Neutral Citation Number: [2013] EWHC 3144 (Admin)

Case No: CO/7314/2013

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

Cardiff Civil Justice Centre
2 Park Street
Cardiff, CF10 1ET

Date: 17/10/2013

Before :

MR JUSTICE CRANSTON

- -

Between :

(1) Trail Riders Fellowship	**Applicants**
(2) Green Lane Association Limited	
(3) Christopher Marsden	
- and -	
Powys County Council	**Respondent**

- -
- -

Adrian Pay (instructed by **Brain Chase Coles**) for the **Applicants**
Emyr Gweirydd Jones (instructed by **Powys County Council's Legal Department**) for the **Respondent**

Hearing date: 03/10/2013

- -

Approved Judgment

Mr Justice Cranston :

Introduction

1. In this statutory application the applicants challenge the decisions of Powys County Council ("the Council") to make a traffic regulation order in May this year over each of two byways in the county. The Council is both the traffic and highway authority for the county. These orders have the effect of prohibiting the use of the byways by motor vehicles, motor cycles and horse drawn vehicles.

2. The first byway is mainly in an upland environment and runs some 4.8 miles from Penrhiw Lane, Dolau, to a waterfall, "Water-break-its-neck" in Radnor Forest ("the WBIN byway"). At the southern end the route passes down a steep slope and then drops into a dingle. The second, the Moelfre City byway, is in an upland environment and Glyndwr's Way National Trail is along part of it. It is some 4.5 miles in length and is from Little Moelfre Farm, Llanbister, to just south of Fiddler's Green, Felindre. At a point along this byway there is a ditch and ford; the footbridge over it is not designed for motorised passenger vehicles or horse drawn vehicles. In the judgment I refer to these byways together as "both byways" or "the two byways".

3. The applicants are two national organisations, the Trail Riders Fellowship and the Green Lane Association, and an individual, Mr Christopher Marsden, who lives just over the border in England. The Trail Riders Fellowship aim to preserve the full status of vehicular green lanes and the rights of motorcyclists to use them, and the Green Lane Association has as its object driving, protecting and researching the country's heritage of unsurfaced public highways. Mr Marsden and his family have used the WBIN byway for over 20 years; he is a representative of the Green Lanes Association in the area.

Background

4. It is convenient to begin some seven – eight years ago, when Mr Marsden served notices on the Council under section 56 of the Highways Act 1980, calling on it to repair the two byways, as well as a third byway, which does not feature in these present applications. After Mr Marsden served his notice relating to the WBIN byway, in April 2005 the Council made the first of a number of temporary traffic restriction orders in respect of both byways. These orders were justified in the interests of public safety, owing to the unsatisfactory condition of parts of them and, in the case of the WBIN byway, possible munitions. That was because the Ministry of Defence has used the area for training purposes over a number of years.

5. Mr Marsden's complaint in respect of the WBIN byway was compromised in November 2005 with the Council agreeing to put the route into a sufficient state of repair by June 2006 for it to be capable of being open to all users, subject to the Ministry of Defence advising that there was no need to make any closure order on the basis of dangerous ordnance. The compromise agreement stated that the Council would use their best endeavours to revoke the order as soon as the byway had been repaired. Very little was done in relation to undertaking the repairs agreed in the compromise agreement.

6. In mid 2010 Mr Stafford-Tolley, the Council's rights of way officer, met with a landowner at the southernmost part of the WBIN byway. For some considerable time that part of the byway had been inaccessible to vehicular traffic since someone had allowed trees to grow over its definitive line and had also cross ploughed the track. Mr Stafford-Tolley agreed to a gate on the byway being locked and for the installation of a bridleway gate. Thus he was making arrangements with the landowner for foot and horse use of the byway at this point but not vehicular use. Subsequently the trees were cleared from the definitive route.

7. In late 2011 Mr Marsden served further section 56 notices in respect of the two byways. These notices were followed by formal complaints which were heard in the Magistrates' Court in mid 2012. On 30 July 2012 the Brecon justices sitting at Llandrindod Wells Magistrates' Court dismissed Mr Marsden's complaint.

> "We find that since the section of WBIN which is impassable is subject to a [traffic restriction order] which prohibits all traffic from using it, we do not make an order under Section 56; we thereby dismiss Mr Marsden's application. As far as Moelfre [City byway] is concerned we do not find that the route is in a state of disrepair; we also dismiss that application."

Mr Marsden appealed to the Crown Court against the dismissal of his complaints but although the hearing occupied two days the matter has been stayed pending a decision on these present applications.

8. Meanwhile in March 2012 the Council had issued its Motorised Access Strategy. It sets out matters such as the character of the county (sparsely populated), the Council's obligations regarding byways, the need to resolve user conflict and the Council's strategy regarding the maintenance and regulation of byways. Part 3 contains policy statements. PS3.1 uses a green, amber and red classification determining the existing surface carrying capacity as the main criteria to prioritise maintenance, along with other factors such as public safety and user views. Under PS3.6, when a route is not deemed to be sustainable, i.e. a red route, the strategy explains that the use of voluntary restraint orders should be sought. A traffic regulation order should be considered when voluntary restraint has failed or is not considered appropriate. PS3.9 provides that all permanent traffic regulation orders should be reviewed at least every 5 years.

9. In March-April 2012 a study of unmade byways open to all traffic in the county was undertaken by Daniel Baynham, one of its engineers and also a keen "off-road" sportsman in his spare time. Mr Baynham assessed these byways in terms of their suitability for use by local traffic all year round while being sustainable so that future care could be kept to a manageable standard. Cost estimates for repair were prepared and the byways labelled green (passable by local traffic), amber (passable at some times of the year) and red (impassible). Although the current standard of the two byways were marked as red in parts, both were marked green as regards their potential standard.

10. In October 2012 the Council's cabinet member responsible for Regeneration and Culture, Cllr Graham Brown, submitted reports to the Radnorshire Committee in relation to the future of each of the two byways. That committee is comprised of councillors from the area and has delegated power in this context. These reports began by acknowledging that a byway open to all traffic is a category of public right of way which enables all traffic, including motorised vehicles. After describing the two byways and the history of temporary traffic regulation orders, the reports acknowledged that management of the byway network as well as "off-roading" were emotive subjects, and that considerable resources were required to ensure the 164km of the Council's unsealed byways were kept to a satisfactory standard. Under the Council's Motorised Access Strategy both byways would be classified as red, since the surfaces were largely grassed, open pasture land, with little or no hard stoned or tarmaced surface. The surfaces were easily damaged by vehicles and open to more extended damage from additional degradation by the weather. In the case of the WBIN byway the cost estimate was £109,484 to make it sustainable for motor vehicle usage; in the case of the Moelfre City byway the figure was £56,689. (In passing I note that Mr Marsden later obtained an estimate which was about a quarter of that figure). Neither estimate included the ongoing costs of repair and management.

11. Both reports referred to the definition of a byway in section 66 of the Wildlife and Countryside Act 1981 (see below) and to the standard of a highway required in Burnside v Emerson, i.e. such good repair as renders it reasonably passable for the ordinary traffic of the neighbourhood (see below). The reports recommended that the ordinary traffic on both byways be confined to pedestrians, cyclists and equestrians. Both reports proposed to suspend permanently the public rights of motorised vehicles and horse drawn vehicles along their length. The reports considered other options. The first was to reinstate the damage to the surface, but this was contrary to the Motorised Access Strategy because both were classified as red routes, and because of the cost. With current and declining council resources, this was not considered a viable option. In relation to this option both reports also noted that the local community councils wished to see a permanent closure of the byways for motorised vehicles. Another option was voluntary restraint but the reports rejected that. The third option canvassed was a stopping up order under the Highways Act 1980 but the outcome of any application to the magistrates' court in relation to that was said to be uncertain.

12. In recommending the orders for closure to motorised vehicles, the reports noted that such orders could be experimental, involve seasonal closures only, or impose weight restrictions. Both reports noted that the byways had been seriously damaged by motor vehicular traffic and to a lesser extent water erosion. Thus there could be a danger to pedestrians and equestrians using the route and an order would prevent further such damage. It was expected that if the ruts or damage became too severe, vehicles might become stuck and that might cause danger due to the remote, upland nature of the byways. The reports concluded by setting out in full both sections 1(1) and 122 of the Road Traffic Regulation Act 1984. In an annotation to section 122(2)(b) (amenity of area) it was accepted that the Council was ignorant about whether horse drawn vehicles used the highway. The routes allowed recreational motor vehicle users enjoyment of the landscape and the natural beauty of the area, so providing amenity for them, albeit that their use affected the amenity of others

through noise and evidence of their passing on the ground in an otherwise tranquil setting of natural beauty.

13. A meeting of the Radnorshire committee on 17 October 2012 resolved to enter into a 21 day public consultation about the proposals. Later that month notices of intention to make the traffic regulation orders and draft orders were issued for both byways. The statement of reasons relating to both byways, issued along with the notices of intention and draft orders, stated that the orders were necessary to safeguard public safety due to the condition of the surfaces, to reduce the likelihood of vehicles becoming stuck and to halt the continued serious damage sustained as result of vehicular traffic. Reference was made to the Motorised Access Strategy and the cost of making the byways sustainable for motor vehicular traffic. In both routes there were a number of deep holes. In the case of the WBIN byway there was a gully requiring extensive engineering works for a byway open to all traffic; in the case of the Moelfre City byway there was a soft surface with varying degrees of ruts. Both statements of reasons concluded as follows:

> "It is the view of the Powys County Council that the standard of the surface for the byway open to all traffic is that the ordinary traffic of the neighbourhood is by foot and equestrians, and may be maintained as a bridleway. Additionally, the legal definition of a byway open to all traffic is that it is a highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purpose for which footpaths and bridleways are so used."

14. In December 2012 further reports went to committee regarding the permanent closure of both byways. These set out the cost estimates referred to earlier for making the byways sustainable for motor vehicle use and to the history of temporary traffic restriction orders "which [were] put in place following substantial damage from vehicle use in 2005". The Council's Motorised Access Strategy was mentioned. Both reports explained that the byways were classified as red in the strategy since their surfaces were largely grassed over pasture land with little or no hard stone or tarmaced surface. That made the surfaces easily damaged by vehicles and open to more extended damage from additional degradation by the weather. Taking into account section 66 of the Wildlife and Countryside Act and Burnside v Emerson, the ordinary traffic on the two byways was by foot, cycle and horseback.

15. The reports then referred to the views expressed by those responding to the consultation and the officer's response to these. (An annex summarised what each respondent had said). Most correspondence highlighted the Council's duty to maintain the byways, that the damage to them was attributable to its failure to maintain them and that a lack of finance was no excuse for its inaction. The officer's comment in this regard was that while the Council was subject to statutory duties, it was for the Council to determine how to discharge them. Bearing in mind that the two byways were red routes under the strategy, they did not fall as a priority on grounds of sustainability. To the consultation submissions, that motorcyclists caused less damage than horses, the officer's response was as follows:

> "This is a subjective argument, and dependent on many factors such as the type of rider, the type of tyre and weather conditions. Horses can damage soft surfaces and arguably has a higher loading, but again any damage by a horse is more likely to have localised water collection in the hoof print, whereas a trail bike is more likely to cause a linear impression that will lead to water erosion very quickly following a cut line. Motor vehicle access is more likely to go in groups of convoys, which will only compound surface damage particularly during and after wet weather."

16. After considering other options, such as seasonal closure and weight restrictions, the reports concluded that it was the Council's duty to maintain all highways, but it had put in place a strategy to prioritise resources on the basis of sustainability. Permanent traffic regulation orders were proposed for motorised and horse-drawn vehicles while works could proceed in accordance with the strategy and until such time as they became a priority. This passage then followed in each of the reports:

> "At present [Powys CC] has been taken to court, under s. 56 Highways Act to put a highway into repair. At present this is in the crown court on appeal from the magistrates' court. A part of the Council's defence is that a TRO supercedes the statutory provision of the maintenance of a highway and therefore any decision that goes against the proposal of this report will put that defence into jeopardy."

17. On 19 December 2012 the Radnorshire committee resolved to defer decisions on the proposed orders in the light of Mr Marsden's appeal to the Crown Court in the section 56 proceedings. When the matter returned to the committee in February this year, the minutes recorded the committee resolving to make the orders to close the byways throughout the year to horse drawn vehicles, four wheeled drive vehicles and motorcycles. The ongoing settlement negotiations over Mr Marsden's appeal continued for a number of months after the February committee meeting and the orders remained unsealed. Further temporary traffic restriction regulation orders were made in the meanwhile.

18. In March 2013 Mr Stafford-Tolley reported that the WBIN byway had been upgraded to bridleway standard and feedback was that an excellent job had been done. In his witness statement for the hearing, Mr Marsden opines that the repairs had brought the Moelfre City byway back into a reasonable state of repair, subject only to the need to address the issue of the ford. The situation with the WBIN byway had dramatically changed with the trees being cleared, although there was still the effect of the cross-ploughing.

19. No settlement in the negotiations having been reached, the traffic restriction orders were sealed in relation to both byways on 9 May 2013. The current applications were lodged with this court on 13 June.

Legal framework

20. The traffic regulation orders under challenge in these proceedings were made in relation to byways which are byways open to all traffic. The byway open to all traffic is defined in section 66 of the Wildlife and Countryside Act 1981 as a highway over which the public have a right of way for vehicular and all other kinds of traffic but which is used mainly for the purpose for which footpaths and bridleways are used. Section 56(1)(c) of that Act provides that where the definitive map shows a byway open to all traffic, the map shall be conclusive evidence that there was at the relevant date a highway as shown on the map and that the public had at that date a right of way for vehicular and all other kinds of traffic.

21. Section 1 of the Road Traffic Regulation Act 1984 ("the 1984 Act") makes provision for traffic regulation orders outside Greater London where it is appropriate for one or more of the purposes set out in that section.

> "(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)."

Orders can also be made in respect of roads in national parks. In that respect the purposes provided for in section 22BB(2) of the 1984 Act are for conserving or enhancing the national beauty of the area and affording better opportunities for the public to enjoy its amenities or recreation or the study of nature there.

22. Section 2 of the 1984 Act provides that a traffic regulation order may make different provision in respect of particular classes of vehicle. Under paragraphs 34 to 37 of Schedule 9 of the 1984 Act any person may challenge a traffic regulation order by application to the High Court within 6 weeks of its making. The grounds of judicial review are available in such a challenge: e.g., R (LPC Group) v Leicester City Council [2002] EWHC 2485 (Admin); [2003] RTR 11; Wilson v Yorkshire Dales National Park Authority [2009] EWHC 1425 (Admin), [14]. In reviewing a decision to make a traffic regulation order under section 1 of the 1984 Act the court is not concerned with proportionality: it is not a matter of the decision-maker being required to make an order which involves the least restriction on vehicular movement, having regard to the relevant factors, although alternative approaches are a relevant consideration to be taken into account and a failure to adopt a less restrictive approach may, in certain circumstances, be irrational: Trail Riders Fellowship v Peak District National Park Authority, [2012] EWHC 3359,[52], per Ouseley J.

23. Section 9(1) of the 1984 Act makes provision for experimental traffic regulation orders. As the name suggests these are for the purpose of carrying out an experimental scheme of traffic control but may include any such provision as may be made by a traffic regulation order. Section 14(1) enables temporary traffic regulation orders to be made, which may prohibit temporarily use of a road or part of it by vehicles or vehicles of any class or by pedestrians, but only if works are to be carried out on the road, if there is a danger to the public, or if serious damage to the road, or if litter clearing or cleaning is to take place. A temporary traffic regulation order made in respect of a byway open to all traffic cannot continue for more than six months, subject to further extensions with permission of the Secretary of State: s. 15(1)(a), (5), (8).

24. Section 122 of the 1984 Act imposes a duty on authorities in exercising their functions under the Act, including section 1. It reads as follows:

> "(1) It shall be the duty of every 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 local authority to be relevant."

25. Authoritative for the interpretation of section 122 are the obiter remarks of Carnwath J in UK Waste Management Ltd v West Lancashire District Council [1997] RTR 201, at 209:

> "The second main point is in relation to the duty under section 122 to have regard to the desirability of maintaining reasonable access to premises. I do not find section 122 an altogether easy section to construe. It refers to a wide range of different matters which have to be taken into account, but it is not clear precisely how the priorities between these various matters are to be ordered. The words "so far as practicable" show that some limitation is intended on the weight to be given to some of the factors. In Greater London Council v Secretary of State for Transport [1986] J.P.L. 513 at 517, the Court of Appeal appear to have assumed that those words qualify the duty to have regard to the items in subsection (2) , thus, in effect, making those matters subordinate to the matters which are referred to in subsection (1). However, there appears to have been no detailed argument on the point in that case and the comments appear to be obiter. To my mind, it seems more likely that the intention is the other way round. Had it been as the Court of Appeal suggest, one would have expected the parenthesis to read, "having regard so far as practicable to the matters specified in subsection (2) below." Furthermore, it is difficult to see the purpose of such a limitation on a duty which is simply to "have regard" to certain matters, since it is always practicable to have regard to matters, not always to give them effect. It is more likely that the limitation was intended to qualify the duty in subsection (1) to secure the expeditious, convenient and safe movement of traffic, that being a duty which would otherwise be expressed in absolute terms."

That was a case where the traffic authority had made an experimental traffic regulation order banning the use of heavy goods commercial vehicles on an access road to a landfill site. In fact there was no effective experiment and the order was quashed for that reason. The order also failed because the authority had not considered under section 122 the desirability of securing and maintaining reasonable access to the site and what that might entail. Only when it had done that, Carnwath J held, could it proceed to the balancing exercise which section 122 involved, however that section was to be interpreted: at 209 F-G.

26. Carnwath J's approach in UK Waste Management has been applied in subsequent authorities: R (on the application of LPC Group plc) v Leicester City Council [2002] EWHC 2485 (Admin), [58]; Wilson v Yorkshire Dales National Park Authority [2009] EWHC 1425 (Admin), [66]; Trail Riders Fellowship v Peak District National Parks Authority [2012] EWHC 3359 (Admin), [51]; Trail Riders Fellowship v Devon Country Council [2013] EWHC 2104 (Admin). In the LPC case the traffic regulation order was quashed because there was no evidence that the balancing exercise required by section 122 had been conducted: [69], [71]. The same result followed in Wilson v Yorkshire Dales National Park Authority [2009] EWHC 1425 (Admin): counsel for the park authority accepted that it had not directed itself to the effect that it was not practicable to observe the duty to secure the expeditious, convenient and safe movement of mechanically propelled vehicles on the routes in question, and although the access committee had considered a number of matters, it had not been demonstrated that the balancing exercise demanded by section 122 had occurred: [77], [80].

27. Thus the duty imposed by section 122 of the 1984 Act is a qualified duty. Against the duty to secure the expeditious, convenient and safe movement of vehicular and other traffic (including pedestrians) is to be balanced the factors in section 122(2), such as the effect on the amenities of the area and, in the context of making a traffic regulation order, the purposes for this identified in section 1(1). As a matter of law the duty of securing the expeditious, convenient and safe movement of vehicle and other traffic (including pedestrians) is not given a primacy: Carnwath J made that clear in rejecting the assumption in Greater London Council v Secretary of State for Transport that the matters in section 122(2) were subordinate to those in section 122(1).

28. All the matters elucidated in sections 1 and 122 are to be taken into account by the decision-makers in making a traffic regulation order. There are obvious tensions. For example, the making of an order to fulfil the purposes under section 1(d) and (e) will clash with the duty under section 122(1), since the order will inevitably restrict the expeditious and convenient movement of vehicular traffic (although it might also render more convenient the movement of other traffic such as pedestrian traffic). It is the decision-maker who balances the duty against other factors. Generally speaking, weight is a matter for the decision-maker: Tesco Stores v Secretary of State for the Environment [1995] 1 WLR 759, per Lord Hoffmann. The case-law establishes that a decision is challengeable on the grounds applying to judicial review. These set quite a high bar to a challenge.

29. The procedure for making a traffic regulation order is contained in the Local Authorities' Traffic Orders (Procedure) (England and Wales) Regulations 1996, SI 1996 No 2489. These provide for mandatory consultation; mandatory publication of a notice of proposals (which must be sent to all bodies required to be consulted); and the mandatory depositing of documents available for public inspection – the notice of proposals, the draft order, a map and the statement of reasons for the proposed order: regulations 6 and 7, schedule 2.

30. The requirements for a statement of reasons for a proposed order has been considered judicially on a number of occasions. In the LPC Group case Sir Christopher Bellamy QC, sitting as a deputy High Court Judge, held that the statement of reasons must demonstrate whether the authority making a traffic regulation order had taken into account the relevant statutory considerations and the balancing exercise carried out: [61], [69]. But that was a case where there was no other admissible evidence of those matters, the judge holding that a subsequent witness statement from a traffic officer that the matters were taken into account could not be adduced to demonstrate that the decision-maker – the council's director of environment, development and commercial services – had taken them into account, the reasons for a decision normally coming from the decision itself (citing R v Westminster City Council ex p Emakov [1996] 2 All ER 302: [73]-[74]).

31. In Trail Riders Fellowship v Peak District National Parks Authority, Ouseley J held that the statement of reasons in that case had to describe adequately the nature and purpose of the experiment: [30]. They did that, admittedly briefly. The vice Ouseley J identified in the statement of reasons was that the experiment described had no rational basis and he quashed the order which had subsequently been made: [31], [35]-[36], [40]-[41]. Ouseley J held that the committee report leading to the statement of reasons could not be read with the statement of reasons to demonstrate that the experiment was, indeed, rational: [42]-[43], [45].

32. In my view the correct approach to what the statement of reasons must contain is discussed in Jeremy Baker J's recent decision in Trail Riders Fellowship v Devon Country Council. At the outset Jeremy Baker J invoked the well-known passage from Lord Brown's speech in South Buckinghamshire District Council v Porter (No 2) [2004] UKHL 33; [2007] 1 WLR 1953, where Lord Brown explained in the context of planning decisions that reasons for a decision had to enable readers to understand why the matter was decided as it was and what conclusions were reached on the principal issues, disclosing how any issue of law or fact was resolved: [35]-[36]. However, said Lord Brown, reasons could be briefly stated, the degree of particularity depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law: at [36]. Applying that passage in Lord Brown's speech, Jeremy Baker J noted that the claimant in that case had been involved in the process from a relatively early stage and was familiar with the type of issues raised. The statement of reasons had to be read in that context: [41]. The failure of the council to make express reference to sections 1 and 122 of the 1984 Act in the statement of reasons was not one giving rise to a claim that it had failed to apply their provisions: [44], [45].

33. The duty of highway authorities as regards the maintenance of the highway is well known. What is now section 41(1) of the Highways Act of 1980 ("the 1980 Act") is the current statutory provision imposing the duty on highway authorities to maintain the highway. In Burnside v Emerson [1968] 1 WLR 1490, Diplock LJ drew on previous authority and said (at 1496H-1497B):

> "The duty of maintenance of a highway which was, by section 38(1) of the Highways Act 1959, removed from the inhabitants at large of any area, and by section 44(1) of the same Act was placed on the highway authority, is a duty not merely to keep a highway in such state of repair as it is at any particular time, but to put it in such good repair as renders it reasonably passable for the ordinary traffic of the neighbourhood at all seasons of the year without danger caused by its physical condition."

In Goodes v East Sussex County Council [2000] 1 WLR 1356, Lord Hoffmann characterised the duty to maintain the highway as an absolute one, i.e. to keep the fabric of the highway in such good repair as to render its physical condition safe for ordinary traffic to pass at all seasons of the year: at 1366 A-B. The other law lords agreed. In his speech Lord Hoffmann noted that the way the courts had always construed the duty was not to consider the issue of resources: at 1367 A-B.

34. Under section 56 of the Act a person who alleges that a highway is out of repair may institute legal proceedings.

35. Section 130(1) of the 1980 Act provides that it is the duty of the highway authority to assert and protect the rights of the public to the use and enjoyment of any highway for which they are the highway authority, including any roadside waste which forms part of it. In R v Surrey County Council ex parte Send Parish Council (1979) 40 P&CR 390, the Court of Appeal said that the predecessor of section 130 – section 116 of the Highways Act 1959 – meant that the highway authority must at all times act with the object of protecting the highway and of preventing or removing any obstruction and, more broadly speaking, of promoting the interests of those who enjoy the highway or should be enjoying the right of way: at 396.

36. In an obiter comment in Trail Riders Fellowship v Devon Country Council, Jeremy Baker J referred to the section 130 duty. While the duty was of critical importance for a highway authority, in the context of a traffic authority considering the making of a traffic regulation order, "I have considerable doubts as to its engagement and even if engaged its significance over and above the matters which the [council] is already obliged to take into account under sections 1, 2 and 122 of the 1984 Act": [52]. Not only do I agree, but I would go further than Jeremy Baker J. The statutory regimes for making traffic regulation orders and for repair of the highway are separate. The legal character of the duties to which traffic and highway authorities are subject in this regard is different (qualified and absolute respectively) as are the remedial possibilities for those objecting to the performance (or non performance) of those duties. In practice the traffic authority might not be the highway authority. Parliament has set out in the 1984 Act the duties and factors to be considered in the

making of a traffic regulation order, an experimental traffic regulation order and a temporary traffic regulation order. The issue of the repair duty enters only indirectly, as with the duty in section 122 to secure the expeditious, convenient and safe movement of vehicular and other traffic (including pedestrians). That section 122 duty, as we have seen, is a qualified duty and is of a different character to the duty to maintain the highway laid down in the 1980 Act.

37. Sections 116 to 119 of the 1980 Act enables the stopping up and diversion of a highway.

Grounds of challenge

Errors of law

38. The first three grounds contend that the Council made errors of law, first, in its reliance upon the proposition that the ordinary traffic for the two byways was non vehicular (ground 1); secondly, in its approach to section 122 of the 1984 Act (ground 2); and thirdly, in its lack of proper reasoning in relation to section 122, which vitiated the consultation process (ground 3).

39. The first ground draws upon what Diplock LJ said in Burnside v Emerson [1968] 1 WLR 1490, about making the highway passable for the ordinary traffic of the neighbourhood. In this case the Council assumed, Mr Pay submitted, especially in the passages I quoted earlier in the judgment from the statement of reasons, that the ordinary traffic of the neighbourhood was by foot, cyclists and equestrians. Thus the Council misunderstood the concept of ordinary traffic, which refers to all traffic which might be expected to use the route which is not extraordinary traffic. Since the route was a vehicular highway, Mr Pay submitted, ordinary traffic included vehicular traffic. The proposition which the Council was advancing was that it was not obliged to maintain the routes for vehicular traffic.

40. In advancing ground 2 Mr Pay submitted that while the Council identified the factors applicable under section 122(2), it did not properly consider whether those outweighed its duty under section 122(1) to exercise its power to secure the expeditious, convenient and safe movement of vehicular traffic. In his submission a traffic regulation order banning vehicular traffic at all times was very much the exceptional case. While the committee reports expressly referred to the Council's duty to maintain the highways, they did not refer to the duty to exercise their powers to secure the expeditious, convenient and safe movement of vehicular and other traffic. Rather they suggested that the Council had a wide discretion as to whether to make the traffic regulation orders. Neither the statement of reasons nor the minutes of the committee meetings made any reference to section 122, nor was there evidence that the committee discussed or appreciated its effect.

41. With ground 3 Mr Pay submitted that there was a failure to identify section 122 of the 1984 Act in the Council's reasoning, in particular in the statement of reasons which, after all, was promulgated for public consultation. That vitiated the consultation process since consultees would not have been aware of the approach which the Council had taken to that section.

42. In my view ground 1 goes nowhere. The reasons for making the traffic regulation orders were based upon the considerations set out in the various reports with regard to the 1984 Act. They made clear that the main public use of this type of byway is non vehicular. This was an assertion of fact in the reports with the only named officer being Mr Stafford-Tolley. As the Council's countryside access officer he was in good position to know. The same conclusion was drawn by reference to the statutory definition of a byway open to all traffic, perhaps not the most appropriate way of advancing the reasoning. The notion of ordinary traffic does not feature in sections 1 and 122 of the Act. Not surprisingly the reports did not draw any distinction between ordinary and extraordinary use. It was certainly not suggested that vehicles would constitute extraordinary traffic. All that was being said was that the predominant use to be expected on these two byways was by foot, horse or bicycle. That was a relevant consideration in the making of the traffic regulation order which, as proposed, would not restrict that main public user of the highway. As I explained earlier in the judgment maintenance of the highway is a different issue, arising under a separate statutory regime.

43. As to ground 2, at the outset of the October, December and February reports it was made clear that vehicle use of byways open to all traffic is a lawful user. Sections 1 and 122 of the Act were set out in full. The amenity and enjoyment which recreational users derive from driving vehicles on the byways was recognised in the annotations to section 122 in the reports. The reports considered whether alternatives to traffic regulation orders would achieve the outcome sought. The representations in the consultation emphasised the importance of serving the expeditious, convenient and safe movement of vehicular traffic and proposed less draconian measures. Those representations were analysed in annexes to the reports. Clearly the committee was very much alive to the impact on the expeditious, convenient and safe movement of vehicular traffic and the disadvantages of that. It is clear, in my view, that the Committee did have regard to its duty under section 122, although there is no doubt that the matter could have been better articulated. Incidentally, I reject as without legal foundation in statute or authority the proposition that with a traffic regulation order a total prohibition on vehicular traffic should very much be the exceptional case.

44. The statements of reasons would not win any prizes for draftsmanship or grammar. But ground 3 is not established. There is no requirement that the statement of reasons should spell out expressly the reasoning with regard to the Council's discharge of its duty under section 122. Certainly there was no need to refer expressly to section 122. What a statement of reasons must do is identify the reasons for proposing the orders in such a way as to enable the consultees to make informed responses. Trail Riders Fellowship v Devon County Council establishes the importance of context. The applicants in these proceedings and some of the other consultees are sophisticated and knowledgeable about the issues at play behind the making of traffic regulation orders in this type of situation. Their responses demonstrated that fact, in particular highlighting the Council's duty to secure the expeditious, convenient and safe movement of vehicular traffic along these two byways. Any failures in the statement of reasons in no way prejudiced them.

Factual/evidential failures

45. Ground 4 is the claimant's contention that the Council proceeded on the erroneous basis that the routes had been closed in 2005 following substantial damage from vehicle use. It also incorporates a point Mr Pay regularly highlighted in oral argument, that the reason the routes were damaged was because the Council had fallen down in its duty to maintain them or, in the case of the WBIN byway, because a landowner or some other person had obliterated or obstructed its definitive line at the southern part. That point was straightforward because the temporary traffic regulation orders since 2005 meant vehicular use had been banned. Damage over that some eight years could not be attributable to vehicles.

46. Ground 5 is that the Council acted irrationally in excluding horse drawn vehicles and motorbikes when there was no evidence that they caused significant damage. In a passage in each of the two December 2012 reports, Mr Pay pointed out, the officer had conceded that the arguments against horse drawn vehicles and motorbikes were without an objective basis.

47. In my view it is far too late to investigate the reason for the closure of the routes in 2005. While damage from vehicles is not mentioned in the available documents from that time, it is a factor identified in later reports. As to the damage since 2005, it appears from the available evidence, not least some excellent photographs, that despite the temporary traffic regulation orders the routes had been subject to vehicular use. No doubt individuals exercising private rights of access are one reason, possibly illegal use is another. The October reports identified damage from motor vehicular use and, to a lesser extent, water damage. That was an assessment the Council was entitled to make through its open access officer. The members of the Radnorshire committee are local councillors and may have been able to confirm that from their own knowledge. As to the Council's alleged failure in law to maintain the byways that, as I have already said, is a separate issue.

48. As to horse drawn vehicles, one can envisage the dangers which might be encountered, in particular with the steep slope and dingle towards the southern end of the WBIN byway. In the reports the officer relied upon his experience of trail bikes causing linear impressions in soft ground which would quickly lead to water erosion, a problem which was aggravated by trail riders travelling in convoy. Regarding that damage, I accept the Council's submission that the local knowledge, experience and common sense of the officers and committee members provided the Council with a sufficient basis for holding that motorbikes can cause significant damage to upland, unsealed byways. This ground is not made out.

Improper purpose/irrelevant considerations: repairs

49. With grounds 6 and 7 the applicants contend that a substantial reason for making the traffic regulation orders was to avoid the cost of repairing the byways, that cost featuring prominently in the committee's reports. Moreover, it is said that the approach of the committee to repairs was flawed. The costings were inaccurate and by the time the orders were made in May 2013 substantial repairs had been carried out to both byways.

50. The difficulty with the costings argument is that these were derived from the Motorised Access Strategy. That was adopted after a period of consultation and the applicants all commented upon the strategy before its adoption. The Council's decision to adopt the strategy could have been subject to a public law challenge but was not. Thus it was proper for the Council to have regard to the strategy in making the orders. The strategy prioritises the maintenance of routes which have a sustainable surface and which can, therefore, be maintained at more modest cost.

51. In any event the duty to secure the expeditious, convenient and safe movement of traffic in section 122 of the 1984 Act is qualified and is to be fulfilled so far as is practicable. Resources are a feature of the practicability test. As for the work on the byways affected between the time the orders were proposed and May 2013 when they were sealed, that still left a considerable amount to be done. With the slope and dingle on the WBIN byway, for example, there was still engineering work. With both byways there were also the ongoing maintenance costs. There is in my judgment nothing to these grounds.

Irrationally in not adopting less restrictive orders

52. In my view this ground is hopeless. The Council considered less stringent traffic regulation orders such as seasonal closures and considered that they would not achieve the statutory purposes. Vehicular use during a wet summer posed a risk of significant damage, which would be significantly diminished by the orders which were made. Furthermore, the statutory purposes were not limited to preventing damage to the fabric of the routes and other purposes such as safety would not have been served by less restrictive orders.

Inaccuracies in the committee reports/minutes

53. Mr Pay did not pursue ground 11, in relation to inaccuracies in the way the responses to the consultees were presented to the committee (ground 11). Ground 12 involved a challenge that the traffic regulation orders as made were not the orders which the Radnorshire committee resolved to make. At the hearing there was considerable debate about whether the minutes accurately recorded what the committee decided. The Council's records unfortunately lack the clerk's initial drafts of the relevant motions. Mr Marsden was at the meeting and has given his account as to what he thought was decided. The picture was muddied because the committee discussed simultaneously the proposed orders alongside the proposals in the settlement negotiations.

54. Having considered the matter I have concluded that the minutes ultimately produced must be treated as accurate. They reflect what the reports proposed. Moreover, the February minutes were confirmed at the committee's March meeting. At the March meeting an inaccuracy in relation to another matter was identified but nothing was raised regarding the motions passed on the byways. That suggests to me that if the councillors had thought that the minutes in relation to the proposed orders were inaccurate they would have said so.

Irrelevant consideration: Mr Marsden's legal proceedings

55. Grounds 8 and 9 are different ways of challenging the orders on the basis that they were influenced by Mr Marsden's legal proceedings. It will be recalled that in the reports prepared for the committee meetings on 19 December 2012 and 20 February 2013 it was stated in respect of the Crown Court appeal that part of the Council's defence was that a traffic regulation order supersedes the statutory provision of the maintenance of a highway "and therefore any decision that goes against the proposal of this report will put that defence in jeopardy".

56. Mr Emyr Jones' submission was that the committee was being kept informed of the progress of the Crown Court appeal, just as it was informed of the negotiations taking place in respect of the appeal. If the committee had decided that they did not wish to make permanent traffic regulation orders then the continued extensions of temporary traffic regulation orders could not be justified as a means of fulfilling the policy of the strategy of prioritising maintenance work to the most sustainable routes. In the same way that it was proper to keep the committee informed of the consequences of abandoning the Motorised Access Strategy it was also proper to keep the committee informed of the developments in the Crown Court appeal. Those consequences were not a reason for making the orders. The issue remained whether or not effect should be given to the strategy. In any event, Mr Emyr Jones submitted, the passage quoted did not have a material impact upon the decision to make the order. The decision was made on the basis of the strategy and an assessment of the relevant factors under sections 1 and 122 of the 1984 Act. The decision would have been the same regardless of whether the passage I have just quoted was included in the reports.

57. It was this aspect of the case I found most troubling. I accept that the committee should have been kept informed of the Crown Court appeal and of the issues arising in respect of it. The Council could not have been under a duty to render itself ignorant of the Crown Court appeal, with the carriage of those proceedings left entirely to the judgment of its officers. The words I have quoted – "and therefore any decision that goes against the proposal of this report will put that defence in jeopardy" – were most unfortunate. I cannot rule out that members of the committee were influenced in their decision to make the orders on the improper consideration that doing so would benefit the Council's position in the appeal or to put it another way, not doing so would jeopardise it. The decision to seal the orders came in the middle of the appeal, and could be seen as a reaction to the events in court. For the reasons set out in this paragpraph the orders must be quashed.