Neutral Citation Number: [2019] EWHC 3268 (Admin)

Case No: CO/2936/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT (MANCHESTER)
PLANNING COURT

Manchester Civil Justice Centre,
1 Bridge Street West, Manchester M60 9DJ
Date: 29 November 2019

Before:

HIS HONOUR JUDGE STEPHEN DAVIES
SITTING AS A JUDGE OF THE HIGH COURT

Between:

VENUSCARE LIMITED	**Claimant**
- and –	
CUMBRIA COUNTY COUNCIL	**Defendant**

Richard Oughton (instructed by **Bendles Solicitors, Carlisle**) for the **Claimant**

Ruth Stockley (instructed by **Legal & Democratic Services, Cumbria County Council**) for the **Defendant**

Hearing date: 15 November 2019
Judgment circulated in draft: 21 November 2019

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APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A paragraph 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

……..

His Honour Judge Stephen Davies

His Honour Judge Stephen Davies:

1. By this statutory challenge issued on 26 July 2019 the claimant, Venuscare Limited, seeks to quash a traffic regulation order ["**TRO**"] made by the defendant, Cumbria County Council, as traffic authority for the city of Carlisle, in respect of an unadopted highway known as Barton's Place. The TRO was made on 20 June 2019 and came into effect on 1 July 2019. It restricts access at the top of Barton's Place, leading down from Warwick Road, to pedestrian traffic only, save for some limited vehicular access exceptions, and makes the bottom of Barton's Place one way only for all vehicular traffic down to Mary Street.

2. I have also read and considered the evidence filed for and against the application, which comprised of two witness statements from the claimant's solicitor, Mr Johnson, one from a director of the claimant, Mr Moualem, and two from Mr Lewis a highways officer with the defendant.

3. I have been assisted by helpful and skilfully presented written and oral submissions from Mr Oughton for the claimant and Ms Stockley for the defendant, to both of whom I am grateful.

4. In summary, my decision is that the claim fails and must be dismissed.

5. I set out my reasons below.

The relevant statutory framework

6. The statutory power to make a TRO comes from s.1 of the Road Traffic Regulation Act 1984 ["**the 1984 Act**"] which provides, as material, as follows:

> "(1) The traffic authority … may make an order under this section (referred to in this Act as a "traffic regulation order") in respect of the road where it appears to the authority making the order that it is expedient to make it—
>
> (a) for avoiding danger to persons or other traffic using the road or any other road or for preventing the likelihood of any such danger arising, or
>
> (b) …
>
> (c) for facilitating the passage on the road or any other road of any class of traffic (including pedestrians), or
>
> (d) for preventing the use of the road by vehicular traffic of a kind which, or its use by vehicular traffic in a manner which, is unsuitable having regard to the existing character of the road or adjoining property, or
>
> (e) …
>
> (f) for preserving or improving the amenities of the area through which the road runs, or
>
> (g) …"

7. Under s.2 of the 1984 Act a TRO may "make any provision prohibiting, restricting or regulating the use of a road, or of any part of the width of a road, by vehicular traffic, or by vehicular traffic of any class specified in the order (a) either generally or subject to such exceptions as may be specified in the order or determined in a manner provided for by it …"

8. The exercise by traffic authorities of the power to make a TRO is governed by s.122 of the 1984 Act, which provides as material that:

> "(1) It shall be the duty of [the traffic authority] … 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 ….
> (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 … so as to preserve or improve the amenities of the areas through which the roads run;
> (bb) …
> (c) the importance of facilitating the passage of public service vehicles and of securing the safety and convenience of persons using or desiring to use such vehicles; and
> (d) any other matters appearing to [the traffic authority] to be relevant."

9. The claimant is entitled to question the validity of a TRO by making an application to the High Court within 6 weeks of the date on which the TRO was made, on the grounds that: (a) it is not within the relevant powers, or (b) any of the relevant requirements has not been complied with in relation to the order": paragraph 35 of Schedule 9 to the 1984 Act.

10. 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, the court may quash the order or any provision of the order: paragraph 36 of Schedule 9.

The relevant legal principles

11. There was no dispute as to the relevant principles in relation to s.122 which, happily for me, have recently been considered and authoritatively stated by the Court of Appeal in *Trail Riders Fellowship v Hampshire CC* [2019] EWCA Civ 1275, in which Longmore L.J. gave the principal judgment. He considered and, subject to one qualification, approved the summary of the law stated by Sir Ross Cranston at first instance, which he recorded at [26]:

> (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."

12. His one qualification was that he did not accept that an inference of compliance with s.122 could be drawn from the fact that the decision had been taken by a specialist committee or officer who could be taken to have knowledge of the relevant statutory powers. He said at [38] that there needed to be "actual evidence that the balancing process required by section 122 has been, in substance, conducted".

13. In the *Trail Riders* case, as in this case, reports had been placed before the decision maker to assist in making the decision. At [36] Longmore L.J. held that the question as to whether or not the right balancing exercise had been conducted should be considered by reference to the overall factual picture, including the reports which had been provided, as opposed to being limited to the statement of reasons given by the traffic authority. At [35] he held that "if the report submitted to and considered by [the decision maker] does in fact conduct the balancing exercise required by the statute that is sufficient". At [37] he suggested that conducting the balancing exercise was "not a particularly difficult or complicated exercise for the traffic authority to conduct". He noted that "it is indeed difficult to imagine that a county's Director of Economy Transport and Environment will not be acutely aware of the county's obligations (so far as practicable) to secure the expeditious, convenient and safe movement of vehicular traffic". Finally, he summarised the approach which should be adopted by traffic authorities in considering whether to make a TRO at [40] as follows:

"(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."

14. When considering the criticisms made by the claimant of the reports which were provided to the decision maker it is necessary to do so by reference to the well-established approach which the court will take to such reports which, in the context of planning decisions, have been summarised on a

number of occasions. I refer to and gratefully adopt the recent summary given by Lindblom L.J. in *Mansell v Tonbridge & Malling BC* [2017] EWCA Civ 1314 at [42]:

"42. The principles on which the court will act when criticism is made of a planning officer's report to committee are well settled. To summarize the law as it stands:

(1) The essential principles are as stated by the Court of Appeal in *R. v Selby District Council, ex parte Oxton Farms* [1997] E.G.C.S. 60 (see, in particular, the judgment of Judge L.J., as he then was). They have since been confirmed several times by this court, notably by Sullivan L.J. in *R. (on the application of Siraj) v Kirklees Metropolitan Borough Council* [2010] EWCA Civ 1286, at paragraph 19, and applied in many cases at first instance (see, for example, the judgment of Hickinbottom J., as he then was, in *R. (on the application of Zurich Assurance Ltd., t/a Threadneedle Property Investments) v North Lincolnshire Council* [2012] EWHC 3708 (Admin), at paragraph 15).

(2) The principles are not complicated. Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge (see the judgment of Baroness Hale of Richmond in *R. (on the application of Morge) v Hampshire County Council* [2011] UKSC 2, at paragraph 36, and the judgment of Sullivan J., as he then was, in *R. v Mendip District Council, ex parte Fabre* (2000) 80 P. & C.R. 500, at p.509). Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave (see the judgment of Lewison L.J. in *Palmer v Herefordshire Council* [2016] EWCA Civ 1061, at paragraph 7). The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way – so that, but for the flawed advice it was given, the committee's decision would or might have been different – that the court will be able to conclude that the decision itself was rendered unlawful by that advice.

(3) Where the line is drawn between an officer's advice that is significantly or seriously misleading – misleading in a material way – and advice that is misleading but not significantly so will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it. There will be cases in which a planning officer has inadvertently led a committee astray by making some significant error of fact (see, for example *R. (on the application of Loader) v Rother District Council* [2016] EWCA Civ 795), or has plainly misdirected the members as to the meaning of a relevant policy (see, for example, *Watermead Parish Council v Aylesbury Vale District Council* [2017] EWCA Civ 152). There will be others where the officer has simply failed to deal with a matter on which the committee ought to receive explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law (see, for example, *R. (on the application of Williams) v Powys*

> *County Council* [2017] EWCA Civ 427). But unless there is some distinct and material defect in the officer's advice, the court will not interfere."

15. More generally, by reference to well established judicial review principles, the court should normally when considering criticism of a decision limit itself to reference to the material which was actually placed before the decision maker and to the reasons which were actually given. The court should not assume that the decision maker considered material to which no reference was made or had reasons for making the decision which were not given. However, as is made clear by the cases cited in *De Smith's Judicial Review 8th edition* at 7-116, to which I was referred, this is not a hard or fast rule. In particular, the court may in appropriate cases, exercising due caution, allow evidence to be admitted in order to clarify, explain and occasionally even to add to reasons to which reference was made. Moreover, there can be no objection to evidence being adduced to explain what material was in fact before the decision maker which was taken into account: see *Hijazi* [2003] EWCA Civ 692 at [32], cited in *De Smith* at fn. 541.

16. One of the grounds relied upon by the claimant involves allegations of misdirection or mistake of material fact and absence of substantial supporting evidence. As to this ground of judicial review I was referred to the discussion in *De Smith's Judicial Review 8th edition* at 11-042 to 11-050. In particular, I was referred to the four necessary requirements to such an allegation as stated by Carnwath L.J. in the Court of Appeal in *E v SSHD* [2004] EWCA Civ 49, namely that: (1) there was a mistake as to an existing fact; (2) the fact must be objectively established rather than contentious; (3) the applicant must not have been responsible for the mistake; and (4) the mistake must have played a material, although not decisive, part in the decision or reasons.

17. It was also common ground that the court has a discretion under paragraph 34 of Schedule 9 as to whether or not to make a quashing order, although it is also the case that this discretion ought to be exercised in accordance with the principles generally applicable in judicial review cases and, in particular, only if the court is satisfied that there was no realistic prospect of any different decision having been reached even had the errors or omissions established by the claimant not occurred.

The material facts

18. Whilst there is a wealth of documentary material in the two lever arch files put before me I concentrate only on the key documents.

19. Barton's Place is a unadopted highway in the city centre of Carlisle which links two roads, Warwick Road and Mary Street. Warwick Road is a major road which connects the city centre with the M6 motorway. It is subject to a one way restriction at the junction with Barton's Place. The evidence shows that Barton's Place was constructed some time after 1913, which is when a plot of land in that area was conveyed to the Postmaster General to enable the construction of a handsome city centre Post Office building. It appears from the plan accompanying the indenture that the width of the new road at its junction with Warwick Road was intended to be only 12 feet in width and that its width would not differ materially along its length down to its junction with Mary Street. Its direction of travel was to be generally from north to south.

20. The indenture makes provision for the ownership of the land forming Barton's Place and for the conferment of private rights of way along its length. For present purposes all that needs to be said is that it is common ground that it became in due course an unadopted highway and that more recently a dispute arose between the claimant and a company known as Burges Halston Limited ["Halston"] as to whether or not the claimant has a private right of way along Barton's Place which is enforceable against Halston. That dispute is to be adjudicated upon by the First Tier Property Chamber (Land Registration) early next year but is not of any direct relevance to the instant case.

21. In the early years of this century the Post Office relocated and had no further use for the Post Office building. In 2011 Halston acquired the building and secured planning permission to redevelop, and have redeveloped, the building so that it is now used as a hotel with associated leisure facilities ["**the Hotel**"]. Halston also acquired what had been a cinema on the other side of Barton's Place ["**the Cinema**"] and secured planning permission for its demolition and redevelopment, including the provision of car parking. The Cinema has now been demolished and behind the Hotel, on both sides of Barton's Place, there is car parking both for hotel guests and the public. In the absence of any restrictions along Barton's Place the car parking facilities could be accessed either by turning into Barton's Place from Warwick Road, or by turning into Barton's Place from Mary Street, or by turning into the car park from Cecil Street to the east. However the position ever since the car parking facilities were provided has been that vehicular access into Barton's Place from Warwick Road is limited to specified access purposes, with a bollard placed in the middle of Barton's Place at the junction with Warwick Road to enforce this restriction. Moreover there is no entry to the car parking from Mary Street up Barton's Place, because vehicular access is one way only, with a barrier and subsequently a bollard being placed at the southern end of the car parking to prevent unauthorised access from this direction. In the car parking area itself there are no relevant traffic restrictions. It appears that some vehicles using the car park may wish to travel from the side to the east of Barton's Place to the side to the west. Other vehicles, both those authorised vehicles gaining entry from Warwick Road and vehicles accessing the car park from Cecil Street, may drive down Barton's Place to exit out into Mary Street.

22. The pedestrian and restricted vehicular access only section of Barton's Place from Warwick Road down to the Halston car parking area remains relatively narrow with no separate pedestrian footway. To the south of the Halston car parking area Barton's Place is relatively wider, with a separate pedestrian footway and with a more open aspect.

23. In 2014 the claimant acquired land to the west of Barton's Place and to the north of Mary Street which it has since used as a car park open to the public. Vehicles enter the car park from Mary Street. There is an exit onto Barton's Place which vehicles can use in order to travel south down to Mary Street and, but for any restrictions, could also have used to travel north onto Warwick Road. The claimant says that it is also considering redevelopment of its land and, in that context, is concerned to ensure that it maintains the public and private rights it has in relation to the use of Barton's Place, so as to ensure that the opportunities for development are not restricted in any way.

24. There has been some factual dispute as to the state and use of Barton's Place before the redevelopment took place which was the trigger for the eventual making of the TRO. In his second witness statement Mr Lewis suggested it was "narrow and uninviting [and] little used by traffic or pedestrians and hence

formal restrictions were not required" but that after the redevelopment it became more inviting and thus required restrictions. Mr Johnson and Mr Moualem produced evidence in response to say that in fact Barton's Place was regularly used both by vehicular traffic and by pedestrians, especially for access to and from the existing parking facilities. It is not possible for me to resolve any factual dispute of this nature and nor is it necessary for me to do so. As I have said, is plain that Barton's Place was and remains – certainly at the northern end – relatively narrow. Whether or not it was "uninviting" is irrelevant. It is also plain that Barton's Place would never have regularly been used as a thoroughfare, although it would doubtless have been used both by pedestrians and vehicles for access to premises and to parking and as a cut-through. There is no evidence adduced by the defendant to the effect that they ever positively considered making a TRO over Barton's Place before the redevelopment took place.

25. The first relevant documentary evidence is an email dated 11 December 2013 from a Mr Hayward of the defendant highways department to the Carlisle City Council as local planning authority in reply to a request for statutory consultation in relation to the planning applications submitted by Halston for the demolition and redevelopment of the Cinema. He recorded that at pre-application discussion stage he had raised with Halston that whilst its planning statement referred to making Barton's Place pedestrian only to the north and one way to the south, this was not shown in the drawings. He recorded that he would support the application if the drawings were amended to incorporate this and other unrelated matters and if Halston also included a "unilateral declaration that TROs to restrict the use of Barton's Place from Warwick Road to the Hotel access to non-vehicular traffic only; and existing traffic only towards Mary Street". Although something appears to have gone wrong with the syntax in this sentence it appears likely that what was being referred to was something in the nature of an expression of willingness by Halston to enter into a s.106 planning agreement.

26. However, as Mr Oughton observed, there was no express reference in the email to the reasons for seeking a TRO. Equally, as Ms Stockley submitted, it is self-evident in my view, especially given Mr Hayward's role and the purpose of statutory consultation as regards the highways department, that the reasons for doing so can only realistically have been traffic related reasons.

27. It appears that whilst following on from this email the planning application drawings were duly amended to show the required details no s.106 agreement or equivalent was entered into. No explanation other than oversight has been suggested for this omission. What did happen was that once the redevelopment was completed Halston unilaterally erected a bollard across the entrance from Warwick Road to prevent unauthorised vehicular access into Barton's Place and also unilaterally sited a barrier across Barton's Place at the end of its car park to prevent unauthorised vehicular access from that direction. The claimant objected to what it undoubtedly rightly regarded as unauthorised obstructions and sought to persuade the defendant to exercise its statutory powers to compel the Halston to remove them.

28. It is clear from the contemporaneous correspondence passing between the claimant and the defendant and between the defendant and Halston or its representatives that the position both of the defendant and of Halston was that both the defendant and Halston had concerns about the risk of accidents between vehicles and pedestrians on Barton's Place, particularly as regards vehicles exiting Barton's

Place onto Warwick Road, due to what was said to be poor visibility and high pedestrian volumes and due to the lack of a footpath at this point.

29. Ultimately, it was agreed between the defendant and Halston that an application for a TRO would be made at Halston's expense. This was done and a report ["**the first report**"] was produced for consideration by the relevant decision maker, being the County Council Local Committee for Carlisle, at its meeting to be held on 17 July 2017. Its author was a Ms Dodds, a traffic management officer with Cumbria Highways, and it was signed off by Mr Donnini the corporate director of economy and highways. Attached to the report was a plan showing the area and the proposed restrictions. Otherwise there were no background papers supplied.

30. The first report explained in its executive summary that its purpose was to advise the committee of the "requirement to implement a TRO on Barton's Place … [to] implement a one way restriction on part of Barton's Place and prohibition of motor vehicles, except for access, on the other part". It recommended that the committee should authorise proceeding with a statutory consultation and then to implementation "subject to there being no unresolved representations received". It stated that this proposal supported the priorities of the local plan, being to provide "safe and well maintained roads and an effective transport network".

31. The section headed "Background" received the most attention in submissions. I refer to the particularly relevant parts of this section as follows.

    (a) It was stated at [4.2] that "as a result of the demolition of [the Cinema] Barton's Place has effectively now been incorporated into the car park of [the Hotel], although the public highway rights remain". This sub-paragraph is the subject of ground 3 and I will have to consider it in more detail later.

    (b) Reference was made at [4.3] to the planning application regarding the Cinema. This recorded that: (i) the defendant's response to the application had requested a unilateral declaration from Halston to put "appropriate TROs in place" to restrict the use of Barton's Place from Warwick Road to the Hotel for pedestrian traffic only and exiting traffic one way only; and (ii) Halston had provided a revised drawing with the required statement which "satisfied the defendant's development management team that the requirements for the necessary TROs would be met". Whilst it may be said that this is no more than a statement of fact, it is clear in my judgment that it would have conveyed the obvious implication to any member of the Committee reading the report that the defendant's development management team must have done so because it believed that the TRO was required for traffic related reasons. It is also clear from the report when read as a whole that Mr Donnini as the director of the defendant's highways department agreed with this and was recommending the TRO to the committee on that basis.

    (c) Reference was made at [4.4] to: (i) the northern section of Barton's Place currently being used by pedestrians only as an access to the car park and to Halston having erected a bollard at the junction of Barton's Place and Warwick Road to prohibit vehicular use; and (ii) the southern section currently being used as a one way exit from the Hotel car park. This sub-paragraph is also the subject of ground 3.

(d) Reference was made at [4.5] to the introduction of the TRO being "necessary" in order to "legally prohibit and restrict the current vehicle movements along Barton's Place and to allow the bollard and barrier to remain in situ". Although this could have been more clearly worded, it is clear in my judgment that what is being referred to as the "current vehicle movements" can only be the vehicle movements without the restrictions imposed by the bollard and the barrier. It was apparent from the report as a whole that the proposal was to make a TRO which would have the same legal effect as the bollard and the barrier had on the ground. There was never any intention further to prohibit or restrict vehicle movements. That conclusion is reinforced by the two options identified in paragraph 5 of the report which identified that if the TRO was not agreed the only other option was to remove the bollard and barrier as unlawful obstructions. It follows in my judgment that this sub-paragraph made it sufficiently clear to the informed reader that the view of the highways department was that the TRO was necessary in order to ensure that the existing position, necessary for traffic reasons, was regularised.

(e) It was recorded at [4.6] that the Halston had agreed to pursue the TRO at their expense to "support the required restrictions on Barton's Place and to enable the continued extension proposals of the Halston".

(f) It was explained at [4.7] that there would be a retention in the pedestrian area for access for vehicles to the Halston where not otherwise available, for example for deliveries and for utilities access.

32. Under section 7, headed "Legal Implications", the committee was specifically advised that the reasons specified under s.1 of the 1984 Act which made it expedient to make a TRO were grounds (a) – avoiding danger to persons or other traffic using the road – and (f) – preserving or improving amenities. The committee was also specifically advised that they were required to take into account the matters specified in s.122(2) in making the decision, those factors being set out in full in this section of the report.

33. The defendant has produced a minute of the meeting which records that the report was considered by the members and that it was resolved that approval to be given to commence the statutory consultation procedure. The statement of reasons which were required by statute to authorise this process recorded that the defendant considered that it was expedient to propose to make the TRO for three reasons: (a) avoiding danger to persons or traffic using the road; (b) preventing unsuitable use by vehicular traffic; (c) securing the expeditious, convenient and safe movement of vehicular and other traffic (including pedestrians) and the provision of suitable and adequate parking facilities off the highway.

34. In his second witness statement Mr Lewis said that "from my recollection of attending the local committee, a summary of the statement of reasons was expressed to the committee during the presentation and consideration of the report which also included reference to the proposal plans and the nature of the restrictions and their reasons for implementation .. being to maintain safety for all road users of Barton's Place and due to the different infrastructure on Barton's Place to split the lane into 3 sections with different restrictions to achieve this objective".

35. Mr Oughton challenged the admissibility of this part of the witness statement on the basis that it was an impermissible attempt to introduce evidence as to matters put before the committee which were not evidenced by the contemporaneous documentation. I do not accept this. I do acknowledge that the evidence is in very general terms. Indeed, I am not entirely sure whether he is referring to the first meeting or the second meeting. He does not provide any detail as to precisely what was said or by whom. He does not even clearly explain his role or why he attended the meeting, nor does he refer to or produce any contemporaneous note or record of his attendance. However, I consider that I can place some limited weight on the statement on the basis that it simply confirms what would be expected anyway of a committee which was properly and conscientiously performing its statutory functions, which is that there was at least some oral explanation and discussion as to the reasons for the proposal, rather than a simple rubberstamping exercise. The evidence is admissible on the basis of the decision in *Hijazi* referred to above that it is not objectionable for a statement to be made which identifies the material taken into account in the course of the decision making process. It does not introduce any significant new material or reasons.

36. The result of the statutory consultation was that only one objection was received, that coming from the claimant. In the course of the discussions which followed it was agreed that pending the resolution of these objections the defendant should make a temporary TRO which made the whole of Barton's Place one way only for vehicular traffic from Warwick Road down to Mary Street. This temporary TRO was made on 9 February 2018. Since the period of any temporary TRO cannot exceed 18 months it expired on 9 August 2019.

37. In the meantime, the defendant considered the claimant's objections and a second report ["**the second report**"] was produced by Ms Dodds and signed off Mr Donnini for consideration by the County Council Local Committee for Carlisle at its meeting to be held on 31 May 2018. It attached the previous report and the minute of the June 2017 meeting and it attached the same plan as previously showing the area and the proposed restrictions. Again, there were no other background papers.

38. Its executive summary recorded that its purpose was to advise the committee of the outcome of the statutory consultation and to recommend that the committee should overrule the representations made by the claimant.

39. Section 4, again headed "Background", referred to the first report and then summarised the claimant's objections, which were recorded as being that: (a) the TRO would prevent access to the claimant's car park; (b) the TRO would interfere with the public law access and private right of way along the whole of Barton's Place; (c) the access arrangements gave the Halston's car park a commercial advantage over the claimant's car park. It recorded that legal advice had been obtained on these grounds and that based on the outcome of that advice as summarised in section 7 below it was recommended that the objections be overruled and the TRO brought into effect.

40. Section 5 stated that the options for the committee were either to approve the TRO or, if not, to "suggest alternative traffic safety measures".

41. Section 7 was again headed "Legal Implications". In this section:

(1) In paragraph 7.1, reminding the committee of the need to consider whether it was expedient to agree to the recommendation, it specified the same three reasons as stated in the notice accompanying the statutory consultation. The first was s1(1) ground (a) – avoiding danger to persons or other traffic using the road. The second was section 1(1) ground (d) – preventing unsuitable use by vehicular traffic. The third was stated to be to "secure the expeditious, convenient and safe movement of vehicular and other traffic (including pedestrians)". This was in fact a reference to the duty imposed by s.122(1) which was, therefore, in substance brought to the attention of the Committee.

(2) In paragraph 7.2 the same reference as previously was made to s.122. In the case of this report s.122(2) had already been referred to in paragraph 3.1, in which the committee was asked to bring the TRO into operation "having taken into consideration the matters contained in s.122(2) …".

(3) In paragraph 7.3 the first objection from the claimant was addressed and disposed of on the ground that access would not be prevented under the TRO.

(4) In paragraph 7.4 the second objection from the claimant was addressed on the basis that: (a) the defendant was able to make the TRO notwithstanding the private right of way but should take into account the requirements of all those with access needs to Barton's Place; (b) any public need to access the claimant's car park was addressed by ensuring that this access continued but was to be "balanced against the traffic reasoning for making the TRO".

(5) In paragraph 7.5 the third objection was addressed on the basis that the commercial impact of the TRO was not a relevant TRO consideration.

42. The defendant has again produced a minute of the meeting which records that the report was received by the committee and that it was resolved that the claimant's representation be overruled and the TRO brought into operation "having taken into consideration the matters contained in s.122 of the [Act]".

43. The TRO itself was accompanied by a statement of reasons, which specified the same three reasons as appeared in the previous statement of reasons and paragraph 7.1 of the second report.

44. It is convenient at this point to consider what the committee would have known about the position on the ground. In addition to what was stated in the reports themselves they did of course also have before them the plan. Although it was not to scale it was taken from the local Ordnance Survey plan. Anyone looking at the plan would see the width of Barton's Place as compared to the width of Warwick Road and Mary Street. Whilst the plan did not however purport to record the changes which had been made since the date of the relevant ordnance survey, i.e. the development of the Hotel and demolition of the Cinema and the car parks operated by Halston and by the claimant, those matters were of course referred to in the reports anyway.

45. Moreover, I am satisfied that I can fairly and properly infer that the committee members, who must of course have been familiar with the city of Carlisle, particularly its city centre, would have been familiar in general terms with: (a) the fact that Barton's Place was narrow when compared with

Warwick Road and Mary Street; and (b) the fact that the Post Office had been converted to a Hotel, that the Cinema had been demolished, and that the land to either side of Barton's Place south of the Hotel was being used for parking. I am also satisfied that I can fairly and properly infer that the committee members would also have been aware from the material before them and from their own general knowledge of the city centre gained both through their general knowledge and their role as members of the committee, that: (a) Barton's Place could not be described as anything other than a narrow, minor road linking two more major roads; (b) given the surrounding road layout and development there would have been no particular reason for vehicles to use Barton's Place other than to gain access to the Hotel and its car parking or to the car park owned by the claimant or as a cut through.

46. The committee knew from the first report at [4.2] and [4.3] that the defendant's development management team considered that the proposed TRO was required in order to restrict traffic along Barton's Place in the context of the development of the Hotel and the proposals to demolish and develop the Cinema which had resulted in the area behind the Hotel being used for car parking. The committee also knew from the first report at [4.4], when read in the context of what the report said as a whole and, very likely, from their own knowledge, that the position on the ground since the development mirrored the position being recommended by the proposed TRO.

The Grounds

47. There are five separate grounds of challenge as amended. They may be summarised as follows:
    - Ground 1: There were no or no sufficient traffic management reasons under s.1 of the Act either for making the TRO or taken into account when making the TRO.
    - Ground 2: The reasons for making the TRO were irrational.
    - Ground 3: The defendant made a mistake of fact and had regard to irrelevant matters when making the TRO.
    - Ground 4: The defendant failed properly to undertake the balancing exercise required by s.122 of the Act.
    - Ground 5: The defendant had insufficient regard to the claimant's rights, especially given the impact upon them, when making the TRO.

Ground 1: There were no or no sufficient traffic management reasons under s.1 of the Act either for making the TRO or taken into account when making the TRO

48. It is rightly common ground that it is a threshold condition for making a TRO that the traffic authority is satisfied that it is expedient to make the order for one or more of the purposes specified in s.1 of the Act. It is also rightly common ground that the court can and should have regard to all material put before the decision maker when considering whether the traffic authority was indeed satisfied that there were such purposes when making a TRO.

49. The claimant's primary argument is that nothing in the material put before the committee provided any basis for a conclusion that any of the specified purposes were satisfied. The claimant says that there was no evidence of any pre-existing difficulties with the unrestricted use of Barton's Place and no

evidence as to how the proposed TRO would overcome any such difficulties and satisfy the specified purposes.

50. I agree that the reports do not make express reference to the particular danger or dangers arising from the unrestricted use of Barton's Place or how the TRO will avoid such dangers, nor do they identify how the existing vehicular use is unsuitable or how the TRO will address such unsuitability.

51. However, as I have already recorded, there can be no doubt from the content of the reports that the committee were advised of the need to be satisfied that it was expedient to make the TRO for the purposes specified and identified as falling within s.1(1) and there can be no doubt from the content of the reasons given both for the statutory consultation and the TRO itself that the committee expressed itself satisfied that the TRO was expedient for those purposes.

52. Mr Oughton submitted that these reasons had all the hallmarks of pro-forma justifications and were neither manifestly self-evident nor supported by any or any sufficient evidence or reasoning.

53. I do not accept this submission that the reasons given in the order itself can simply be rejected as amounting to "pro-forma justifications". It would be wholly wrong to do so in the absence of a proper basis for doing so. In any event it is clear in my judgment that the committee could have been in no doubt that they were being asked to approve the TRO for the purposes specified in the reports and stated in the reasons and that there is no reason to consider that they did not do so. This is apparent from (a) the clear references in both reports to the factors appearing in s.1; (b) the clear references in the reasons both at statutory consultation stage and at the stage of making the TRO; (c) the content of the second report at paragraphs [5.2] [7.4] and [7.5] where reference was made variously to traffic safety measures, traffic reasons and traffic considerations. I should take that evidence at face value unless good reasons are shown for not so doing and, in my view, no such reasons are evident.

54. There is no basis for a suggestion that the TRO was being sought or made other than for genuine and substantial traffic reasons. It was made clear at paragraph 7.5 of the second report that commercial impacts were not relevant considerations. It cannot be said by reference to the content of the reports, and paragraph 4.3 of the first report in particular, that the reason for recommending or making the TRO was because the defendant believed that it (or, more likely perhaps, the City Council as the local planning authority) was under some legal or other obligation to assist the Halston to do so because of the discussions which had taken place at the planning permission stage. Arguments based on paragraphs 4.3 and 4.6 of the first report seek to take these individual paragraphs in isolation and out of context, without reading the reports fairly and as a whole. Paragraph 4.3 is not only recording the context in which the proposed TRO first came about but also explaining, importantly, that it was a proposal which had emanated from and indeed been insisted on by the defendant's development management team as part of the planning scrutiny procedure. This is wholly consistent with the reasons being traffic reasons. Paragraph 4.6 of the first report was simply recording why the Halston had agreed to pursue the TRO at its own expense, rather than suggesting that the committee was obliged to approve it on that basis.

55. I reject the submission that the absence in the reports of a clear identification of the particular dangers or unsuitability and a clear identification of the grounds for considering how the proposed TRO would

address those dangers or unsuitability leads to a conclusion that there was no or no sufficient evidence before the committee which enabled them, or could have enabled them, to form the view that it was expedient to make the TRO by reference to the specified purposes. By reference to the overall evidence which I am satisfied was before the committee members, and which there is no reason to think they did not take into account, it is obvious in my judgment that the purposes behind the first restriction in the first area (no vehicular access save for limited access reasons) and for the second restriction in the second area (one way vehicular traffic only) were, as was stated in the reasons, both the sub-section 1(1)(a) purpose, namely avoiding danger to persons using the road, and the sub-section 1(1)(d) purpose, namely preventing the unsuitable use by vehicles. In that respect is of note that there was no suggestion in the only objection received, from the claimant, that there was no justification from a traffic perspective for making the TRO.

56. By reference to the principles summarised by Lindblom L.J. in *Mansell* as noted above there is no question in my judgment of the advice given in the reports being wrong or misleading. The most that can be said is that no specific advice was given in relation to the factual justification for the TRO. However there was, as I have recorded, sufficient reference in the reports to the circumstances as they existed in relation to Barton's Place and the reasons why the TRO was being proposed for the committee members to be able to be satisfied as to the factual justification for making the TRO. I am entitled to and do assume, as was the report writer, that the committee members had local knowledge and did not need to be told about matters about which it could safely be assumed they were well aware. Insofar as necessary I am entitled to and do assume, supported by the evidence – albeit in general terms – of Mr Lewis, that there must have been some discussion of and explanation for the proposed TRO at the meeting. I would be extremely reluctant to hold that a failure to include, in reports addressed to a specialist committee with local knowledge, reference to the factual justification for making the TRO in what was a straightforward case should invalidate their decision. I would also be extremely reluctant to hold that a simple failure to include in the minute a reference to the fact that there was some consideration and discussion of the reports should invalidate their decision. I do not consider that there is any proper basis for doing so.

57. I am firmly of the opinion that this ground seeks to over-complicate and over-formalise the need for consideration of a question which was really not particularly difficult or complicated. In my judgment there could have been no basis for complaint whatsoever had the reports simply recorded what had been said by the defendant both to the claimant and to Halston in the correspondence pre-dating the reports and the meetings as noted in paragraph 28 above, namely that it was concerned about the risk of accidents between vehicles and pedestrians on Barton's Place, particularly as regards vehicles exiting Barton's Place onto Warwick Road (with what was said to be poor visibility and high pedestrian volumes) and the lack of a footpath at this point, and that the TRO was proposed to provide a legal basis for the traffic safety measures which were already present on the ground for those purposes. I have no doubt that the committee members were fully aware of these essential points without the necessity of the former being spelled out in the reports.

58. Accordingly, I reject ground 1. If, contrary to this finding, I had held that the reports were deficient because they failed to refer to the relevant factual circumstances which justified the conclusion that it was expedient to make the TRO for the specified statutory purposes, then I would have had no hesitation in declining to quash the TRO for this sole ground on the basis that I can be, and am,

satisfied that: (a) the specified statutory purposes did indeed exist; (b) the committee must have been satisfied that they existed from what they knew from the reports and their own local knowledge of the position on the ground; (c) there is no likelihood whatsoever that their decision could or would have been any different had the further material which on this analysis was required to be included in the reports actually been included.

Ground 2: The reasons for making the TRO were irrational

59. By this ground the claimant argues that the differing treatment of the three sections of Barton's Place demonstrates that the decision to make the TRO was irrational in that it does not address in a rational way the specified purposes identified in the reasons for making the TRO.

60. I have no hesitation in rejecting this ground for the following reasons, bearing in mind the test for establishing irrationality or *Wednesbury* unreasonableness is that I must be satisfied that no committee acting reasonably or rationally could have approved the TRO either at all or in the proposed terms.

61. The claimant suggests that the two way traffic allowed to the northerly section of Barton's Place is more dangerous than the one way traffic allowed by the temporary TRO or the one way traffic restriction introduced by the TRO to the southern section. This argument wholly ignores the fact that the two way traffic is limited to traffic for specified restricted access purposes and, therefore, that in reality very limited vehicular traffic will be encountered in this area. It also seeks to draw a false comparison between the situation as it now is and the situation when the temporary TRO was in force, whereas the true comparator is between the situation as it now is and the situation before any TRO was in force, albeit that it is true that the committee was entitled, as it was advised in the second report, not to follow the recommendation and propose their own safety measures. A decision to allow the limited restricted access traffic to exit onto Warwick Road, as opposed to making it one way only, is a matter for the judgment of the committee and not for the court. It cannot be said to be a decision no reasonable committee acting rationally would make.

62. The claimant also suggests that the lack of any restrictions in the middle Halston car park section is more dangerous than one way traffic. However, the only vehicular traffic using this section of Barton's Place will be either traffic seeking to cross over from the car park on one side of Barton's Place to the other, or traffic existing the car parks down Barton's Place towards Mary Street or, possibly, any traffic permitted to enter from Warwick Road and then seeking either to use the car parking or to exit down Barton's Place. It is plain from the evidence, including the photographs produced by Mr Moualem, that this area is more open than the section to the north and that the separation between the car parking area and Barton's Place is clearly marked on the ground. Again I am satisfied that it is not a decision no reasonable committee acting rationally would have made.

63. The claimant does not appear to quarrel with the one way restriction in the lower section, nor is there any basis for so doing. Complaints about whether there is or should be a barrier or a bollard between the middle and lower sections are wholly irrelevant to the TRO in the absence of evidence that pedestrians would be inconvenienced by either.

Ground 3: The defendant made a mistake of fact and had regard to irrelevant matters when making the TRO

64. The first limb is a complaint about the wording of paragraph 4.2 of the first report as recorded above. However, in my judgment there is no basis, reading both reports fairly and as a whole, for a submission that this was intended as and must have been understood as a statement of fact that Barton's Place as a physical feature on the ground had entirely disappeared. In my view that can only have been understood as referring to the fact that as matters then stood on the ground the middle section of Barton's Place was effectively being used solely for car parking purposes. It would have been obvious to the committee reading the second report, referring as it did to the claimant's own position, that this was not purporting to suggest that this was the position along the whole length of Barton's Place. On that basis there was no mistake.

65. In any event, even if that had been the impression conveyed, it cannot in my judgment have been a material mistake. The sub-paragraph immediately acknowledged that the public highway rights remained. There was never any suggestion that pedestrian rights to travel from the very top to the very bottom of Barton's Place would be interfered with or that vehicular rights to travel one way down the southern section of Barton's Place would be interfered with. It was not being suggested, nor could it rationally have been thought to be suggesting, that this reference in some way provided a separate justification for the TRO.

66. The claimant also complains about the failure at paragraph 4.4 of the first report to make any reference to its use of Barton's Place. It is true that there is no express reference in that report either to the claimant or to its car park or to the use of Barton's Place made by those using its car park. However, this complaint goes nowhere because the claimant's position was of course addressed in the second report and, as is common ground, the reports have to be read together.

67. The claimant also complains about the wording at paragraph 4.5 of the first report but, as I have said above when referring to that paragraph, properly read it was not suggesting nor could it have been reasonably thought as suggesting that the current permitted vehicular movement along Barton's Place was "informal" as opposed to being as of right along Barton's Place as a highway.

Ground 4: The defendant failed properly to undertake the balancing exercise required by s.122 of the Act

68. In my judgment there can be no possible argument that this balancing exercise was not undertaken. The following points are in my view conclusive:

    (1) Clear and accurate advice was given in the first report and again in the second report of the need to take into account the relevant s.1(1) and s.122(2) factors.

    (2) In paragraph 7.1 of the second report the duty imposed by s.122(1) was expressly referred to, albeit not expressly by reference to s.122(1).

    (3) In paragraph 7.4 of the second report the need to balance the access needs of the public against the traffic reasons for making the TRO was expressly referred to.

(4) In paragraph 7.5 the committee was reminded that traffic considerations should be at the heart of the decision, with reference being made to s.122 as a whole.

(5) The minute of the second meeting records in terms that the matters contained in s.122(2) were taken into consideration.

(6) The statement of reasons for making the TRO again expressly refers to the duty imposed by s.122(1), although again albeit not expressly by reference to s.122(1).

69. Whilst it is true that the reports did not specify in terms that it was necessary to conduct a "balancing" exercise in relation to the duty imposed by s.122(1), the purposes identified in s.1(1) and the matters specified in s.122(2), there can be no question in my judgment of the advice given in the reports being in any way materially wrong, misleading or incomplete.

70. Again, in my judgment, one must look at the question in a reasonable way bearing in mind, as Longmore L.J. said in *Trail Riders*, that one looks to substance and not to form and that it was "not a particularly difficult or complicated exercise for the traffic authority to conduct". The question should not be considered in a factual vacuum. As I have said, there was only one objection received and that was from the claimant. Its objections were carefully recorded and addressed in the second report and, where they raised matters relevant to the balancing exercise, they were addressed in paragraph 7.4 with specific advice to undertake that balancing exercise. There was no suggestion by anyone else that there were particular reasons for considering that making the TRO would conflict with the (qualified) duty in s.122(1) to secure the expeditious, convenient and safe movement of vehicular traffic along Barton's Place, so that the nature and extent of the proposed interference would conflict with the traffic safety reasons for making the TRO. Thus there were no other particular reasons which the authors of the report needed to refer to or to advise the committee that they would need to be addressed as a part of the necessary balancing exercise between the interference and the safety benefits. I would be extremely reluctant to hold that the decision should be invalidated because of a failure to include reference in the reports or in the minutes to what would in this case have been essentially an arid and essentially theoretical exercise. I have no doubt that in substance the balancing exercise was carried out so far as necessary and appropriate to the particular facts of the case.

Ground 5: The defendant had insufficient regard to the claimant's rights, especially given the impact upon them, when making the TRO

71. It is submitted that: (a) the claimant's interest was not limited to its current position as car park operator but extended to its interest as owner and prospective redeveloper of its land, where unrestricted access in both directions along the whole length of Barton's Place was, or may be, important; (b) the TRO has permanent effect (subject to the admitted power to revoke or supersede); (c) the practical impact of the TRO is akin to a permanent closure order; (d) in the circumstances, greater justification was required for making this TRO in these circumstances; (e) the reasons given for making the TRO did not satisfy this requirement for greater justification.

72. Mr Oughton realistically accepted that this was not his client's strongest point and I consider that he was right to do so. As Ms Stockley submitted, the defendant was under no statutory or other

obligation to consider the commercial impact upon the claimant of making the TRO, particularly insofar as it related to future use which was not the subject even of any application for planning permission and which had not been adverted to in the objections raised. If the claimant subsequently obtained planning permission for redevelopment and was able to demonstrate a proper basis for revocation then that would afford it a sufficient remedy. The practical impact of the TRO was no more akin to a closure order than was the TRO made in the *Trail Riders* case which prevented use of the green lanes in question by motor cars and motor cycles. In the circumstances there was no basis for greater justification, whatever that might mean. The balancing exercise conducted under s.122 would, when properly conducted, have given appropriate regard to all relevant factors. In my judgment that is what happened in this case.

73. Accordingly, I am satisfied that there is no merit in this ground either.