the repaired surface, would attract the non-MPV users back on to the surface of the BOAT, stopping the damage to the adjacent land. The experiment was not about seeing what happened to the surface of the BOAT, albeit that Mr Campen included the nature of the route and what happened either side of it as both featuring in the experiment.

40. I accept that criticisms can be made of that as an experiment, and in particular that if non-MPV users are attracted back, it may not be possible to tell whether that is the effect of the repairs or of the ban on MPVs. There is however already some credible evidence that MPVs deter use of the surface of the BOAT by non-MPVs, so it could rationally be thought

that if the surface is repaired, MPVs are banned, and the users return, the ban has had an effect on enabling non-MPV users to return to the BOAT from the adjacent land, to the overall benefit of the National Park. Certainly, if they do not, it can be seen that neither ban nor repairs have had an effect. That is a legitimate description of a rational experiment. Mr Pay's contention does not show that experiment to be irrational, merely that another experiment could have been devised, which might or might not have been better. But that shows no error of law.

41. Unfortunately for the NPA, that is not the experiment described in the Statement of Reasons. It is, however, the experiment which Mr Prendergast describes in his witness statement. That reinforces my view that the description of the experiment in the Statement of Reasons is not the description of a rational experiment, since it appears that the NPA meant to describe a different experiment. It may be that the NPA understood all along what it intended but failed to focus precisely enough on how it was described in the crucial public document. As I read it, however, without the benefit of Mr Prendergast's statement or the officer's report of 3 June 2011, the experiment seemed clear to me: it was the one I have described above and not the one described in the officer's report or in Mr Prendergast's statement.

42. The question then arises as to the extent to which this report can be used to support the lawfulness of the ETRO, and not just to refute the allegation of ulterior purpose. I do not regard it as capable of being read into the Statement of Reasons since it is not incorporated into it by reference, nor even referred to in it. The report could not have been incorporated into the draft Statement of Reasons but the draft does not refer to or incorporate some earlier report either. I accept that it would have been publicly available. The fact that the ETRO is not based on a rational experiment does not mean that some other experiment must have been intended and so evidence as to what that other experiment was becomes admissible. The mere fact that the report is nearly contemporaneous with the ETRO itself is not enough to make it admissible to ascertain the nature and purpose of the experiment underlying the ETRO.

43. There is a statutory obligation to provide reasons for the making of the Order in a prescribed document. It is necessary for the purposes of genuine public consultation. It enables those affected to see if the Order is susceptible to legal challenge. I have very considerable reservations about whether any document, other than the Statement of Reasons and those incorporated in it, should be referred to for the purposes of ascertaining the experiment which it envisages. There should be no need for such additional material: the Statement of Reasons should say enough, and it is scarcely a difficult task to ensure that it does. If extraneous material is permitted, which I doubt, to aid the resolution of a genuine ambiguity, that is as far as in my judgment it should go, and such material should not be permitted for the purposes of creating an ambiguity. One of the reasons for my doubt is that it seems to me likely that such extraneous material would show that there was an underlying failure in the consultation process since its very admission shows that the experiment was not adequately and clearly described in the Statement of Reasons. The decision of Richards J in *Decra Plastics Ltd v London Borough of Waltham Forest* [2002] EWHC 2718 (Admin) is not concerned with the statutory duty to give reasons in or simultaneously with the Order at issue. His judgment on the admissibility of reasons for the refusal to hold an Inquiry in a witness statement made for the purposes of judicial review does not deal with the position at issue here.

44. In this case, it is in my judgment clear that this further material could only be admitted with the effect of contradicting the conclusion to be drawn from the Statement of Reasons as to what the experiment was. It is not elucidatory, nor resolving of ambiguities. Had the report been part of the Statement of Reasons, it would have created a real uncertainty as to what experiment was being described and consulted upon. The NPA Press Release of 10 December 2012 announcing the public consultation does not suggest an experiment as described in the officer's report. In so far as it describes an experiment at all, it describes the one I deduce from the Statement of Reasons.

45. On that basis, the officer's report cannot be admitted to contradict the Statement of

Reasons without revealing a further unlawfulness, in the failure to consult adequately. I do not think that consultees would have appreciated the nature of the experiment from the Statement of Reasons, which is where they should be entitled to look. The consultation responses do not support the notion that the consultees understood that the experiment was to be as described in the report or as described by Mr Prendergast. This is not a separate ground of challenge but rather a legitimate means of testing whether the experiment as described in the Statement of Reasons is different from the one intended, and whether the evidence which contradicts the Statement should be admitted.

46. The subsequent evidence of Mr Prendergast is not admissible since it too would contradict the Statement of Reasons, on the most limited application of *R v Westminster City Council ex parte Ermakov* [1996] 2 All ER 302 CA. At page 315h, Hutchinson LJ said:

"(2) The court can and, in appropriate cases, should admit evidence to elucidate or, exceptionally, correct or add to the reasons; but should, consistently with Steyn LJ's observations in *Ex p Graham*, be very cautious about doing so. I have in mind cases where, for example, an error has been made in transcription or expression, or a word or words inadvertently omitted, or where the language used may be in some way lacking in clarity. These examples are not intended to be exhaustive, but rather to reflect my view that the function of such evidence should generally be elucidation not fundamental alteration, confirmation not contradiction. Certainly there seems to me to be no warrant for receiving and relying on as validating the decision evidence - as in this case - which indicates that the real reasons were wholly different from the stated reasons. It is not in my view permissible to say, merely because the applicant does not feel able to challenge the bona fides of the decision-maker's explanation as to the real reasons, that the applicant is therefore not prejudiced and the evidence as to the real reasons can be relied upon. This is because, first, I do not accept that it is necessarily the case that in that situation he is not prejudiced; and, secondly, because, in this class of case, I do not consider that it is necessary for the applicant to show prejudice before he can obtain relief. Section 64 requires a decision and at the same time reasons; and if no reasons (which is the reality of a case such as the present) or wholly deficient reasons are given, he is prima facie entitled to have the decision quashed as unlawful."

47. The principles he enunciated are not confined to the particular context of s64 Housing Act 1985.

48. For those reasons, the Order must be quashed. It might be said that it has only a few months to run, but if not quashed, it could act as the springboard for a truncated procedure to make it permanent.

The other grounds

49. In those circumstances I can take the other grounds shortly. Ground 2: taking account of the costs of repair. I do not agree with Mr Pay that the NPA erred in relation to the costs of the highway repair. There may be an absolute duty to maintain the highway on the highway authority; but that does not require the NPA, which is not the highway authority, to assume a world which does not exist, when carrying out its own functions in relation to the beauty, wildlife and cultural heritage of the National Park. It is entitled to take account of the state of disrepair and the prospective timing and extent of repair in judging what TROs are required which it is empowered to make. It certainly disavows any policy of making a TRO simply on the basis of disrepair; nor was this ETRO made on such a basis. If the ETRO had been based on the experiment as described by Mr Prendergast, I would not have concluded that the references to disrepair showed any unlawfulness of approach. Nor is it an additional reason for holding the ETRO as made unlawful.

50. Ground 3: failing to distinguish between 2 and 4 wheeled MPVs. If the experiment had been as described by Mr Prendergast, I do not think that the absence of distinction between 4 wheeled MPVs (bad) and 2 wheeled MPVs (good), asserted by Mr Pay, would even have been arguably unlawful. The evidence of Mr Prendergast about the speed of arrival, swiftly varying direction and noise of 2 wheeled MPVs, and their likely effect on dispersing non-MPV users, could well have been a proper reason for not drawing a distinction between the two in the experiment to which his evidence was addressed. There might also have

been a good reason for not drawing a distinction between the two in the experiment as set out in the Statement of Reasons but, when focussing on the damage done to the surface by the two forms of vehicle, the absence from the experiment of the distinction urged upon the NPA by some consultees with some justification, required to be considered by the NPA, probably through the report. I do not see it so addressed. There is a simple reason for this: the experiment in the Statement of Reasons which they addressed is not the experiment considered in the report. That also emphasises the importance of the accurate identification of the nature and purpose of the experiment, for a public consultation process based on the Statement of Reasons. It ought not to be left to a Press release, although that helps the Claimant here.

51. Ground 4: the gravamen of Mr Pay's submission is that s122 means that the paramount consideration was the "expeditious, convenient and safe movement" of all users, so far as that aim was practicable having regard to the various considerations listed in the Act and other relevant ones. I agree with what Carnwath J said about the construction of this provision in *UK Waste Management Ltd v West Lancashire County Council* [1996] RTR 201 at 209G, and with what HHJ Behrens said about it in *Wilson v Yorkshire Dales National Park Authority* [2009] EWHC 1425 (Admin). Mr Pay submitted that this required the Order-making authority to make an Order which involved the least restriction on vehicular movement having regard to the relevant factors, even if it meant that the authority's objectives could not necessarily be achieved. Mr Green submitted that the touchstone of the operation of the section was rationality and not proportionality. The primacy of the general duty in s122 did not resolve the conflict between convenience and safety for different classes of users.

52. I do not think that either submission is entirely right on the approach to the least restrictive order. S122 does not require the experimental Order-making authority to proceed in stages starting with the least restrictive possible experiment, and moving by stages to the experiment which the NPA really wants to assess. If the experiment is rational, it is that which has to be assessed against the requirements of s122. If there is a less restrictive experiment which may achieve all that the NPA wishes, that is no more than a factor to be considered. If it will do so, it is difficult to see how rationally a more restrictive Order could be justified under s122. The balance under s122 between an experiment which falls short of providing all that the NPA seeks to know and one which achieves it all but is very much more restrictive, is one for the rational assessment of the NPA. But the possibility of a less restrictive ETRO, with whatever that may achieve, is in principle a factor which the NPA should consider within s122. Here, the NPA was not required to restrict the ban on MPVs to 4 wheeled MPVs in the first place if it had a reasonable basis for banning them all for the purpose of the experiment. On the basis of the report and Mr Prendergast's evidence it did. Mr Green is right that the primacy of the general duty in s122 cannot resolve all conflicts in its application.

53. However, if, as I conclude happened, the report and hence the NPA approached s122 on the basis of an experiment other than that in the Order, it cannot have fulfilled its duty under s122 anyway.

Conclusion

54. For those reasons, I quash the Order. The NPA will have had fifteen months in which to gather the data it sought. The NPA cannot move to make the Order permanent without going through the full TRO procedure.