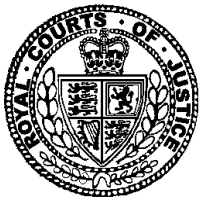

Neutral Citation Number: [2020] EWHC 2293 (Admin)

Case No: CO/80/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/08/2020

Before :

MR JUSTICE DOVE

- -

Between :

PATRICIA STUBBS (on behalf of Green Lanes Environmental Action Movement)	**Claimant**
- and -	
Lake District National Park Authority	**Defendant**
-and-	
(1) Cumbria County Council (2) National Trust for Places of Historic Interest or Natural Beauty (3) The Trail Riders Fellowship	**Interested Parties**

- -
- -

Ms Katherine Barnes (instructed by **Irwin Mitchell LLP**) for the **Claimant**
Mr Ned Westaway (instructed by **Julie Wood, Authority Solicitor Lake District Naitonal Park Authority**) for the **Defendant**
No appearances or representation for 1st and 2nd Interested Parties
Mr Adrian Pay (instructed by **DMH Stallard LLP**) **for the 3rd Interested Party**
Hearing dates: 2nd and 3rd June 2020

- -

Approved Judgment

Judgment Approved by the court for handing down.

Mr Justice Dove :

Introduction

1. The claimant brings this case on behalf of an organisation known as the Green Lanes Environmental Action Movement ("GLEAM"). GLEAM is an unincorporated association which campaigns to protect green lanes and the rights of walkers and others to use them without danger, difficulty or inconvenience. They are opposed to green lanes being used inappropriately for off-road driving. The third interested party is a national organisation founded in 1970 which has amongst its objectives the preservation of the rights of motorcyclists and others to use vehicular green lanes as a legitimate part of access to the countryside.

2. The defendant is the national park authority for the Lake District National Park. The first interested party is the highway authority for the two highways within the defendant's administrative area known as Tilberthwaite Road and High Oxen Fell Road. Parts of these highways are unsealed (or unsurfaced), and in 2017 a project was initiated between the defendant and the first and second interested parties to establish the most appropriate long-term management solution for the unsealed sections of these roads, including assessing the relevance of a Traffic Regulation Order ("TRO"). Having analysed the evidence obtained during the course of this project, the question of the future management of the unsealed sections of these roads was reported to the defendant's Rights of Way Committee on the 8 October 2019. An Assessment Report ("AR") was presented to the members of the committee to assist them in the decision that they needed to reach. The members decided to adopt the recommendation put to them in the AR which included the conclusion that it was inappropriate to impose a TRO at the time. The claimants challenge that decision.

3. This judgment commences by setting out the relevant material contained in the AR underpinning the decision which the members reached. The grounds are then set out in brief. It then sets out the law and policy background in relation to ground 1 and reaches conclusions in relation to its merits, prior to turning to the law and policy materials relevant to grounds 2 and 3 and reaching conclusions in respect of those issues. At the outset I would like to put on record my thanks to all counsel and their solicitors who contributed to the presentation of the written material in this case which has greatly assisted the court. Further, I would wish to place on record my gratitude to counsel for their helpful written and oral submissions.

The defendant's decision

4. The two highways with which this case is concerned are situated in the Langdale and Coniston Valleys of the Lake District. In the AR it was noted that motor vehicle usage of both of the roads had increased over the past 20 years, and maintenance of the surface and drainage had declined. This, combined with three severe weather incidents in 2005, 2009 and 2015 led to a deterioration in the surface of Tilberthwaite Road, in particular such that agricultural traffic was having difficulties accessing land for farming purposes. Against this background the defendant was requested by an amenity group to make a TRO prohibiting the use of the unsealed portions of the highways by motor vehicles. For reasons which are set out below, the defendant has power to make TROs in relation to unsealed highways of the sort concerned in this case.

5. As part of the project to investigate the request to impose a TRO, a variety of different types of survey were undertaken alongside monitoring on a comprehensive basis. The nature and extent of the usage of the highways were investigated, along with social surveys of users of the highway. Physical surveys were undertaken, including before and after works of repair that were undertaken to the Tilberthwaite Road as part of the project.

6. The AR noted that it was extremely likely that there were public rights to use the unsealed portions of the highway with motor vehicles. Although there was a widespread belief amongst users and members of the public that the unsealed sections of the roads were footpaths or bridleways, the AR concluded that they were not, and that there was an existing public right of access for use by mechanically propelled vehicles over both the sealed and unsealed lengths of both roads. As part of the background to the decision the AR noted the purposes for which National Parks were designated, as described in section 5(1) of the National Parks and Access to the Countryside Act 1949 which is set out in full below. The AR went on to record the special qualities of the Lake District National Park which had led to its designation and which needed to be considered when determining whether and in what way to exercise the defendant's powers. In particular, the AR set out what is known as the Sandford Principle, which is derived from the Report of the National Park Policies Review Committee, chaired by the Reverend Right Honourable Lord Sandford DSC which reported in 1974 ("the Sandford Report"). The AR describes the principle in the following way:

> "1.10 The Sandford Principle
>
> 1.10.1 The Sandford Principle as written in 1974 states that "Where irreconcilable conflicts exist between conservation and public enjoyment, then conservation interest should take priority", and this has been updated in 1995 to say "If it appears that there is a conflict between those purposes (as set out at 1.8.2 above) [the National Park Authority] shall attach greater weight to the purpose of conserving and enhancing the natural beauty, wildlife and cultural heritage of the area". Or, in the words of UK National Parks*: "If there is a conflict between protecting the environment and people enjoying the environment, that can't be resolved by management, then protecting the environment is more important."*"

7. The AR rehearsed all of the areas of activity which had been undertaken as part of the project, together with the findings which had been arrived at. In addition the AR was supported by a comprehensive suite of appendices setting out in detail the various areas of work which had been completed as part of the project. The AR went on to set out the responses to consultation which had been received from various parties interested in the decision. At section 12 of the AR the officers commenced discussion of the merits of the various options available to members which were for decision. This discussion commenced with an examination of the various grounds under which a TRO might be made in respect of the highways. The AR provides as follows:

"12.2 In considering the role of a TRO the best starting point for a discussion is to look at the grounds under which we can make a Traffic Regulation Order.

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.

The issue of safety has been raised by a number of people. GLEAM have referred to the dangers of riding horses over bare rock, difficulties in passing traffic, danger from fast-moving vehicles, and flying chippings being thrown up by motorbikes.

We have no actual evidence of any accidents, incidents or injuries to any users of either of these roads, which are largely unconfined in width. GLEAM (paragraph 46, Appendix 2.4) have provided links to videos and timings showing walkers having to move off the Tilberthwaite Road to avoid motorbikes. But watching these videos at the recommended timings merely shows walkers stepping to one side- much as they would if they were approached by mountain bikes or horses: there does not appear to be any animosity shown by the walkers who appear to be quite tolerant, and safe, passing something coming in the opposite direction.

There are also complaints about the risks posed to walkers by mountain bikers – but again, we have no direct evidence of any incidents or accidents. Studies elsewhere with regard to conflicts between users have generally tended to show that the perception of danger when creating mixed use routes is far greater than the resultant reality once the routes have been created.

B For preventing damage to the road or to any building on or near the road.

Damage to the road surface is one of the main [original] issues raised by the campaign, the petition threads, and by a large proportion of those completing the online surveys. The main issue raised is damage caused to the surface through 4WD use – as there is little evidence of damage from other users. This is discussed in section 13 below.

No issues have been raised with regard to damage to any buildings on or near the roads caused by vehicular use of the roads. One field wall was becoming undermined through erosion, and was repaired by the National Trust, crowd-funded by GLASS and the TRF (MPV users).

C For facilitating the passage on the road or any other road of any class of traffic (including pedestrians).

Prohibiting one type of traffic may arguably make it easier for other types-but there is little evidence to show that this would be the case. Issues of safety have been raised through our surveys, and this is discussed above.

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

With regard to the suitability an existing character of the road-the unsealed, stone bound nature of the road lends itself to use by 4WD and motorbikes. That is, the traffic wishing to use the road is suited to the physical character of the road (which was previously used by quarry traffic, which is physically heavy in nature. With regard to the adjoining property, this is a similar ground as H (below) – as the unsuitability of vehicular / motorbike traffic is one of the key elements with regard to natural beauty.

E (without prejudice to the generality of paragraph (d) above) for preserving the character of the road in a case where it is specially suitable for use by persons on horseback or on foot.

These are public roads, with vehicular rights over them. All the MPV usage is by virtue of it being a public road, including that by the farmers. It is quite difficult to define what the 'character of these roads' are – but it would be fair to say that the main character is that of an unsealed stone-based track.

We have not identified any criteria strong enough to show that these roads are more specially suitable for these users that any other surrounding road or highway. In addition, any prohibition under this provision would have to consider cyclists. It is also the case that there are just sub-sections of longer roads, half of which are tarmac.

F For preserving or improving the amenities of the area through which the road runs.

This is best addressed alongside paragraph H (below), as it is difficult to define amenities other than through the special qualities, natural beauty and other aspects as discussed later.

G For any of the purposes specified in paragraphs (a) to (c) of subsection (1) of section 87 of the Environment Act 1995 (air quality).

> Although a large number of people have commented on air pollution (and carbon / fuel usage / climate change), it is not really credible that usage of these two roads contributes in a significant way to the overall air quality. Our on site surveys show that the vast majority of walkers and cyclists using this route had driven to the start of their walk or ride, and will by definition have contributed to air pollution. And to prohibit vehicles from just these two roads without prohibiting vehicles from other roads (sealed or unsealed) in the locality would not achieve anything. It is also true to say that the vehicles currently using these roads will still exist and will still travel on other public roads, even if they are prohibited here – and so will still contribute to overall pollution levels. However, the real issue in relation to fumes and pollution is in the context of the impact on other users' enjoyment and amenity – which is discussed later.
>
> **H For the purpose of 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 or the study of nature in the area. This includes conserving its flora, fauna and geological and physiographical features.**
>
> This is the main area of discussion, and is addressed in detail later.
>
> **12.3 Conclusion for grounds A, C, E, G**
>
> 12.3.1 On the present information, it would not be appropriate to impose any traffic regulation order on the grounds **A**, **C**, **E**, or **G** as listed above. Discussions on grounds **B** and **D/F/H** follow."

8. As set out in the AR, in the light of the conclusion that a TRO could not be justified on grounds A, C, E or G the AR went on, firstly, to examine ground B in detail. Ground B relates to the prevention of damage to the road. The officers noted that consultation responses included observations about the damage which was being caused by the vehicles to the road surface. The AR then went on to consider each of the highways individually, and noted in relation to High Oxen Fell Road that the inspections and the photographs showed limited signs of damage to the surface which were purely attributable to recreational vehicles. Monitoring since 2017 had not shown any significant degradation as a consequence of the current levels of use of the road. In respect of High Oxen Fell Road the officers concluded that "there simply does not appear to be much evidence, if any, that a prohibition would be necessary or appropriate for the purposes of preventing damage to the road".

9. In relation to the Tilberthwaite Road, officers noted that the position was different, and that there had been obvious degradation of the surface over time in some sections. This was likely to have been the consequence of a combination of increased usage of the rights of way in general including mountain biking, increased four wheel drive vehicle usage, three major weather incidents and a general increase in the severity and frequency of inclement weather and also the cessation in around 2006 of any minor repair works being carried out on the route and a reduction in management and

monitoring of the vehicular use following the termination of this activity in 2007. Having examined the evidence in relation to the Tilberthwaite Road over time the officers conclusions are expressed as follows:

> "13.8.16 The implication is that if the drains and surfaces had been maintained, much of the surface damage may/would not have occurred in the first place. And consequently, now that the road has been rebuilt, with vastly improved drainage, so long as a proper maintenance regime is put in place, is no reason that the surface should not be adequately preserved in the future.
>
> 13.8.17 It is also notable that we had not received any significant complaints from walkers, horse-riders, or cyclists that they were finding the route difficult to use. Once the petition started, we did receive adverse comments about damage to the surface-but again, few of them were actually directed around any issues of difficulty of use, they were more along the lines of "*the surface is wrecked by vehicles*"
>
> 13.8.18 The repair work was carried out because the farmer was having difficulty in using the public road to access his land. It was not carried out to improve the road for walkers, cyclists, or horse-riders – that was a by-product. In fact, the repairs were the subject of vociferous complaints from the mountain biking sector, who wished it to be left as it was to provide a more technically challenging route. Since the repairs have been completed we have continued to receive complaints that the surface is now 'boring', and should have been left in its 'natural' state. Therefore, any damage, however it had been caused, did not appear to have seriously hampered most users.
>
> 13.8.19 Finally, the statutory duty of the highway authority (Cumbria County Council) is to keep the road in repair for the ordinary traffic of the neighbourhood, and vehicles have a right to use the road. The road is now fit for purpose following the repairs. This shows that the surface damage (caused by whatever means) is not irreparable. It would be inappropriate to prohibit traffic for the sole purpose of preventing damage to the surface without at least monitoring the repair works and any new maintenance regime for a number of years to see if it can satisfactorily withstand the levels of use. It is also worth bearing in mind that cars could use this route in the 1960s, so there was a long period of decline before it became vastly more difficult to use.
>
> 13.8.20 **Conclusions for Tilberthwaite Road**-consequently it is difficult to conclude that it would be appropriate to make a traffic regulation order for the Tilberthwaite Road solely on the ground of preventing damage to the road."

10. The AR went on to consider grounds D, F and H which are specified as follows:

> **"14. Ground 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**
>
> **Ground F: For preserving or improving the amenities of the area through which the road runs.**
>
> **Ground H: For the purpose of 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 or the study of nature in the area. This includes conserving its flora, fauna and geological and physiographical features**."

11. These issues were examined through a discussion of the Outstanding Universal Values of the Lake District World Heritage Site and their associated Special Qualities. The AR concluded that it was difficult to show that vehicular usage of the roads was having a significant impact on the wider conservation movement or the cultural landscape. There was no evidence of any impact of vehicular usage of the roads on wildlife, and the nature conservation ambitions of the second interested party appeared unaffected by the existence and usage of the roads by recreational vehicles. The officers were unable to identify any impact upon agro-pastoralism as a consequence of the recreational usage of the roads. Similarly, the officers concluded that there was no actual evidence of artistic inspiration being reduced or stifled by the presence of recreational vehicles on the roads, and little evidence of impact upon literary associations.

12. Having examined the question of impact upon tourism and outdoor activities, and bearing in mind the opportunities for quiet enjoyment and spiritual refreshment, the AR concluded that it was difficult to find that the limited, albeit increased, usage of motor vehicles was making the area less attractive to a degree where it was reducing tourism or outdoor activities in the area.

13. Again, in relation to opportunities for quiet enjoyment and spiritual refreshment, the AR turned to consider four main aspects of concern which had been expressed through the evidence-gathering process namely visual impact, pollution and fumes, noise and finally the inappropriateness of the presence of the vehicles. Having noted that comments had been received in relation to not wishing to see vehicles in the countryside the AR observes as follows:

> "14.6.2 However, there are no comments about not wanting to see vehicles on surrounding roads, such as Wrynose Pass, or on the road to Tilberthwaite Car Park (or indeed in the car park). It is therefore difficult for us to judge the actual impact of around 40 a week 4WD vehicles using these roads, when compared to the vastly greater use of the surrounding road network. Both uses have an impact on the views of the valleys and fells, and it is difficult to say that prohibiting vehicles on the Tilberthwaite Road would substantially enhance the views and the landscape as a whole.

> 14.6.3 With regard to High Oxen Fell Road it is harder to make any such justification. The road passes through mainly wooded pasture, and users are not really visible beyond the road itself.
>
> 14.6.4 The roads have a stone surface – whether they are used by MPVs or not, and they will remain in the landscape as a visible feature, along with the other roads."

14. Turning to the question of pollution and fumes the conclusions of the AR are as follows:

> "**14.7 Pollution / fumes**
>
> 14.7.1 As mentioned earlier – there is little wider impact on overall air quality from the limited usage of these roads, especially when compared to the overall usage of the road network, not least by those walking or cycling on these roads, almost all of whom have driven through the Lake District to reach their start point. Therefore, comments about diesel pollution, carbon, and so on are not really relevant in the context of off-road use. No-one has provided any evidence to show that the 4x4 and motorcycles that use either of these roads cause more air pollution than any other vehicle using the tarmac roads for recreation purposes.
>
> 14.7.2 The more relevant issue is the impact on other people using the roads on foot or riding a bike/horse. It is undoubted that 4WD vehicles and motorbikes pass walkers and riders in fairly close proximity – and their fumes and pollution will be directly inhaled by the other users.
>
> 14.7.3 There is an undoubted impact on those using the road, as the online survey comments make clear. Whether there is a sufficient enough impact to warrant prohibition is debatable. It is probably relevant to note that the nature of the impact is transient given that it is infrequent, and once the vehicle passes it quickly subsides. The likelihood and times of the impact are discussed at 14.8.24."

The AR went on to consider the question of noise and tranquillity. The report noted the findings of the CPRE tranquillity mapping in relation to the roads and their surrounding countryside. In relation to the surrounding countryside, the AR concluded that in addition to it being difficult to determine the exact source of the vehicular noise, on occasion it was difficult to conclude that the prohibition of recreational vehicles would have a noticeable impact on the surrounding countryside bearing in mind the existence of traffic using the roads in any event. The overall conclusions in relation to noise issues are as follows:

> "14.8.23 As mentioned above, it is beyond doubt that removing recreational MPV traffic from the roads would change the experience for those meeting the traffic whilst on

> the roads themselves. The question then is really 'by how much', and is the impact on other users' so great that MPV traffic needs to be prohibited.
>
> 14.8.24 With noise, it has to be accepted that the noise is fairly localised and relatively temporary. At pages 14-15 of Appendix 3.4 we have tried to assess how long other users may be affected by looking at how long vehicles are actually using the Tilberthwaite Road in the context of a full day. We have looked in detail at three days. On one of the busiest days of the year, if walking the whole route sometime between 9am and 5.30pm, the chances of meeting at least one vehicle would be high. On a more 'normal' weekend day, the chances are far less. And during the week, you could spend all day walking up and down these two roads and you might only meet a few vehicles, or none at all. And 4WD noise does not (according to the YDNPA study and our own experience) travel great distances, so walkers and cyclists are not impacted by this for any great length of time before or after meeting the vehicle(s).
> …
>
> 14.8.29 The decision is here is whether prohibiting recreational MPV traffic will actually afford better opportunities to people to enjoy the amenities of the area, in particular the ability for quiet enjoyment. And this mainly depends on individuals' interpretation (as shown in the surveys), and 'how much noise is acceptable'?
>
> 14.8.30 From the results of our online and onsite surveys, it is debatable whether the impact on other users' is so great that recreational MPV traffic needs to be prohibited"

15. Finally, in this connection the AR went on to consider whether or not the use of the roads by recreational vehicles was inappropriate. The AR noted that the use of roads such as this for off-road driving in the Lake District had developed soon after the development of the car. The AR noted that it could be argued that the use of roads was part of the cultural history of the Lake District, albeit that was not in and of itself an indication that it was automatically an appropriate activity to continue into the modern era. It was observed that to prohibit motor vehicle use of the roads could be taken as saying that one type of recreational vehicular use would be acceptable when it was on the narrow busy country roads in the nearby area, whereas another type of recreational use was unacceptable when it involved limited levels of driving on quiet and more challenging routes also used by walkers and cyclists. Ultimately the AR noted that the question was whether the recreational vehicular use of the roads was "so inappropriate and unacceptable that it should be prohibited". The AR drew the threads together in relation to this section of the report with the following synthesis of the issues:

"**14.10 Overall impact on Outstanding Universal Values, World Heritage Site Status, and the Application of the Sandford Principle**

14.10.1 Whilst we respect the concerns expressed by ICOMOS, we are concerned that these may have been formed through the provision of partial and inaccurate information as opposed to actual evidence. The purpose of this project and report was to collect and examine evidence. We have done this be looking at the three themes of Outstanding Universal Value, and our conclusions regarding them are:

14.10.2 Continuity of agro-pastoralism tradition and local industry in a spectacular mountain landscape: The National Trust as landowners consider that there is minimal impact on the agro-pastoralism aspects of World Heritage Status.

14.10.3 Development of a model for protecting cultural landscape: There are no significantly identifiable impacts on the ability to retain and maintain the cultural landscape through continued low-level usage of these two roads.

14.10.4 Discovery and appreciation of a rich cultural landscape: There is an impact on the ability to experience quiet enjoyment of the National Park. But this has not deteriorated since World Heritage Site inscription, nor is it considered damaging enough to warrant prohibiting vehicles.

14.10.5 The Save the Lake District Campaign petition states as its main headline and byline: *"Protect the Lake District's World Heritage status – The Lake District risks losing its UNESCO World Heritage status. One of the most beautiful and distinctive stretches of land near Little Langdale in the UK is being ruined by 4x4 cars and motorbikes that are devastating tracks, have forced a sheep farmer out of the area and are violating the terms of its World Heritage status. We have to save it."*

14.10.6 It adds that *"The noise of these vehicles can be heard for miles in the valley, ruining the peace and tranquility of the area that were the key reasons for its being recognized by UNESCO"*.

14.10.7 This implies that something has happened since inscription that detracts from the reasons for inscription. However, when considering this, it is important to bear in mind that these roads existed, and were being used, at

the time that the Lake District was awarded World Heritage status. The surface condition was known at the time of inscription, and in fact has been improved since. Usage levels, and therefore the associated noise, pollution, and interference with farming, interference with quiet enjoyment, and so on, have not, so far as we can tell, dramatically risen since inscription (in fact, in the last six months, they have fallen).

14.10.8 That is, there has been no significant change since inscription – and inscription happened when the roads were already well used, and the condition of the roads was known. The Status was granted with this situation already existing.

14.10.9 With regard to the Sandford Principle it is important to note that this relates to where there is an irreconcilable conflict between conservation and public enjoyment, and where there is conflict between the purposes the greater weight should be applied to conserving over recreation. Or, in the words of UK National Parks: *"If there is a conflict between protecting the environment and people enjoying the environment, that can't be resolved by management, then protecting the environment is more important."*

14.10.10 It is certainly not the case that surface damage (on it's own) is 'beyond repair' or irreconcilable – as it has clearly been shown that the surface can be repaired.

14.10.11 Given all the evidence collated during this project, there is a strong doubt as to whether any conflict is irreconcilable, and even whether the conflict is so great that damage is being caused to a significant degree. It is also clearly the case that the active management regime of the routes and attempts to influence the usage of them was discontinued in around 2006/2007."

16. The final section of the AR addressed the options which were available to members resulting from the evidence and analysis of the AR together with the officers' recommendation in respect of which option should be pursued. It is worthwhile to set out both of these sections in full to understand, in particular, the nature of the decision which the members were being asked to make. The AR provided as follows:

"**15 Options and Recommendation** (repeated as section 6 of the Summary Report)

15.1 Our evidence gathering has shown that there are only a few realistic options:

a) Do nothing

b) Maintain the surface, but do nothing else

c) Prohibit all motor vehicles (except agricultural / emergency / service)

d) Prohibit some motor vehicles, or for some activities (such as commercial operators), or in certain circumstances (such as during winter, or one way)

e) Develop a Partnership Management Group (consensus working)

15.2 **Option a – Do Nothing**

15.2.1 This would involve no further action by the National Park Authority. The current condition of both routes is acceptable, and current usage levels could continue. However, we would not know whether future usage would increase or decrease, and would not be alert to any changes. The maintenance of the route would fall to Cumbria County Council, and so it is likely to be low-key, if any. Given the levels of public concern, and the recent investment of over £50,000 on the Tilberthwaite Road, this option alone would probably not be appropriate.

15.3 **Option b – Maintain the surface, but do nothing else**

15.3.1 This would require some sort of agreement between Cumbria County Council and the National Trust and ourselves to ensure that the works carried out on the Tilberthwaite Road were protected by routine maintenance, and that minor works were carried out on the High Oxen Fell Road as and when required.

15.3.2 However, we would learn nothing about future use and how such use impacted the surface over a longer period of time. Because of this, option b alone is probably not the most appropriate for Tilberthwaite given the obvious public concern – but could be appropriate at High Oxen Fell, given the lower level of concern expressed.

15.4 **Option c – Prohibit all motor vehicles (except agricultural / essential).**

15.4.1 This option would meet the requests of the Save the Lake District Campaign. However, as discussed within the

body of the Assessment Report, the grounds for such a prohibition may not be sufficiently met to support the case. Any prohibition is likely to be challenged through the courts, and so we would have to be sure that this was the right thing to do, based on evidence, before choosing this option.

15.4.2 Defra advice is that other avenues should be explored before prohibitions are imposed. The Sandford Principle refers to 'irreconcilable conflict', and the World Heritage nomination document refers to visitor management as being important. The last active management of these roads ceased in around 2006, and it is therefore probably inappropriate to prohibit traffic at this point, without fully exploring whether re-instating some form of management or partnership working would help reduce (reconcile) the issues and problems – perceived or otherwise.

15.4.3 Before any Traffic Regulation Order was made, we would be required to carry out a formal consultation on the actual regulation proposed. The results of such a consultation would then be brought back to this committee for a final decision.

15.4.4 We have not exhausted other management options to see if the conflict is reconcilable, so it is inappropriate at this time to impose a full TRO.

15.5 **Option d – Prohibit some motor vehicles, or for some activities, or in certain circumstances.**

15.5.1 A significant number of people have concerns about commercial 4WD usage. It is difficult from the evidence we have to conclude that such groups do in fact contribute a greater impact upon the surface, landscape, or tranquillity than the same number of single users.

15.5.2 Many of the comments are about those making money through using the roads not then contributing to the repairs and maintenance. But this argument overlooks the fact that all of our footpaths, bridleways and other leisure routes are also funded by the Government. That is – walkers do not directly pay us to maintain footpaths, it all comes out of general budgets and taxation – in the same way that maintenance of unsealed and sealed roads is funded through general taxation.

15.5.3 Many of the other comments relating to the commercial companies refer to the behaviour of the drivers. It would not be appropriate to prohibit companies from using these roads because of perceived behavioural issues or prejudice.

15.5.4 In addition to this, there is a question over whether solely prohibiting commercial operators could be construed as discriminatory and inequitable. If we did impose such a prohibition, we would need to consider whether to have a lead-in period in order for the relevant companies to develop different business plans. And if these business plans involved additional usage of different unsealed roads (displacement), then we may have to consider the potential impact on those roads as well.

15.5.5 Very few people have actually suggested prohibitions for size, direction, weather conditions, and so on – and there is little evidence to show that any of these factors directly contribute to the issues to a greater degree than general usage for these roads.

15.5.6 Finally, we could consider prohibiting motorbikes because of the noise impact, as it is clear from the evidence gathered that people consider 4WD to damage the surface and the immediate tranquillity, whereas motorbikes damage the tranquillity over a greater area.

15.5.7 … Anecdotally, motorbikes use the whole network of unsealed roads, such as through Hallgarth, Hodge Close, and so on. And therefore to be effective in the local area, all these roads would require some sort of prohibition.

15.5.8 It is also difficult to prevent motorbikes from physically accessing these roads, and so any prohibition would be difficult to police.

15.5.9 The difficulties involved in a partial prohibition make this option inadvisable.

15.6 **Option e – Develop a Partnership Management Group**

15.6.1 There is a difference between the Tilberthwaite Road and the High Oxen Fell Road in the levels of feedback, survey data and surface conditions. The levels of concern at High Oxen Fell are significantly lower than at Tilberthwaite, and so the following discussion should be read with this in mind. Given the low concerns, it is probably not necessary to establish a partnership management group for High Oxen Fell. But given the greater concerns at Tilberthwaite, this option is worth considering.

15.6.2 Defra Guidance on National Park Authority powers to make Traffic Regulation Orders suggests that other actions should be taken before considering prohibiting traffic – such

actions could include establishing a working group to develop a local strategy.

15.6.3 The World Heritage Nomination Documentation (p299 – Lake District's Integrity and Authenticity) specifically refers to opportunities for quiet enjoyment and spiritual refreshment as being potentially vulnerable to tourism and other development pressures, and considers that this attribute is best protected through implementing visitor management strategies.

15.6.4 A consensus relationship or partnership management group would be the logical first step in implementing such a strategy for the Tilberthwaite Road. This would bring together the various interested parties such as those using it for all the legal purposes, those maintaining the road, those managing the surrounding land, those wishing to see MPV usage reduced or prohibited, and so on. A partnership of this nature could continue monitoring use, attitudes, surface condition and other factors in the future – and could make appropriate recommendations as to future management. It should be a management group, rather than open ended.

15.6.5 The Sandford Principle, in the words of UK National Parks, says that *"If there is a conflict between protecting the environment and people enjoying the environment, that can't be resolved by management, then protecting the environment is more important."* Active management regime of the routes and the usage of them ceased in around 2006, and therefore, before imposing any TRO to remove any conflict, it is incumbent upon us to explore whether or not the conflict can be resolved by management – that is, is the conflict irreconcilable? A partnership management group would explore this.

15.7 **Recommendation**

15.7.1 The evidence supporting the grounds for prohibition is not conclusive, and as we have not exhausted other management options to see whether any conflict is reconcilable, it is inappropriate at this time to impose a TRO.

15.7.2 Given the summary above, a combination of options b and e (maintain the surface, and develop a partnership management group) for the Tilberthwaite Road (U5001) would seem appropriate. This would be to maintain the surface through an agreed management regime (we are already developing a regime to be agreed by the National Trust, ourselves, and Cumbria County Council), whilst also developing a partnership management group to monitor and maintain the route, whilst continuing to build on the evidence collated so far. Such a group should include the three bodies

named above, with relevant stakeholder representatives such as user bodies and campaigners.

15.7.3 For the High Oxen Fell Road (U5001), Option b (maintain the surface, but do nothing else) would suffice. Far fewer concerns have been raised about this road in all aspects), and the surface appears to be stable. However, it should be monitored to identify and assess any issues that may arise. We would need to agree with Cumbria County Council and the National Trust exactly who would do what, but it is likely that we would propose that we monitor the surface, and report any issues to Cumbria County Council to carry out any required maintenance.

15.7.4 These are only recommendations, and the decision is with Members to make. Members may consider that the grounds have been met and propose and agree a different recommendation, such as a prohibition of some or all MPV traffic. If so, then the exact proposal, reasoning for the proposal, and the relevant grounds on which any prohibition would be made, and how these grounds are met, will have to be agreed within the committee meeting, so that staff can make the required order, and defend it against any potential challenge through the courts."

17. In addition to the material contained within the AR, members of the committee were provided with further views and information from officers in respect of the potential procedural approach to a TRO. In particular, the following written advice was provided (which was reiterated orally during the committee meeting):

"If Members do consider that we should be looking further at a TRO option, then we will need a strong steer (but not a final decision) from them at the meeting as to the following. (The Defra guidance says that we/you should not be of fixed mind at this point, but we do need a steer as to where we should be going in terms of a consultation. In Defra's words *"Ensure the consultation is as specific as possible - setting out the parameters that are being considered by the National Park Authority"* – for instance, is the surface condition the main issue, and so on):

 What sort/extent of prohibition do Members consider we should be looking at (see 1.7.2 of the assessment report);
 Which legal ground(s) do Members feel are most applicable (see 1.7.1 of the assessment report);
 On what basis and reasoning (in detail) do Members consider this?

We would then carry out a formal consultation as set out in the National Park Authorities' Traffic Orders (Procedure) (England) Regulations 2007 (SI 2007 No. 2542), using the above information provided by Members.

> The results of the consultation would then be reported back to a future Rights of Way Committee meeting (probably a few months after the consultation ends – as we will have to put them together in a paper and analyse the responses), and they would then make the formal decision as to whether to proceed with a TRO, and the precise nature of such a TRO.
>
> We would then publish a Notice of intention to make such an order, to which anyone may comment. Depending on any comments of the order, we would then decide whether or not to make the TRO. This latter decision could well be delegated to officers (on the proviso that if any comments are significant, they will be referred back to the Committee)."

18. Following discussion at the committee meeting, the members resolved, in accordance with the recommendation, to make the following decision:

> "a Tilberthwaite Road (U5001)
>
> Members agreed to advise Cumbria County Council to maintain the road surface at its current condition, creating a partnership management group of invited key partners and stakeholders to work collaboratively to monitor usage and condition; undertaking necessary activities to help mitigate any new issues that may arise; and
> b High Oxen Fell Road (U5004)
> Members agreed to advise Cumbria County Council to maintain the road surface at its current condition, working with them and the National Trust to help monitor surface condition."

The grounds in brief

19. The claimant pursues this judicial review on the basis of three grounds. Ground 1 is the contention that the defendant failed to properly interpret and apply section 11A(2) of the 1949 Act, which is the section which seeks to enact the Sandford Principle. When officers advised the members that the need to prioritise the statutory purpose of "conserving and enhancing the natural beauty, wildlife and cultural heritage" of the National Park over that of "promoting opportunities for the understanding and enjoyment of the special qualities" of the National Park only arose when there was an "irreconcilable conflict" it is submitted that they misinterpreted and misapplied section 11A(2) of the 1949 Act. This subsection refers only to "conflict" between the two purposes, and makes no mention of irreconcilable conflict. It is therefore submitted that the defendant imposed a higher threshold in relation to the triggering of this prioritisation than was warranted by a proper understanding of this section.

20. Grounds 2 and 3 of the judicial review are both related to the TRO procedure. Under ground 2 the claimant contends that the defendant failed to discharge the duty upon it under section 122 of the Road Traffic Regulation Act 1984, and failed to make a decision based upon the relevant mandatory considerations which needed to be taken into account. The defendant was in error when it contended that in making its decision it was not exercising a function under the 1984 Act. It therefore committed an error of

law in reaching the decision. Finally, ground 3 is the submission that there was a misdirection in relation to the test for consultation under regulation 4 of the National Park Authorities Traffic Orders (Procedure)(England) Regulations 2007 ("the 2007 Regulations"). Officers told members that they would need to be provided with details of a specific TRO proposal in order to meet the requirements to undertake a consultation under regulation 4 of the 2007 Regulations. This was mistaken, because a consultation could have been undertaken on an in principle decision. The failure to advise members of the availability of consultation on an in principle decision, and the view that was expressed that a specific proposal was required, was both a misunderstanding of the relevant legislation and amounted to seriously misleading the members in relation to the decision which they had to reach.

Ground 1: the law and policy

21. The statutory foundation for the designation of National Parks is to be found in section 5 of the National Parks and Access to the Countryside Act 1949 as amended. Section 5 provides both the power to designate a National Park which is vested in Natural England, subject to submission and confirmation by the Minister and it also contains the statutory purposes for the designation of National Parks. The provisions of section 5 of the 1949 Act are as follows:

> "5 (1) The provisions of this Part of this Act shall have effect for the purpose—
>
> (a) of conserving and enhancing the natural beauty, wildlife and cultural heritage of the areas specified in the next following subsection; and
>
> (b) of promoting opportunities for the understanding and enjoyment of the special qualities of those areas by the public.
>
> (2) The said areas are those extensive tracts of country in England as to which it appears to Natural England that by reason of—
>
> (a) their natural beauty, and
>
> (b) the opportunities they afford for open-air recreation, having regard both to their character and to their position in relation to centres of population, it is especially desirable that the necessary measures shall be taken for the purposes mentioned in the last foregoing subsection.
>
> (2A) Natural England may–
> (a) when applying subsection (2)(a) in relation to an area, take into account its wildlife and cultural heritage, and
>
> (b) when applying subsection (2)(b) in relation to that area, take into account the extent to which it is possible to promote opportunities for the understanding and enjoyment of its special qualities by the public.
>
> (3) The said areas, as for the time being designated by order made by Natural England and submitted to and confirmed by the Minister, shall be as known as, and are hereinafter referred to as, National Parks."

22. For reasons which will become evident below, section 62(1) of the Environment Act 1995 affected changes to the 1949 Act, including the insertion of section 11A regarding the duties of certain bodies in relation to National Parks, including, in particular, the duties of the National Park Authority. By virtue of section 11A of the 1949 Act a National Park Authority is charged with fostering the economic and social wellbeing of local communities within its National Park, and cooperating with local authorities and public bodies whose functions include promotion of economic or social development. Of particular note for the present case are the provisions of section 11A(2) which are as follows:

> "11A (2) In exercising or performing any functions in relation to, or so as to affect, land in a National Park, any relevant authority shall have regard to the purposes specified in subsection (1) of section five of this Act and, if it appears that there is a conflict between those purposes, shall attach greater weight to the purpose of conserving and enhancing the natural beauty, wildlife and cultural heritage of the area comprised in the National Park.

23. This section is said to be the statutory enactment of the Sandford Principle. There is only one case in which this statutory provision has featured and been the subject of judicial observation. The case of *R (Harris and another) v Broads Authority* [2016] EWHC 799 (Admin); [2017] 1 WLR 567 was based upon very unusual facts which are not relevant for present purposes. Having observed at paragraph 6 of his judgment the nature of the principle set out by section 11A(2) of the 1949 Act, Holgate J went on to observe the following about the application of that section at paragraph 75 of his judgment:

> "75… Section 11A(1) of the 1949 Act imposes relatively broad duties, which are largely dependent upon the value judgments made by a National Park Authority from time to time. The subsection is directed at the promotion of broad objectives and securing co-operation between public bodies within that context. Duties of that breadth do not imply a Parliamentary intention to prohibit the use of the term "National Park" outside the code based upon the 1949 Act. Section 11A(2) is similar in this respect, in that it only deals with conflicts between two objectives phrased in very broad terms."

24. Holgate J then went on in the context of further submissions as to the effects of the Sandford Principle to engage with the rival contentions of the parties in that case as to how section 11A(2) of the 1949 Act was to be applied. The competing submissions and his conclusions in relation to them are set out as follows:

> "85. This issue therefore depends upon whether the mere use of the phrase "Broads National Park" in promotional literature would mislead a reasonable member of the public into thinking that the Sandford Principle is applicable within the Broads. Here the parties disagree as to what the effect of the Sandford Principle is. The Claimants submit that whenever there is a

conflict between the "conservation" objective and the "public enjoyment" objective, the former prevails over the latter. The Authority submits that where there is such a conflict, section 11A(2) merely requires "greater weight" to be given to the conservation objective than would otherwise be the case (in the absence of section 11A(2)), but does not require the "conservation" objective to prevail. However, in paragraph 17 of their Reply the Claimants submit that the outcome of Ground 1 does not depend upon the Court determining which interpretation of section 11A is correct. I agree. But I should add that if the Authority's contention is correct, then in my judgment the effect of the Sandford Principle would be so subtle or nuanced that this part of ground 1 would be quite unarguable.

86. Even if the Claimants are correct in saying that section 11A(2) requires the "conservation" objective to prevail over the "public enjoyment" objective whenever there is a conflict between the two, their case that the use of the "Broads National Park" name as a marketing tool is misleading (whether or not in conjunction with the marketing of the UK's National Parks), is misconceived. The Claimants submit that conservation is "always the uppermost consideration" within a National Park (see also paragraph 6 of Mr Harris's first witness statement). But even within a National Park that is not always the case. UK National Parks, unlike national parks in some other countries, are not publicly owned. Much of the land is privately owned and used, for example, for agriculture or forestry (see paragraph 1.5 of the Sandford Report). Thus, section 11A(2) only requires a "relevant authority" to *have regard* to the twin purposes set out in section 5(1) of the 1949 Act. Moreover, those purposes are not exhaustive of all the considerations which will have to be taken into account when decisions are made on land use within a National Park, for example on farming practices or planning control decisions. The Sandford Principle in section 11A(2) only deals with the relationship between the "conservation" objective and the "public enjoyment" objective. It does not deal with all relevant considerations which may have to be taken into account in a planning decision, such as the need for development including housing and economic need.

87. The Claimants' reliance upon the Sandford Principle as (i) the key difference between National Parks in the statutory sense and the Broads and (ii) the basis for their argument that the brand name adopted by the Authority is misleading is unsustainable. Even on the Claimants' construction of section 11A(2), the limitations and subtleties of the Sandford Principle are such that no reasonable person's reaction to tourism and other promotional material would be affected by the

> distinctions between the precise legal regimes applicable in National Parks as compared with the Broads. In the context of branding or marketing, the term "National Park" uses ordinary language, and not a statutory concept, to evoke the nationally important qualities of the area and stimulate public enjoyment of, and potentially visits to, that area. The use of capital letters simply reflects the fact that the Broads is a proper name and does not alter the legal analysis. No reasonable member of the public would see the use of the words "Broads National Park" in promotional literature as referring to the specific legal regimes governing either the Broads or National Parks in the UK."

25. Before moving on to consider the parties' submissions and my conclusions in relation to these issues it may be worthwhile to set out some of the background to the Sandford Principle and the process whereby section 11A(2) came to be enacted. All parties on both sides of the debate placed some reliance on this material in support of their submissions in relation to the correct approach to the interpretation of this statutory section.

26. The starting point is, of course, the Sandford Report itself. As set out above it was a report of the National Park Policies Review Committee which was chaired by Lord Sandford. The remit of the Committee was to "take a fresh look at the national parks in the light of changing circumstances and to consider long term polices for them." As such, a wide variety of topics were considered by the Committee in undertaking their review and formulating their report and recommendations. A particular theme of the report was, in particular, the Sandford Report's identification of the potential friction between the two statutory national park purposes. The Report expressed a view as to their continuing importance and, if necessary the prioritisation between them, in the following terms:

> "2.15 The first purpose of national parks, as stated by Dower and by Parliament – the preservation and enhancement of natural beauty- seems to us to remain entirely valid and appropriate. The second purpose the promotion of public enjoyment – however, needs to be re-interpreted and qualified because it is now evident that excessive or unsuitable use may destroy the very qualities which attract people to the parks. We have no doubt that where the conflict between the two purposes, which has always been inherent, becomes acute, the first one must prevail in order that the beauty and ecological qualities of national parks may be maintained."

27. In the concluding section of the Sandford Report, entitled Summary of Findings and Main Recommendations, the following findings in relation to statutory purposes and conflict between them are set out as follows:

> "Findings
>
> 1. When the national parks were designated, following the passing of the National Parks and Access to the Countryside

> Act 1949, there were serious reservations about them in several quarters, but the parks are now almost universally accepted; public concern for their protection has become strong and widespread. There is general approval of the statutory purposes of the parks- the preservation and enhancement of natural beauty (which embraces scenic beauty and wildlife), and the promotion of their enjoyment by the public. The inherent conflict between the purposes has, however, become apparent as recreational use of the parks has increased.
>
> …
>
> 10. The increasing and changing recreation uses of national parks have not been matched by adequate measures to cope with them. Too little has been spent on facilities, especially for those visitors who like to relax near their cars. The services which guide and enlighten visitors and thus mediate between them and local interests, that is the warden and information services, have not been sufficiently developed; in some parks they are rudimentary.
>
> …
>
> 12. But there have also been uncertainties and differing views about the purposes of a national park, which stem from the ambiguities of the statute, which gives equal weight to the preservation and enhancement of natural beauty on the one hand, and the promotion of public enjoyment on the other. The apparent assumption that any conflict between the purposes could be easily resolved has been disproved by experience, which shows that public use of the parks can be of such a kind and on such a scale as to be destructive of their environment qualities. Good management can protect the parks and cater for visitors with diverse inclinations by providing opportunities and facilities for differing kinds of public enjoyment in different parts of each park, according to the varying qualities and circumstances. By developing the capacity of suitable areas to absorb greater numbers of the more gregarious visitors, pressures may be diverted from the wilder and more sensitive areas. But where it is not possible to prevent excessive or unsuitable use by such means, so that conflict between the dual purposes becomes acute, the first one must prevail in order that the beauty and ecological qualities of the national parks may be maintained."

28. Although it was accepted that there was no legitimate legal reason for regard to be had to the debates in Parliament leading to the enactment of section 62 of the 1995 Act, and the inclusion of section 11(A)(2) within the 1949 Act, the claimant nonetheless drew attention to the fact that during the debates on the legislation in the House of Lords an amendment was moved by Viscount Addison to amend the legislation by the insertion of a clause qualifying the conflict between the two

purposes, such that the legislation would trigger giving greater weight to the first purpose when the relevant National Park Authority deemed there to be "irreconcilable" conflict. This amendment was moved on the basis that it better reflected the stated intention of the legislation to implement the Sandford Principle. Responding to the debate Viscount Ullswater, the relevant Minister, rejected the amendments, stating that it had been "our long-standing policy to accept the Sandford Principle that in those rare cases where there are irreconcilable conflicts between the first and second National Park purposes the first purpose takes priority". The government rejected the amendment on the basis that every opportunity should be taken for negotiation and mediation before the principle was applied, and there was concern that inclusion of the amendment might lead to lengthier and drawn-out discussions in an attempt to prove that negotiations had reached a point where viewpoints could not be reconciled. By contrast, it was the government's anticipation that the number of occasions where the Sandford Principle would need to be applied would be relatively rare and exceptional, on the basis that careful planning and positive management would enable greater use of the National Parks whilst respecting their special qualities. The claimant refers to this legislative history as supporting their contention that the defendant's interpretation of section 11A(2) of the 1949 Act, incorporating a threshold of irreconcilable conflict, is illegitimate.

29. The parties also alluded to national government policy, promulgated from time to time, in relation to the exercise of statutory powers in National Parks and their conservation. The Department of the Environment and Welsh Office Circular 4/76, which flowed directly from the Sandford Report, noted and agreed with the committee's assessment that there would be conflict between the statutory purposes and observes as follows:

> "NPAs can do much to reconcile public enjoyment with the preservation of natural beauty by good planning and management and the main emphases must continue to be on this approach wherever possible. But even so, there would be situations where the two purposes are irreconcilable. The Secretaries of State accept the committee's view that where this happens priority must be given to the conservation of natural beauty and they will issue guidance to this effect to the NPAs."

30. Circular 12/96 published by the Department of the Environment flowed directly from the enactment of the 1995 Act, and the changes it made to the statutory framework for National Parks. Within the section addressing the Sandford Principle at paragraph 17 of the Circular it observed that it was expected that National Park Authorities and other public bodies would make every effort to reconcile conflicts between the two National Park statutory purposes by encouraging mediation, negotiation and cooperation, "but there may be instances where reconciliation proves impossible." In those cases the conservation purpose would take precedence.

31. In a publication by the Department of the Environment, Food and Rural Affairs ("DEFRA"), dating from March 2005, dealing with the duties on relevant authorities in relation to the purposes of National Parks and other designations, reference is made to the Sandford Principle and section 11A(2) of the 1949 Act. It observed that "if it appears there is an irreconcilable conflict between the parks' two purposes then greater weight should be attached to the conservation purpose". By contrast in further

advice published by DEFRA in 2007 relating to TROs it is stated that "where there is an apparent conflict between these twin statutory purposes, section 11A [of the 1949 Act] (the so-called Sandford Principle) requires that greater weight is given to conservation".

32. A further reference to the Sandford Principle is contained within DEFRA guidance as part of the document published by them entitled "English National Parks and the Broads-UK Government Vision Circular 2010". This provides as follows in relation to the operation of section 11A(2) of the 1949 Act:

> "18. Section 11A(2) of the 1949 Act (inserted by section 62 of the 1995 Act) requires any relevant authority (such as various public bodies and statutory undertakers), when exercising for performing functions which relate to or affect land in a national park, to attach greater weight to the purpose of "conserving and enhancing" if it appears that there is a conflict between the two national park purposes. This enshrines in legislation the long established government policy often referred to as the "Sandford Principle". However, this requirement does not apply to the Broads, where three purposes apply (see below).
>
> 19. The government believes that in most cases it remains possible to avoid potential conflicts through negotiations and well considered planning and management strategies and expects the NPAs to take the lead and encouraging mediation, negotiation and cooperation."

33. In addition to this national policy material the parties placed before the court a number of documents, including in particular planning policies, from various National Park Authorities. It is unnecessary for the purposes of this judgment to set those documents out at length, but it suffices to say that some, but not all, of those documents when referring to the Sandford Principle indicate that its application arises when there is conflict between the two National Park purposes which either is irreconcilable or which cannot be resolved. As the evidence lodged on behalf of the claimant from Ms Diana Mallinson observes, whilst there are references to irreconcilable in some of this documentation, it is not necessarily a consistent picture.

Ground 1: submissions and conclusions

34. Against this background it is necessary now to turn to the submissions made by Ms Katherine Barnes on behalf of the claimant. At the heart of the claimant's case under ground 1 is that members were misdirected in relation to the application of section 11A(2), in that they were told that the trigger for the operation of the Sandford Principle was that there should be irreconcilable conflict. Ms Barnes submits on behalf of the claimant that this is an inappropriate gloss on the language of the statute, which refers simply to a "conflict". Ms Barnes submits that the starting point for the exercise of statutory interpretation required in this case must be the natural meaning of the statutory language. The use of the word conflict is unqualified and should be applied on that basis. The need to wait for a conflict to become irreconcilable is a requirement which introduces excessive rigidity into the statutory framework, and illegitimately ties the hands of the National Park Authority when exercising its

statutory functions. In particular, the claimant's approach to the interpretation of section 11A(2) is set out in the following terms in Ms Barnes' skeleton argument:

> "In the claimant's interpretation, the general expectation is that NPAs will pursue both statutory purposes. However, where the relevant NPA judges in the context of particular case that the tension inherent between the two purposes has become a "conflict", the protection in section 11A(2) is triggered. Importantly, this does not mean that there is no scope for sensible management solutions. On the contrary, part of deciding whether there is a "conflict" involves the NPA reaching a view on the appropriateness of management options. This means that if a tension can be appropriately managed, then it is not a "conflict" for the purposes of section 11A."

35. Ms Barnes observes that the way in which the AR was expressed advised members that they could only proceed to pursue a TRO if the conflict between the two purposes was irreconcilable and all management measures apart from the TRO had been exhausted. This was an unlawful approach and set the evidential bar for making a TRO so high that it was inconsistent with the correct operation of the Sandford Principle. In response to a submission made on behalf of the defendant that, in reality, since no conflict was found between the two purposes and that therefore the principle was not at stake, Ms Barnes submits that on a proper analysis of the AR there were conflicts identified by the officers, albeit no firm conclusions are often reached in the AR. It was open to members to reach their own conclusions on these issues and members had the advantage of the details of the social surveys which had been undertaken by the defendant in preparing the AR within which there was evidence, which supported the contention that it was open to members to find that there was a clear conflict between the principles, and one that did not have to be irreconcilable before the application of section 11A(2) of the 1949 Act required preference and additional weight to be given to the first purpose.

36. On behalf of the defendant, Mr Ned Westaway submits that the approach taken in the AR to section 11A(2) was entirely appropriate and consistent with a proper understanding and interpretation of the statutory provision. Reliant upon the observations of Holgate J in *Harris*, he submits that section 11A(2) builds on the broad exercise of judgment in relation to the statutory purposes, and incorporates a further judgment as to when conflict is acute or irreconcilable, at which point the first statutory purpose is to be preferred. He points out that if the section 11A(2) principle were to apply whenever there was any conflict between the statutory purposes it would be illogical and unworkable. For instance, whenever footpath usage by walkers or horse riders led to erosion, then the first purpose would be preferred without consideration of whether or not the harm could be managed so as to avoid the conflict arising between the purposes.

37. Reliant upon the articulation of the Sandford Principle contained in national government policy and the planning policy from the various National Park Authorities, Mr Westaway submits that the use of irreconcilable within the AR was a normal and appropriate classification of conflict which would give rise to the operation of section 11A(2) and reflected a proper understanding of the statutory provision. Thus, the AR was neither misleading nor unlawful.

38. On behalf of the third interested party Mr Adrian Pay particularly emphasised the contents of the Sandford Report as supporting the defendant's construction of section 11A(2). The Report and its recommendations clearly illustrated the context of the enactment of section 11A(2), and illuminated a proper understanding of when the principle is intended to operate and favour the first statutory purpose. He submits that in relation to the term "conflict" what was meant in the legislation was a conflict of some substance and one which could not be resolved or managed away.

39. In my view the starting point for the consideration of this issue must be the statutory language of section 11A(2), read in the context of the statutory framework within which it sits. It is clear from section 5 of the 1949 Act that the two statutory purposes are set out on an equal footing, and are both objectives which are to be pursued in the management and operation of National Parks and the exercise of the powers contained in part II of the 1949 Act. On the face of section 5, therefore, there is no justification to distinguish between the two purposes. It is clear to me that section 11A(2) is included within the 1949 Act as a means of resolving situations where it is no longer possible to treat both of the purposes equally, and not possible through management or stewardship to satisfactorily accommodate both purposes. I accept the submission made by Mr Westaway on behalf of the defendant, that the use of the word "conflict" in section 11A(2) is not to be understood as referring to any conflict or friction between the two purposes set out in section 5. Those purposes will very often be at odds with each other in the absence of any intervention to resolve them (such as the erosion caused to popular paths by walkers, cyclists or horse riders). Thus, something more than simply conflict which is not managed must arise for the provisions of section 11A(2) to be triggered. In truth, it does not appear that this proposition is controversial. Where the National Park Authority judges that the conflict can no longer be satisfactorily mediated through management or stewardship then, in circumstances where it is judged that both purposes cannot be accommodated and the National Park Authority concludes that it must make a choice, section 11A(2) makes clear that it is the first of the purposes which is to be afforded greater weight. Whether this is described as a conflict which is acute, or unresolvable, or irreconcilable is a matter of semantics. However, each of these adjectives properly describes the point at which section 11A(2) comes into play, in order to resolve a conflict which cannot be properly accommodated through management measures when greater weight then has to attach in the decision-taking process to the first purpose of conserving and enhancing the natural beauty, wildlife and cultural heritage of the area comprised in the national park.

40. In my view Holgate J was correct when he observed that the provisions of section 11A(2) impose "relatively broad duties, which are largely dependent upon the value judgements made by a National Park Authority from time to time". It is clear that broad and often subjective judgements will need to be formed by a National Park Authority in relation to how the best interests of both of the purposes set out in section 5 are to be served by the decisions which it makes. In addition to these judgments, the question of whether or not there is a conflict which engages section 11A(2) is a further exercise of judgment in relation to the broad duties imposed on the National Park Authority. What is clear from the language of the statute, and the way in which section 5 and section 11A(2) of the 1949 Act interrelate, is that section 11A(2) arises in circumstances where the National Park Authority reaches the judgment that a conflict between the two purposes is such that it cannot be resolved or reconciled and

the preference for the first statutory purpose under section 5 of the 1949 Act must arise. Section 11A(2) is a necessary means of breaking the deadlock where the interests of the two purposes cannot be mediated through a management or stewardship solution.

41. This conclusion is reached on the basis of the statutory language which the court has to interpret. Strictly speaking this is not a case in which it is necessary to have regard to debates in Parliament, and the other materials placed before the court in the form of the Sandford Report and the contents of government policy and the policies of National Park Authorities in respect of the Sandford Principle. This material is purely context to the exercise at best. Nonetheless, I have given consideration to whether or not these materials are at odds with the conclusions which I have reached in relation to the proper statutory construction of section 11A(2) of the 1949 Act. In my view this material is, essentially, consistent with this statutory interpretation. The debates in Parliament made clear that the intention behind declining to accept the amendment to include irreconcilable as a description of the conflict in section 11A(2) was driven by the government's view that wherever possible conflict between the two purposes should be resolved through management initiatives. This approach is consistent with the interpretation set out above. Whilst not universally the case, the preponderance of national government policy seeking to describe either the Sandford Principle itself, or the government's view as to how section 11A(2) of the 1949 Act should be applied, reflects the statutory interpretation set out above, describing the triggering of the operation of section 11A(2) as arising when the conflict is irreconcilable or incapable of being resolved. Again, the extracts from National Park Authority documents, whilst not entirely consistent, in the main support the statutory interpretation which has been set out above and are consistent with it. Thus, whilst I do not regard this material as being in any way decisive, the conclusions which I have reached in relation to the question of statutory interpretation is consistent rather than inconsistent with that wider context.

42. It follows that I am satisfied that the approach taken by the AR in the present case to section 11A(2) of the 1949 Act was a reliable and accurate interpretation of that statutory provision. The claimant's case under ground 1 must therefore be dismissed. It is unnecessary to resolve, in those circumstances, the submissions made by Mr Westaway on behalf of the defendant that in any event such conflicts as were recorded in the AR were so limited that no other conclusion other than that reached by the members was potentially possible. It is, however, clear that members were correctly directed as to those circumstances in which section 11A(2) might come into the decision-taking process, and therefore that the committee report was not misleading or legally inaccurate.

Grounds 2 and 3: law and policy

43. Both grounds 2 and 3 relate to the issues associated with the making of a TRO and the way in which those issues were treated in the AR.

44. Section 22 BB of the Road Traffic Regulation Act 1984 grants National Park Authorities the power to make TROs in relation to unsealed roads shown on a definitive map and statement as a byway open to all traffic (amongst other forms of highway). Under section 22 BB (2)(a) the making of such an order must be for a

purpose mentioned in section 1(1)(a) to (g) or section 22(2). It is therefore necessary to set out these elements of the 1984 Act which provide as follows:

> "1 (1)The traffic authority for a road outside Greater London may make an order under this section (referred to in this Act as a "traffic regulation order") in respect of the road where it appears to the authority making the order that it is expedient to make it—
>
> (a) for avoiding danger to persons or other traffic using the road or any other road or for preventing the likelihood of any such danger arising, or
> (b) for preventing damage to the road or to any building on or near the road, or
> (c) for facilitating the passage on the road or any other road of any class of traffic (including pedestrians), or
> (d) for preventing the use of the road by vehicular traffic of a kind which, or its use by vehicular traffic in a manner which, is unsuitable having regard to the existing character of the road or adjoining property, or
> (e) (without prejudice to the generality of paragraph (d) above) for preserving the character of the road in a case where it is specially suitable for use by persons on horseback or on foot, or
> (f) for preserving or improving the amenities of the area through which the road runs or
> (g) for any of the purposes specified in paragraphs (a) to (c) of subsection (1) of section 87 of the Environment Act 1995 (air quality).
> …
>
> 22 (2) This Act shall have effect as respects roads to which this section applies as if the list of purposes for which a traffic regulation order may be made under section 1 of this Act, as set out in paragraphs (a) to (g) of subsection (1) of that section and referred to in section 6(1)(b) of this Act, included the purpose of 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 or the study of nature in the area."

45. Section 122 of the 1984 Act sets out how the functions of a local authority are to be exercised and the duties placed upon them. Section 122 of the 1984 Act provides as follows:

> "122 Exercise of functions by strategic highways companies or local authorities.
> (1) It shall be the duty of every strategic highways company and local authority upon whom functions are conferred by or under this Act, so to exercise the functions conferred on them by this Act as (so far as practicable having regard to the matters specified in subsection (2) below) to secure the expeditious, convenient and safe movement of

> vehicular and other traffic (including pedestrians) and the provision of suitable and adequate parking facilities on and off the highway or, in Scotland the road.
>
> (2) The matters referred to in subsection (1) above as being specified in this subsection are—
>
> (a) the desirability of securing and maintaining reasonable access to premises;
> (b) the effect on the amenities of any locality affected and (without prejudice to the generality of this paragraph) the importance of regulating and restricting the use of roads by heavy commercial vehicles, so as to preserve or improve the amenities of the areas through which the roads run;
>
> (bb) the strategy prepared under section 80 of the Environment Act 1995 (national air quality strategy);
>
> (c) the importance of facilitating the passage of public service vehicles and of securing the safety and convenience of persons using or desiring to use such vehicles; and
>
> (d) any other matters appearing to the strategic highways company orthe local authority to be relevant."

46. Further statutory material in relation to the making of TROs is to be found in the 2007 Regulations. It is made clear by regulation 1 of the 2007 Regulations that they apply to TROs that are to be made, or are proposed to be made, by a National Park Authority. Under regulation 4, where a National Park Authority proposes to make a TRO it must, before publishing a notice of proposals under regulation 5, consult a number of statutory consultees who are specified in schedule 1 of the 2007 Regulations. Pursuant to regulation 5, not less than 1 month before it proposes to make a TRO, a National Park Authority must publish a notice containing its proposals in various locations, including a local newspaper and on its website, along with giving further publicity to the proposal through local notices and notifications. Regulation 6 of the 2007 Regulations makes provision for the availability of documentation concerning the proposals which can be inspected by those interested in them. By regulation 7 of the 2007 Regulations, representations can be made by any person in respect of the proposals, provided they are made in writing and specify the grounds upon which they are made. Under regulation 8 of the 2007 Regulations a public inquiry can be held before the making of an order.

47. It is therefore clear from the 2007 Regulations that there are, in effect, two stages of consultation. The first consultation stage, under regulation 4, requires the National Park Authority to consult with a particular class of identified statutory consultees. Thereafter, under regulation 5, there is a second consultation stage with the wider public in relation to the TRO proposal, which the National Park Authority is considering making. In the 2007 DEFRA publication entitled "Guidance for National Park Authorities making Traffic Regulation Orders under section 22BB Road Traffic Regulation Act 1984", the following is provided in relation to the issue of consultation and publicity:

> "Consultation and publicity
>
> The legislation requires that the National Park Authority consult before making a TRO and the regulations identify a number of parties that must be included in such a consultation. However, there is no specific direction as to the form that such a consultation should take place. National park authorities are welcome to take into account the following:
>
> - Consult at a point "before the mind of the decision maker becomes unduly fixed". Consultees should be given a reasonable opportunity to make effective representations and influence the outcome of the process in other words, the consultation must be a genuine opportunity for consultees to comment, not just a box ticking exercise;
>
> - Ensure the consultation is as specific as possible – setting out the parameters that are being considered by the national park authority. It is acceptable if views are sought on a range of options including a TRO however, it should be made clear that the national park authority is serious about pursuing it rather than just canvasing views; and
>
> - Clearly state in the consultation letter or equivalent that the national park authorities is issuing the letter in accordance with regulation 5. Whilst there is no statutory requirement to do this, it removes any doubt about the intention behind the letter."

48. In relation to ground 2, the defendant contends that in the AR the defendant was not exercising a function which engaged section 122 of the 1984 Act at all. The decision which the defendant was reaching was one concerned with a consideration of the potential management options for the routes, amongst which was the possibility of considering a TRO. Section 122 of the 1984 Act was not engaged at this preliminary stage. The defendant relies in particular on the Court of Appeal decision in *Trail Riders Fellowship v Hampshire County Council* [2019] EWCA Civ 1275; [2020] PTSR 194. The case concerned a challenge to the making of a TRO preventing the use of certain highways by motorised vehicles including motorcycles. The claim was dismissed at first instance, and the Court of Appeal upheld that decision. There were conflicting authorities at first instance before the Court of Appeal bearing upon the question of whether or not it was necessary when taking a decision to make a TRO for the local authority to make specific reference to section 122 of the 1984 Act. At paragraph 35 of his judgment Longmore LJ concluded that, provided the report which formed the basis of the decision undertook in substance the balancing exercise required by section 122 of the 1984 Act, this would suffice for a lawful decision to be reached, and that it was not necessary for there to be any specific reference to section 122 in the authority's decision. Longmore LJ went on to articulate his view as to what was required by the balancing exercise in order to demonstrate that the statutory requirements had been met. At paragraphs 34 and following of his judgment Longmore LJ sets out his view:

> "34. By way of contrast in *Trail Riders Fellowship v Devon County Council* [2013] EWHC 2104 (Admin) at [45] Jeremy Baker J said that an authority's failure to refer to section 122 does not of itself give rise to a conclusion that the authority failed to have regard to its statutory duty. In *Williams v Waltham Forest London Borough Council* [2015] EWHC 3907 (Admin) at [85] Holgate J said that it would be sufficient that the relevant duty is satisfied as a matter of substance whether expressly or by implication.
>
> 35. These last two cases, which I would respectfully approve, justify the judge's third proposition of law set out in para 26 above and are, of course, the reason why Mr Pay was constrained to accept that no specific reference to section 122 need be made in the authority's decision.
>
> …
>
> 36. The question is, therefore, whether the right balancing exercise has been conducted. I would respectfully disagree with Sir Christopher Bellamy QC's view that this must be primarily ascertained from the traffic authority's statement of reasons, which are statutorily required for the purpose of seeking the view of interested parties but are not a statutory requirement at the time of the making of the TRO. The balancing exercise has to be conducted after, not before, the receipt of such views. The report made by Hampshire's traffic officer (Mr Sykes) to Mr Jarvis as decision-maker in the light of the responses received is inevitably an important part of the overall picture.
>
> 37. One must, of course, be clear what the relevant balancing exercise is. On the one hand regard must be had to the duty set out in section 122(1) so far as practicable "to secure the expeditious, convenient and safe movement of vehicular and other traffic (including pedestrians)"; as the judge points out (paras 37(i) and 44) it is significant that pedestrians are included. On the other hand, regard must be had to the effect on the amenities of the locality affected and other matters appearing to the traffic authority to be relevant (section 122(2)(b) and (d)). This is not a particularly difficult or complicated exercise for the traffic authority to conduct. It is indeed difficult to imagine that a county's director of economy transport and environment will not be acutely aware of the county's obligations (so far as practicable) to secure the expeditious, convenient and safe movement of vehicular traffic. Part of that duty is inevitably a duty to consider any necessary repairs and that was one of the considerations expressly referred to but rejected as impracticable in Mr Sykes's report to Mr Jarvis and in section 3 of Mr Jarvis's own decision of 26 February 2018. Appendix C of Mr Sykes's report also expressly referred to the balance which needed to be struck between the beneficial enjoyment for motor vehicle drivers and what Mr Sykes called the disbenefits to the local community and the surrounding environment. These considerations amply justify the judge's conclusion that the

> section 122 duty was in substance fulfilled. I would therefore reject Mr Pay's second submission.
>
> 38. I am, with respect, somewhat more doubtful about the latter part of
> the judge's proposition (iv), that it is possible to infer that the section 122 duty has been complied with merely because the decision had been made by a specialist committee or a specialist officer who can be taken to have knowledge of the relevant statutory powers. There does, in my judgment, have to be actual evidence that the balancing process required by section 122 has been, in substance, conducted. It cannot be merely a matter of inference from the status of the decision-maker. But that requirement has been satisfied in this case.
>
> 39. In the event therefore I would approve the judge's succinct statement of
> the law as contained in para 37 of his judgment and para 26 of this judgment save for the last part of proposition (iv).
>
> 40. Before parting with this aspect of the case it may be helpful to summarise the approach which should be adopted by traffic authorities in considering whether to make a TRO: (1) the decision-maker should have in mind the duty (as set out in section 122(1) of the 1984 Act) to secure the expeditious, convenient and safe movement of vehicular and other traffic (including pedestrians) so far as practicable; (2) the decision-maker should then have regard to factors which may point in favour of imposing a restriction on that movement; such factors will include the effect of such movement on the amenities of the locality and any other matters appearing to be relevant which will include all the factors mentioned in section 1 of the 1984 Act as being expedient in deciding whether a TRO should be made; and (3) the decision-maker should then balance the various considerations and come to the appropriate decision. As I have already said, this is not a particularly difficult or complicated exercise nor should it be."

49. Both Mr Westaway and Mr Pay point out that Longmore LJ makes it clear that the balancing exercise required by section 122 of the 1984 Act is to be undertaken after, and not before, the statutory requirements for consultation have been satisfied (see paragraph 36). They submit therefore that it is clear from this authority that the exercise required by section 122 had not arisen at the preliminary stage that the decision was being reached based on the AR. The section 122 exercise would arise after consultation had occurred, and the balancing exercise that section 122 required would be undertaken in the light of the consultation responses which had been received.

50. In response to this contention Ms Barnes submits that the Defendant was undertaking an exercise which required the application of section 122 of the 1984 Act at the time of this decision. The defendant was being asked to consider whether or not to undertake consultation under regulation 4 of the 2007 Regulations. She submits that the making of a preliminary decision in relation to consultation under regulation 4 of the 2007 Regulation is a function for the purposes of section 122 of the 1984 Act. In support of this submission she relies upon the authority of *Hazell v Hammersmith and Fulham LBC* [1990] 2 WLR 17. This case concerned the entering into of transactions

by a local authority, the detail of which it is unnecessary to rehearse for present purposes. The local authority contended that the transactions were lawful and within the powers granted by section 111 of the Local Government Act 1972. The Divisional Court held that the transactions were not within the scope of section 111 of the 1972 Act as there was no nexus between the discharge of the council's proper functions and the financial transactions into which it had entered. The terms of section 111 of the 1972 Act give power to a local authority to do anything "which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions." Woolf LJ (as he then was) assessed the nature of a function for the purposes of the subsection in the following terms:

> "What is a function for the purposes of the subsection is not expressly defined but in our view there can be little doubt that in this context "functions" refers to the multiplicity of specific statutory activities the council is expressly or impliedly under a duty to perform or has power to perform under the provisions of the Act of 1972 or other relevant legislation. The subsection does not of itself, independently of any other provision, authorise the performance of any other activity. It only confers, as the side note to the section indicates, a subsidiary power. A subsidiary power which authorises an activity where some other statutory provision has vested a specific function or functions in the council and the performance of the activity will assist in some way in the discharge of that function or those functions."

51. Turning to the claimant's factual contentions in relation to the duty under section 122 of the 1984 Act, the claimant contends that the defendant failed to discharge the duty in a number of ways. In particular, the claimant contends that there was no consideration of safe movement for pedestrians which is a mandatory relevant consideration in respect of section 122(2). The treatment of grounds A, B and C did not deal fully and properly with the need to secure the expeditious and convenient movement of pedestrians. Secondly, the AR failed to undertake any assessment of the weight to be attached to the various factors in striking the balance overall. For example, in relation to pollution the conclusion which was reached was that it was "debateable" whether there was an impact warranting the prohibition of traffic. Similarly, in respect of noise no clear cut conclusion was reached about the impact of noise and the role that it played in striking the overall balance in the case.

52. In response to these submissions Mr Westaway on behalf of the defendant contends that firstly, as set out above, the section 122 duty was not in play, bearing in mind the preliminary stage which had been reached in relation to the consideration of this matter. Secondly, he submits that even if section 122 applied at this stage the necessary degree of assessment would be far less at this early stage than would be necessary at a later stage where the local authority were resolving to make the order. He submits that all of the matters required by section 122 were considered during the course of the AR. In particular, in relation to the expeditious, convenient and safe movement of pedestrians, the AR provided more than ample information to address this question. Under ground A, the AR considered danger and the convenience of pedestrians. Under ground B, the question of damage to the road surface was rejected.

In relation to ground C, which included a consideration of pedestrians, the conclusion was that there was little evidence and the assessment included a cross reference to the material set out under ground A. This was clearly sufficient to address this issue. So far as the weight to be attached to the various factors was concerned, Mr Westaway submits that this was obvious from the way in which the AR was expressed, and thus the manner in which the factors had been addressed could not be faulted. On behalf of the third interested party Mr Pay submitted that in reality the claimant's challenge was one to a failure to exercise a discretionary power which could only be appropriate if there were some form of positive duty. There was none in the present case, and therefore the challenge was misconceived.

53. My conclusions in relation to these rival submissions are as follows. Firstly, in my view, it is clear that the defendant was not taking a decision in respect of which the section 122 duty was engaged. It is very clear when the AR is read as a whole that the decision which the defendant was taking was not whether or not to make a TRO, but what was the most appropriate management option to be considered at the stage that the decision was being taken. It has to be accepted that part of the assessment of the appropriate management options included the question of whether or not to embark upon the first stage of statutory consultation in relation to a TRO. However, that is not sufficient in my judgment to involve the engagement of the duty which arises at the point in time when the National Park Authority is considering whether or not to make a TRO on which they have consulted in detail. The decision here was whether or not to start considering the process that could lead to the making of a TRO which was a decision far too early in the process to be governed by the section 122 duty. The *Trail Riders* decision from the Court of Appeal illuminates this point. The section 122 duty, as explained by Longmore LJ, requires consideration to be given to the fruits of the statutory consultation which has been undertaken under regulation 5 of the 2007 Regulations within the balancing exercise. That is the point at which section 122 duty arises and must be discharged. It does not arise at an earlier stage when the National Park Authority is considering whether or not to embark upon the TRO process. I do not consider that Ms Barnes' reliance upon the *Hazell* case is of assistance. Whilst she is right to observe that in that case Woolf LJ provided a wide definition to the question of what might amount to a function, in the present case the defendant was clearly acting at a very preliminary stage, considering various options, prior to any specific engagement of the function addressed by section 122 and in which the duty under that section is engaged. Whilst the matters set out in section 122 of the 1984 Act were, as the AR implicitly identified, examined as considerations in the appraisal of the various options by the defendant, that is very different from saying that as a matter of law the duty under section 122 of the 1984 Act was operational and applied to the decision which the defendant was making such that it was an error of law not to comply with its requirements.

54. In any event I am entirely satisfied that the matters required to be addressed by section 122 of the 1984 Act were in fact addressed in the AR and its analysis. Firstly, and in truth the submission is not at the heart of the claimant's case, it is clear on the authorities that there was no need for the defendant to refer to section 122 of the 1984 Act in making an assessment in relation to it; it sufficed if the substance of the duty and the balancing exercise was undertaken. Nothing turns therefore on the absence of reference to section 122 of the 1984 Act in the AR. So far as the question of addressing the expeditious, convenient and safe movement of pedestrians is

concerned in my judgment these were fully addressed within sections A, B and C of paragraphs 12.2 of the AR.

55. Ground A, relating to danger to pedestrians or other traffic using the road, addressed directly the issue of safety and noted that there was no actual evidence of any accidents, incidents or injuries to any road users. Motorcycles and pedestrians were noted as passing one another safely and without animosity. Issues in respect of damage to the road surface which might affect the expeditious or convenient use of the road were addressed under Ground B and in greater detail in section 13 of the AR, where the conclusion was reached that it did not appear that there was much evidence that a prohibition was necessary or appropriate to prevent damage to High Oxen Fell road; in relation to Tilberthwaite Road, the works of repair which had been undertaken made it difficult to conclude that a TRO was necessary on the basis of preventing damage to the road. Ground C addressed facilitating the passage on the road of traffic including pedestrians, and concluded that there was little evidence that the prohibition of one type of traffic would make it easier for others such as pedestrians.

56. In my view it is clear that this analysis, based on evidence underlying the AR, dealt effectively and in substance with the question of expeditious, convenient and safe movement of pedestrians. So far as the claimant's further point in relation to the absence of weighting of the individual factors is concerned, I accept the submissions made in this connection by Mr Westaway, namely that when the AR is read as a whole it is clear what weight the officer's place on the various factors which they identify based upon the way in which their analysis is described and expressed. It was not necessary for some quantitative metric to be placed upon the various factors to be incorporated within what were in any event valued judgments for the members to make in an overall assessment of the factors identified as relevant, which were analysed in accordance with the substance of section 122 of the 1984 Act.

57. Turning to ground 3, the claimant's contention is that members were misdirected in relation to the test to be applied when embarking upon consultation under regulation 4 of the 2007 Regulations. As set out above the material which was contained in the AR on this topic was supplemented by further advice provided in writing and orally in relation to the officers' view as to what ought to be provided in order to enable an appropriate consultation to occur. The claimant submits that members were seriously misled, because they were told that they would have to provide the detail of any TRO that they were intending to pursue, and were not advised that such detail was optional and the approach which could be taken under regulation 4 was far more flexible. Ms Barnes points out on behalf of the claimant that the consultation process under regulation 4 of the 2007 regulations is only specific as to the parties which must be consulted, and that apart from this there is no other specified requirement of the consultation process under regulation 4. She therefore submits that there is a spectrum of potential approaches to the regulation 4 consultation process: it would be permissible to work up a detailed proposal for consultation purposes but equally it would be possible under regulation 4 to consult on a range of options or possibilities or, alternatively, on the simple question as to whether or not in principle a TRO should be considered. Given the breadth of regulation 4 of the 2007 regulations all of these approaches would have been lawful, and it would have been open to the members to conclude that an in principle consultation should be embarked upon. In

fact, as a consequence of what they were told in the AR and the subsequent clarification, members were not told that an in principle consultation process was open to them, but were rather left in the position of being instructed that in order to enable the consultation process under regulation 4 to commence, it would be necessary to answer questions such as the nature and extent of the prohibition which would be imposed, and the legal grounds to be relied upon, together with the reasoning for their decision. The advice from the defendant's solicitor proceeded on the basis that all this would be required before a formal consultation could be undertaken. This was misleading, as it left out of account the complete spectrum of potential consultation approaches which were in fact open to the members.

58. In response to these submissions Mr Westaway on behalf of the defendant points out that what was being provided to members, in particular in the briefing from the defendant's solicitor, was advice and guidance rather than some form of diktat or rigid direction or instruction. The advice was not intended to close the minds of the members. Mr Westaway also points out that the advice which members received faithfully reflected the DEFRA guidance, which is set out above, in relation to the exercise of the powers in respect of TROs. The advice was, in any event, consistent with the "Sedley principles", which require that when undertaking consultation to provide sufficient information in respect of the proposals, and reasons justifying them, to enable an intelligent response from those who have been consulted. The requirement to provide reasons, in particular as such a decision would have involved departing from the officers' recommendation, was something which was both common sense and, arguably, something that the common law required.

59. Whilst Mr Westaway accepted that there could be various forms of consultation which could proceed consistent with regulation 4 of the 2007 Regulations, he submitted that members were not seriously or materially misled by the advice that they were given in the AR and, in particular, the clarification provided by the defendant's solicitor, who was advising them in accordance with the DEFRA guidance and conscientiously providing an opinion as to progressing a TRO in the event that the conclusions of the AR were not accepted. In any event, Mr Westaway submits that it was clear that members were not persuaded of the merits of pursuing a TRO, and so this aspect of the advice which they received as to process had no bearing upon the substance of the decision which they reached in any event. On behalf of the third interested party Mr Pay emphasises that there would always need to be sufficient material produced as part of a regulation 4 consultation to enable a meaningful response from consultees. Thus, he submits, that the approach taken in the defendant's solicitors advice was entirely appropriate.

60. I have no difficulty in accepting, and indeed it appears to be common ground, that there could be a range of types of consultation which might be embarked upon under regulation 4 of the 2007 Regulations. However, firstly, the type of consultation which might be chosen will always be specific to the facts of the particular case in relation to which consultation is being undertaken. Secondly, and in a related fashion, the purpose and context of the AR and the subsequent clarification needs to be borne in mind. The material in relation to the consultation process for a potential TRO relied upon by the claimant is advice provided by officers to members setting out their view as to the most appropriate course of action to be followed if a TRO was identified as a possible management option. That is their advice on the basis of the particular facts

and circumstances of the case being considered. In my view it was not a necessary legal requirement for the officers to provide members with information about every conceivable form of consultation exercise that might be undertaken pursuant to regulation 4 of the 2007 Regulations, including a consultation in principle, as part of providing a report which is intended to be specific to the circumstances of the decision under consideration.

61. What members were quite properly provided with was the officers' advice as to the appropriate form of process to be followed if a TRO was identified as a possible management option in the case of these two roads, bearing in mind the nature and extent of the evidence available, and the quantity and quality of research which had been undertaken into the use of the TRO as a possible management option. Furthermore, in my view the claimant faces an uphill struggle in seeking to suggest that the advice members received was misleading and unlawful when it is clearly consistent with the relevant DEFRA guidance in relation to this process. I do not consider that it was materially misleading against the backdrop of the detailed AR and its extensive appendices, coupled with the DEFRA guidance, for the defendant's solicitor to provide the advice which she did indicating that in her view were a TRO consultation under regulation 4 to be pursued, information as to the nature and extent of the prohibition together with the legal grounds and reasons relied upon would be appropriate in order to undertake the formal consultation. It is after all the purpose of observations of this kind in a committee report to provide the members of the committee with the officers' advice as to the appropriate course of action in respect of the issues and circumstances before them, and not necessarily review every possible course of action that they might take. There could be no complaint as to the accuracy of the opinion that the officer expressed: the claimant's real complaint is that for the committee report to be lawful it was necessary for the officers to advise in relation to a range of alternative options she did not support. In my view that does not amount to seriously misleading the members of the committee, and it was not necessary for the defendant's solicitor to include in the report a range of other legally possible options in relation to the consultation.

62. Finally, it needs to be born in mind that the AR and the clarification provided are parts of a process of decision-taking undertaken in the context of a committee meeting at which questions can be raised and further advice sought. I therefore am quite unpersuaded that there was any error of law arising from members not being advised as to the full spectrum of potential consultation options, including a consultation in principle, when they were provided with the material contained in the committee report together with the opportunity for subsequent clarification, and the oral presentation and discussion at the committee meeting.

63. It follows that in the light of these conclusions I am satisfied that ground 3 of this claim must be dismissed.

Conclusions

64. Having considered each of the grounds upon which this application for judicial review has been pursued I am satisfied that each of them must be dismissed.