IN THE HIGH COURT OF JUSTICE **CO/3039/2018**
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
PLANNING COURT

BETWEEN

TRAIL RIDERS FELLOWSHIP **Claimant**

and

WILTSHIRE COUNTY COUNCIL **Defendant**

SKELETON ARGUMENT
(CLAIMANT'S FOR HEARING 21/22 NOVEMBER 2018

INTRODUCTION

1. The TRF applies to have quashed an experimental traffic regulation order prohibiting mechanically-propelled vehicles from using a number of byways open to all traffic around the Stonehenge area.

2. A list of definitions and abbreviations adopted follows.

3. A suggested reading list appears as Appendix I to this Skeleton Argument.

4. The hearing bundle is in two volumes. References in this Skeleton Argument are in the form **[Volume/Section/Tab/Page]**.

DEFINITIONS AND ABBREVIATIONS

5. The following definitions and abbreviations are adopted (consistently with the Particulars of Claim).

Wiltshire CC	Wiltshire County Council
TRF	Trail Riders Fellowship

LARA	Land Access and Recreation Association (a national umbrella organisation which brings together leading national associations in motor sport and recreation; the TRF is one of four full member associations).
WSCAF	Wiltshire and Swindon Countryside Access Forum
BOAT	Byway Open to All Traffic
MPV	Mechanically-propelled vehicle
TRO	Traffic Regulation Order
ETRO	Experimental Traffic Regulation Order
Stonehenge BOATs	Various BOATs in the vicinity of Stonehenge, namely: • Byway 11, Amesbury • Byway 12, Amesbury • Byway 11, Berwick St James • Byway 10, Durrington • Byway 1, Wilsford Cum Lake • Byway 2, Wilsford Cum Lake Byway 16, Woodford
Stonehenge BOATs ETRO	The County of Wiltshire (Various Byways and Footpaths, Amesbury, Berwick St James, Durrington, Wilsford Cum Lake and Woodford) (Prohibition of Driving) Experimental Order 2018
HA 1980	Highways Act 1980
RTRA 1984	Road Traffic Regulation Act 1984
1996 Regulations	Local Authorities' Traffic Orders (Procedure) Regulations.

OVERVIEW - THE TRF'S CASE

6. On 26 June 2018, Wiltshire CC made the Stonehenge BOATs ETRO **[2/3/JV10/427-435]**.

7. In 2010/2011, Wiltshire CC had proposed to make TROs prohibiting MPVs in material identical terms to the Stonehenge BOATs ETRO. A length public inquiry followed. The TRF, through LARA, (among others) made detailed objections to any such order. On 16 November 2011, the Inspector delivered his report, finding that the statutory grounds for

implementing such a prohibition were not met **[1/3/JV5/244-294]**. The Inspector made detailed findings on a number of issues directly relevant to purported basis of the Stonehenge BOATs ETRO.

8. The Stonehenge BOATs ETRO was then made - out of the blue - without any consultation with those affected by such an order, including, in particular, the TRF. The statement of reasons made no reference at all to the outcome of the public inquiry. A number of matters relied upon in the Statement of Reasons **[2/3/JV10/429-434]** were in direct conflict with the findings of the Inspector. The statement of reasons relied upon no evidence of any worth contradicting the findings of the Inspector. It appears that Wiltshire CC proceeded by of an ETRO as an expedient to avoid the more stringent procedural requirements of a TRO: the ETRO and the statement of reasons disclose no proper experiment.

9. The TRF asks the Court to quash the Stonehenge ETRO on three grounds:

   9.1. Failure to consult and procedural unfairness;

   9.2. A lack of regard to relevant considerations (in particular, the findings of the 2011 Inquiry); a lack of evidential basis for the order; and irrationality; and

   9.3. No proper experiment disclosed by the Stonehenge ETRO.

STATUTORY FRAMEWORK

Road Traffic Regulation Act 1984

10. Section 1(1) RTRA 1984 provides as follows:-

> **Traffic regulation orders outside Greater London**
>
> (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).

11. By section 9, a traffic authority may, for the purposes of carrying out an experimental scheme of traffic control, make an ETRO making such provision as might be made as for a TRO for a period of not more than 18 months.

12. Section 122 RTRA 1984 provides as follows:-

(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 or the local authority to be relevant.

(3) The duty imposed by subsection (1) above is subject to the provisions of Part II of the Road Traffic Act 1991.

13. Part VI Schedule 9 RTRA 1984 provides that any person may question the validity of, or of any provision contained in, an order on the grounds that (a) that it is not within the relevant powers, or (b) that any of the relevant requirements has not been complied with in

relation to the order, by application to the High Court within 6 weeks of the date on which the order is made.

1996 Regulations

14. By Regulation 6 1996 Regulations, a traffic authority must before making an order (that is, including both a TRO and an ETRO) consult with specified persons including in all cases 'such other organisations (if any) representing persons likely to be affected by any provision in the order as the order making authority thinks it appropriate to consult.' (Regulation 6(7)(c)).

15. In the case of a TRO, by Regulation 7, prior to making the order, the authority must publish a notice of proposals and deposit certain documents to be available for public inspection, including a draft order and a statement of reasons. In the case of a TRO, by Regulation 8, any person may make objections to the proposed TRO. Thereafter the authority may, but is not obliged to, hold a public inquiry. Before making a TRO, the order making authority must consider all objections made pursuant to Regulation 8 (and any recommendations of any public inquiry).

16. By Regulation 17, after making an order, the authority must publish a notice of making.

17. By Regulation 22, the provisions of Regulation 7 (notice of proposal) and Regulation 8 (objections) do not apply in respect of an ETRO.

18. By Regulation 23, the provisions of Regulation 7 (notice of proposal) and Regulation 8 (objections) do not apply in the case of making a TRO following an ETRO provided that the requirements of Regulation 23(3) are satisfied, which provide *inter alia* for a 6 month period in which objections may be made during the currency of the ETRO. By Regulation 23(4) such objections are to be treated as if they were objections made under Regulation 8, and must be considered by the authority before making the TRO.

Countryside and Rights of Way Act 2000

19. By section 94 CROWA 2000, a local highway authority must establish a local access forum whose function include to advise the appointing authority '*as to the improvement of public access to land in that area for the purposes of open-air recreation and the enjoyment of the area and any other prescribed matters*' (section 94(4)). By Regulation 22, Local Access

Forums (England) Regulations 2007, '*public access to land in the area for which a forum is established for any lawful purpose other than those mentioned in section 94(4)*' was prescribed as an additional matter in respect of which it is the function of local access forums to advise. By section 94(5), Wiltshire CC was obliged to '*have regard, in carrying out their functions, to any relevant advice given to them by a local access forum under that subsection or any other provision of this Act.*'.

PRELIMINARY – ADMISSIBLE EVIDENCE

20. The reasons for the order are to be discerned primarily from the Statement of Reasons. Extrinsic or additional evidence is only to be looked at in exceptional circumstances, for example, to resolve an ambiguity in the statement of reasons: see

    20.1. R v Westminster CC ex parte Ermakov [1996] 2 All ER 302 at 315h per Hutchinson LJ.

    20.2. TRF v Peak District NPA [2012] EWHC 3359 (Admin) at [37-48] per Ouseley J, in particular at [43],

    > 'There is a statutory obligation to provide reasons for the making of the Order in a prescribed document. It is necessary for the purposes of genuine public consultation. It enables those affected to see if the Order is susceptible to legal challenge. I have very considerable reservations about whether any document, other than the Statement of Reasons and those incorporated in it, should be referred to for the purposes of ascertaining the experiment which it envisages. There should be no need for such additional material: the Statement of Reasons should say enough, and it is scarcely a difficult task to ensure that it does. If extraneous material is permitted, which I doubt, to aid the resolution of a genuine ambiguity, that is as far as in my judgment it should go, and such material should not be permitted for the purposes of creating an ambiguity. One of the reasons for my doubt is that it seems to me likely that such extraneous material would show that there was an underlying failure in the consultation process since its very admission shows that the experiment was not adequately and clearly described in the Statement of Reasons.'.

21. The vast majority of the evidence in Khansari 1 **[2/4/549-569]** is inadmissible on the above basis. The purpose of Khansari 1 appears to be to shore up and provide additional or other reasons to that which is referred to in the statement of reasons. One particularly egregious example is the evidence at Khansari 1 paras 16-22 under the heading 'Traffic Counts': the statement of reasons **[2/3/JV10/429-434]** makes it quite clear that the decision was not based on any such data – it refers in terms at para. 8 to 'anecdotal evidence': 'Anecdotal

evidence indicates the byways have become far more widely used since 2013 and there has been an apparent increase in motor vehicles using particular sections of the byways since the A344 was closed to motor vehicles in 2013.'.

22. Coupled with this *ex post facto* evidence is a remarkable lack of evidence as to how the decision to make the ETRO was *actually* made and what material was *actually* before the decision-maker. In Wiltshire CC's evidence there is no formal decision record, no report preceding the decision, nothing contemporaneous which evidences what material was before the decision-maker and Wiltshire CC's evidence does not even state by whom the decision was made. This is surprising in itself, but it is particularly surprising that Wiltshire CC has chosen not to respond to paragraph 28 Vannuffel 1 (where this point is raised).

GROUND 1 – FAILURE TO CONSULT / PROCEDURAL FAIRNESS

23. For the principles of procedural fairness and consultation generally:

23.1. In Lloyd v McMahon [1987] 1 AC 625, 702-3, Lord Bridge of Harwich said:

> '[I]t is well established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness.'.

23.2. In R (Doody) v Secretary of State for the Home Department [1994] 1 AC 531 at 560 Lord Mustill said:

> "(1) [W]here an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh

against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

23.3. The case law on procedural fairness and a duty to consult is fully and conveniently summarised in Plantagenet Alliance Ltd v SoS for Justice and ors [2014] EWHC 1662 at [89-92] (procedural fairness) and [98] (duty to consult). The latter is set out below:

'The following general principles can be derived from the authorities:

(1) There is no general duty to consult at Common Law. The government of the country would grind to a halt if every decision-maker were required in every case to consult everyone who might be affected by his decision. *Harrow Community Support Limited) v. The Secretary of State for Defence* [2012] EWHC 1921 (Admin) at paragraph [29], *per* Haddon-Cave J).

(2) There are four main circumstances where a duty to consult may arise. First, where there is a statutory duty to consult. Second, where there has been a promise to consult. Third, where there has been an established practice of consultation. Fourth, where, in exceptional cases, a failure to consult would lead to conspicuous unfairness. Absent these factors, there will be no obligation on a public body to consult (*R (Cheshire East Borough Council) v. Secretary of State for Environment, Food and Rural Affairs* [2011] EWHC 1975 (Admin) at paragraphs [68-82], especially at [72]).

(3) The Common Law will be slow to require a public body to engage in consultation where there has been no assurance, either of consultation (procedural expectation), or as to the continuance of a policy to consult (substantive expectation) (*(R Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755, at paragraphs [41] and [48], *per* Laws LJ).

(4) A duty to consult, *i.e.* in relation to measures which may adversely affect an identified interest group or sector of society, is not open-ended. The duty must have defined limits which hold good for all such measures (*R (BAPIO Ltd) v Secretary of State for the Home Department* [2007] EWCA Civ 1139 at paragraphs [43]-[44], *per* Sedley LJ).

(5) The Common Law will not require consultation as a condition of the exercise of a statutory function where a duty to consult would require a specificity which the courts cannot furnish without assuming the role of a legislator (*R (BAPIO Ltd) (supra)* at paragraph [47], *per* Sedley LJ)

(6) The courts should not add a burden of consultation which the democratically elected body decided not to impose (*R(London Borough of Hillingdon) v. The Lord Chancellor* [2008] EWHC 2683 (QB)).

(7) The Common Law will, however, supply the omissions of the legislature by importing Common Law principles of fairness, good faith and consultation where it is necessary to do, *e.g.* in sparse Victoria statutes (*Board of Education v Rice* [1911] AC 179, at page 182, *per* Lord Loreburn LC) (see further above).

(8) Where a public authority charged with a duty of making a decision promises to follow a certain procedure before reaching that decision, good administration requires that it should be bound by its undertaking as to procedure provided that this does not conflict with the authority's statutory duty (*Attorney-General for Hong Kong v Ng Yuen Shiu* [1983] AC 629, especially at page 638 G).

(9) The doctrine of legitimate expectation does not embrace expectations arising (merely) from the scale or context of particular decisions, since otherwise the duty of consultation would be entirely open-ended and no public authority could tell with any confidence in which circumstances a duty of consultation was be cast upon them (*In Re Westminster City Council* [1986] AC 668, HL, at 692, *per* Lord Bridge).

(10) A legitimate expectation may be created by an express representation that there will be consultation (*R (Nadarajah) v Secretary of State for the Home Department* [2003] EWCA 1768 Civ), or a practice of the requisite clarity, unequivocality and unconditionality (*R (Davies) v HMRC* [2011] 1 WLR 2625 at paragraphs [49] and [58], *per* Lord Wilson).

(11) Even where a requisite legitimate expectation is created, it must further be shown that there would be unfairness amounting to an abuse of power for the public authority not to be held to its promise (*R(Coughlan) v. North and East Devon Health Authority* [2001] 1 QB 213 at paragraph [89] *per* Lord Woolf MR).'

24. In the present case, the TRF says:

24.1. Wiltshire CC was subject to an express (albeit qualified – see below) duty to consult under Regulation 6(7)(c) of the 1996 Regulations; and, further:

24.2. The TRF had a legitimate expectation that it would be consulted, engendered by sections 12 and 19 Wiltshire CC's policy **[1/JV7/317A]**; a representation at a meeting of the WSCAF on 14 March 2018 (to the effect that any rights of way changes vis-à-vis the Stonehenge BOATs would be dealt with through central government not by Wiltshire) **[1/JV6/312]** at para. 6.5); and section 94(5) CROWA 2000.

These propositions are put forward both separately and cumulatively. The context giving rise to the latter proposition, colours Wiltshire CC's decision not to consult under Regulation 6(7)(c).

25. The 1996 Regulations provide for differing forms of consultation in respect of ETROs and TROs (as summarised above):

25.1. In relation to a TRO there is (i) mandatory consultation under Regulation 6 with certain prescribed bodies in certain cases together with in every case '*(c) Such other organisations (if any) representing persons likely to be affected by any provision in the order as the order making authority thinks it appropriate to consult*.'; followed by (ii) publicization of a proposed order and a period in which representations must be made and considered under Regulation 7 and 8.

25.2. In relation to an ETRO there remains (i) mandatory consultation under Regulation 6; but (ii) Regulations 7 and 8 are disapplied. Further, if a TRO in the same form follows an ETRO, compliance with Regulations 7 and 8 is not required for the TRO, provided that an opportunity for representations has been given in the first 6 months of the ETRO.

26. The following further points can be made in relation to the contrasting procedure for a TRO and an ETRO:

26.1. Notwithstanding that there may be (but not necessarily will be) a period for representations during the currency of an ETRO, the mandatory provisions of Regulation 6 remain.

26.2. Accordingly, the consultation provisions are of particular importance in relation to an ETRO as compared with a TRO.

26.3. The ETRO as not a freestanding alternative procedure to a TRO. An authority might achieve a e.g. a prohibition of MPVs for 18 months by means of an ETRO or a TRO. But the ETRO procedure cannot be used as a more convenient and less procedurally rigorous alternative means to impose a restriction on vehicular traffic: an ETRO must be based on a genuine experiment.

27. The duty to consult under Regulation 6(7)(c) '(1) An order making authority shall, before making an order in a case specified in column (2) of an item in the table below, consult the persons specified in column (3) of the item… 7. All cases … (c) Such other organisations (if any) representing persons likely to be affected by any provision in the order as the order making authority thinks it appropriate to consult.' can be broken down into the following constituent parts:

27.1. The duty to consult is a mandatory duty;

27.2. The potential consultees are limited to organisations '(if any) representing persons likely to be affected by any provision in the order'; and

27.3. The authority is obliged only to consult those whom it thinks appropriate to consult.

That is to say, the consultation, itself, is mandatory not discretionary, but it is dependent upon a decision by the authority as to whether it is 'appropriate' to consult a particular organisation. That decision must be reached properly on normal judicial review principles: i.e. it must be rational, have regard to relevant considerations and not have regard to irrelevant considerations etc. Further, the TRF submits that Regulation 6 should be read in a way which is consonant with the general principles of procedural fairness and consultation: that is, it will normally be appropriate to consult with those affected by an order.

28. The TRF was unarguably an organisation 'representing persons likely to be affected by any provision in the order' as was well-known to Wiltshire CC. Moreover, it was an obvious organisation to consult in relation to an order which would primarily or substantially affect trail-riders (as had been emphasised in the 2011 Inquiry and as further illustrated by the fact that the TRF had a member on Wiltshire's Countryside Access Forum).

29. No reason for not consulting the TRF (or other such bodies) is apparent from the statement of reasons. Wiltshire CC provide no direct contemporaneous evidence that any decision as to whether or not it was appropriate to consult the TRF (or other such bodies) was actually made. There is nothing in the contemporaneous evidence which shows that the test under Regulation 6(7)(c) was ever properly considered at all. The *ex post facto* evidence in Khansari 1 is as follows:

    29.1. '*There is no requirement to consult with organisations if the council does not consider it appropriate to consult'* (para 2 Khansari 1 – misstating, at least to some extent, the true effect of Regulation 6(7)(c)).

    29.2. '*In this case it was not considered appropriate to undertake a consultation under paragraph 6 because of the high volume of vehicles using byways 11 and 12 in particular it was considered operationally it made sense to undertake urgent repairs after the Solstice whilst the byways were cleared and the to simply continue with the closure for ETRO. The Council will consider all the objections received on expiry of the 6 month consultation period (January 2019) and may decide to amend the ETRO or withdraw the ETRO or make it permanent…*' (para. 4 Khansari 1).

30. The purported reasoning for not consulting does not stand up to any scrutiny: it appears to be suggested that Wiltshire CC positively decided not to consult organisations representing persons affected by the ETRO only because they happened to be carrying out some repairs to two of the byways: but that cannot be any proper reason not to consult (consultation could have taken place before, during or after the relevant repairs). Further, there appears to be some suggestion that a decision was made not to consult because of the provisions relating to representations during the period of the ETRO: but that cannot be a proper reason not to consult – the consultation provisions in Regulation 6 remain *notwithstanding* the procedure for representations during the currency of the ETRO; if that was a proper reason not to consult, it would be a proper reason in every case and Regulation 6 would be robbed of any meaningful effect.

31. In summary, the TRF submits:

    31.1. There is a lack of evidence – notwithstanding Khansari 1 - establishing that Wiltshire CC considered the consultation provision of Regulation 6 properly at all.

    31.2. The *ex post facto* explanation contained in Khansari 1 is irrational (or based on irrelevant considerations).

    31.3. Wiltshire CC breached the TRF's legitimate expectation of being consulted, in any event.

GROUND 2 (IRRATIONALITY, LACK OF ANY PROPER EVIDENTIAL BASIS FOR THE ORDER, FAILURE TO HAVE REGARD TO RELEVANT CONSIDERATIONS)

32. The 2011 Inquiry was directed precisely to the question of whether there was a justifiable case to restrict MPVs from using the Stonehenge BOATs. The inquiry took detailed evidence and the inspector produced a comprehensive report **[1/3/JV5/244-294]**. Not only was the overall conclusion of the inquiry (viz. that there was no proper basis to prohibit MPVs from the Stonehenge BOATs) obviously of key relevance to the question of whether any such prohibition should be imposed, but the Inspector made findings informed by detailed evidence germane to more or less every point referred to in the Statement of Reasons **[2/3/JV10/429-434]** in support of the Stonehenge BOATs ETRO (and, in the majority of cases, those findings undermined or contradicted the purported basis of the

Stonehenge BOATs ETRO). The key paragraphs of the the Statement of Reasons are tabulated against key findings in the 2011 Inquiry at Appendix II. The Statement of Reasons makes no reference at all to the outcome or findings of the 2011 Inquiry. There is no evidence that the findings of the 2011 Inquiry were considered at all when deciding to make the Stonehenge BOATs ETRO. Wiltshire CC's position appears to be that the findings of the 2011 Inquiry are – and therefore were – of no relevance (see para. 11 Khansari '*The 2011 Public Inquiry and Inspector's recommendation is not considered to be relevant to these proceedings.*' **[2/4/552]**. Even a cursory comparison between the findings of the 2011 Inquiry and the Statement of Reasons shows any such suggestion to be completely unsustainable. The Stonehenge BOATs ETRO must be quashed for failure to have regard to the highly relevant consideration that the 2011 Inquiry had roundly rejected Wiltshire CC's case for imposing restrictions on MPVs on these BOATs and the highly relevant findings in doing so.

33. A comparison between the findings of the 2011 Inquiry and the Statement of Reasons **[2/3/JV10/429-434]** shows, moreover, the lack of any proper evidential basis for the Stonehenge BOATs ETRO.

34. The relevant principles are summarised in in Plantagenet Alliance Ltd v SoS for Justice and ors [2014] EWHC 1662 at [99-100]

'Duty to carry out sufficient inquiry/Tameside duty

99. A public body has a duty to carry out a sufficient inquiry prior to making its decision. This is sometimes known as the 'Tameside' duty since the principle derives from Lord Diplock's speech in Secretary of State for Education and Science v Tameside MBC [1977] AC 1014, where he said (at page 1065B): "The question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?".

100. The following principles can be gleaned from the authorities:

(1) The obligation upon the decision-maker is only to take such steps to inform himself as are reasonable.

(2) Subject to a Wednesbury challenge, it is for the public body, and not the court to decide upon the manner and intensity of inquiry to be undertaken (R(Khatun) v Newham LBC [2005] QB 37 at paragraph [35], per Laws LJ).

(3) The court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed

the information necessary for its decision (per Neill LJ in R (Bayani) v. Kensington and Chelsea Royal LBC (1990) 22 HLR 406).

(4) The court should establish what material was before the authority and should only strike down a decision by the authority not to make further inquiries if no reasonable council possessed of that material could suppose that the inquiries they had made were sufficient (per Schiemann J in R (Costello) v Nottingham City Council (1989) 21 HLR 301; cited with approval by Laws LJ in (R(Khatun) v Newham LBC (supra) at paragraph [35]).

(5) The principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant, but from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion (per Laws LJ in (R (London Borough of Southwark) v Secretary of State for Education (supra) at page 323D).'.

35. As set out in the preliminary submissions above, the reasons for the Stonehenge BOATs ETRO are to be primarily discerned from the Statement of Reasons. Insofar Wiltshire CC seeks to rely upon additional reasoning through Khansari 1, this is not admissible. But all of this further reasoning / justification is beside the point for a further reason: it is not said that any of this reasoning / justification was before the decision-maker when the Stonehenge BOATs was made and there is no contemporaneous record of what material was before the decision-maker.

36. The following specific further points are made:

36.1. The statement of reasons **[2/3/JV10/429-434]** purports to rely upon an increase in use by MPVs since 2013, but refers to no evidence of this other than 'anecdotal evidence'. No reasonable authority would make a traffic regulation order based only on anecdotal evidence.

36.2. Wiltshire CC relied upon damage to the route (paragraph 7), but failed to determine what sort of vehicles are responsible for that damage. Not only is this an obvious point going to the evidential basis for making an order, but it is a point which was squarely raised in the 2011 Inquiry. The 2011 Inquiry found that there was little evidence of damage by recreational MPVs as opposed to agricultural vehicles (the latter are excepted from the prohibition contained in the Stonehenge BOAT ETRO). There was no evidence, in particular, that two-wheeled MPVs (which by the nature are much less likely to cause damage) have caused or are likely to cause any damage to the routes.

36.3. Insofar as Wiltshire CC stated (paragraph 7) '*The byways are unsealed and are not designed for the current levels of traffic throughout the year*.', Wiltshire CC had no proper evidence as to what the current levels of traffic were. Even if Wiltshire CC had proper evidence that the routes could not sustain the current levels of traffic, it failed to consider or obtain evidence as to alternative options, such as restriction of 4-wheeled MPVs.

36.4. Insofar as Wiltshire CC relied upon the inconvenience to other users of parked MPVs (paragraph 8) this was irrational. The BOATs confer no right for MPVs to park, as was expressly confirmed in the 2011 Inquiry. Other methods are available to address any problems caused by parked vehicles. Moreover, it is inconceivable that parked 2-wheeled MPVs could cause any substantial inconvenience.

36.5. Wiltshire CC had no evidence that MPV usage affected the amenity or the safety of use the BOATs by other users (paragraph 9). The bare assertion is contrary to the express findings of the 2011 Inquiry.

37. Further, Wiltshire CC failed to consider whether the purported statutory purposes of the Stonehenge BOATs ETRO could be met by less restrictive measures (such as e.g. seasonal restrictions, voluntary restraint and/or restrictions on four-wheeled MPVs only). This was a breach of Wiltshire CC's Policy and the legitimate expectation created thereby; alternatively, it was a failure to have regard to a relevant consideration; alternatively, it was a breach of section 122 RTRA 1984.

GROUND 3 (NO PROPER EXPERIMENT)

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38. An ETRO must be made for the purposes of a genuine experiment:

38.1. UK Waste Management Ltd v West Lancashire DC [1997] RTR 201 at 208-9 per Carnwath J;

> 'There is, by way of further explanation of the council's actions, an affidavit from Mr Martin. Indeed, there is one from him in the U.K. Waste Management proceedings and one in the St Helens proceedings. That does not add very much to what is contained in the report. In particular, it does not expand on the nature of the experiment which the authority thought they were carrying out under section 9 . It refers to the statement of reasons and says:

> "It is stated quite clearly there that the respondent has proposed to introduce the restrictions contemplated by the order on an experimental basis in order for an assessment to be made of their effect in operation from which it is apparent both that the order was to be made as an experiment and that consideration was given to the question of whether the order should be experimental. The experiment will be monitored by periodic traffic surveys, the first of which has already been carried out at the end of January and beginning of February 1996."

…

'The issues in this case cover a number of matters, but there are two principal points which are made by the applicants. First, they say that this is not an experimental order. The purpose of section 9 of the Act of 1984 is, they say, to enable the authority to make an order where there is a genuine experiment. That is an operation designed to glean information about the workings of the scheme in practice. In this case, they say there was no experiment. The statement of reasons asserts that there is an experiment but does not explain what it is, nor does the affidavit of Mr Martin.

In my view, this objection to the order is unanswerable. I agree that for there to be a valid experimental order there must be an experiment and the traffic authority must be able to explain what it is. In this case, the clear purpose of the order was to prevent any traffic gaining access to the Holiday Moss site. The traffic authority did not require any further information about the working of that order. If the order has effect the result will simply be that heavy traffic cannot use Crawford to gain access to that site. That is known. The only question arising from that is what, if anything, St Helens council, on their side of the boundary line, will do *209 about it, either to make it easier for the company to gain access through Rainford, or to extend the life of the tip. But those are not the sorts of matters which are intended to be researched by an experimental traffic order. Mr Martin, as I have said, refers to the fact that there has been traffic monitoring in January and February but he does not say what that traffic monitoring was intended to reveal or what any further traffic monitoring would be intended to reveal. There is no reason to think that the company were not going to comply with an order and, in any event, they would be criminally liable if they failed so to do. It seems to me that the purpose of this order was clearly to introduce a final restriction on the traffic through Crawford and that the reference to an experiment was simply a means to get over the procedural hurdles which would otherwise apply. It is also difficult to see the point of an experiment lasting 18 months in relation to a problem which, left to itself, was due to end by October 1997. It seems to me therefore, having regard to section 9, that the order cannot be justified and must be quashed.'.

38.2. TRF v PDNPA [2012] EWHC 3359 (Admin) at [30] per Ouseley J:

'30 Crucial to this ground, and of importance for the other grounds, is whether the ETRO was made for an experimental purpose. The statutory provisions clearly require that an experiment should underlie the ETRO, and that it should

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

Where Ouseley J went on to conclude that an experiment expressed to be for the purpose '*so that the effect of the order on the condition of the route can be assessed*' was held to be no experiment at all.

39. It is submitted further that:

39.1. Given that the same prohibition can be achieved through a TRO (where there are more stringent procedural safeguards) and an ETRO, the Court should be particularly astute to scrutinise whether the statement of reasons discloses a genuine experiment (as opposed to the mere use of a more convenient procedure).

39.2. A feature which will tend to point towards the lack of a genuine experiment is the adoption of the statutory maximum period of 18 months (as here): unless there is some particular reason why the results of the experiment cannot be achieved within a shorter period of time, this will tend to indicate that the underlying intention is a prohibition *simpliciter* rather than any particular experiment.

40. In the present case, the Statement of Reasons **[2/3/JV10/429-434]** states:

'12. The changes are initially being proposed on an experimental basis to determine the impact of the changes on the byways and the non-motorised traffic using the byways should they be introduced on a permanent basis. As such the implementation on an experimental basis will afford the council flexibility if considered appropriate to modify or suspend the Order as a result of any objections received during consultation, and provide an opportunity to monitor the effects of the scheme before consideration is given after the trial period as to whether or not the provisions of this Experimental Order should be made permanent.

13. The Experimental Order will be in force for a maximum period of 18 months before a decision is required to be made as to whether or not to bring the Order into permanent effect. Objections to the Order may be submitted within the first 6 months of the operational date, or if the Order is subsequently varied or modified, within 6 months of the date of the variation or modification coming into force.'.

41. No proper experiment can be discerned from the Statement of Reasons, essentially for the same reasons as in the two above-cited cases. There is no explanation of how the so-called 'experiment' could yield data of any significance which would bear upon the question of whether a TRO should be made: in particular, how it could yield data which would count against a TRO being made. Not only is there no such explanation in the statement of reasons, but it is impossible to conceive as a matter of logic how the purported experiment could yield such information. Moreover, the lack of any genuine experiment is revealed by the fact that Wiltshire CC had no evidential baseline against which to measure the results of the purported experiment.

42. Wiltshire CC's flawed approach to the proper basis of an ETRO is revealed by its reference to the impact of representations and by its reference to 'flexibility'. The fact that representations are to be received during the period of an experiment does not make an experiment (the same applies to a TRO); an ETRO is no more flexible than a TRO (which can be time-limited; can be discharged at any time; and can be varied in its provisions). It seems clear that Wiltshire CC has regarded an ETRO as a – to put it into the vernacular – a 'suck-it-and-see' procedure (cf. the reference to the 'trial period') rather than appreciating that an ETRO must be made for the purposes of a proper experiment.

CONCLUSION

43. For the above reasons, the TRF respectfully asks the Court to quash the Stonehenge BOATs ETRO.

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2 November 2018

APPENDIX I – READING LIST

[1/1/3-19]	Particulars of Claim
[1/3/20-28]	Vannuffel 1 (without exhibits, except as referred to here)
[2/3/JV10/427-435]	Stonehenge BOATs ETRO (order **[2/3/JV10/427-8]**; statement of reasons **[2/3/JV10/429-434]**; order map **[2/3/JV10/435]**)
[1/3/JV5/244-294]	Report 7 September 2011 following public inquiry (sections 1,2 and 5 only unless time permits for the report to be pre-read in full)
[2/4/549-569]	Khansari 1

APPENDIX 2 – STATEMENT OF REASONS / INQUIRY REPORT

Statement of Reasons	**Comment / Relevant parts of Inquiry Report**
Para. 6 The impact of traffic on the WHS was first raised in 1986 by UNESCO. The A344 was stopped up between its junction with Byway Amesbury 12 and its junction with the A303 at Stonehenge Bottom and the greater part of the section of the A344 between Airman's Cross and the A344 junction with Byway Amesbury 12 was made subject to a traffic regulation order prohibiting use by motor vehicles (with certain exceptions) which was implemented in 2013 when the Stonehenge Visitors Centre was first opened to the public. In June 2013 the Statement of Outstanding Universal Value ('OUV') was adopted by the World Heritage Committee. It is Government policy that WHS nominated to UNESCO must have a WHS management plan in order to have effective management systems in place specifying how the OUV, authenticity and integrity of each site is to be maintained. The Council as one of the stakeholders has adopted the Stonehenge WHS Management Plan 2015–2021 ('Management Plan'). Policy 6a of the Management Plan states the need to Identify and implement measures to reduce the negative impacts of roads, traffic and parking on the WHS and to improve road safety and the ease and confidence with which residents and visitors can explore the WHS' and Policy 6b states the aim to manage vehicular access to byways within the World Heritage Site to avoid damage to archaeology, improve safety and encourage exploration of the landscape on foot whilst maintaining access for emergency, operational and farm vehicles and landowners. In 2017 a major infrastructure scheme to improve the A303 (the A303/A358 Corridor Improvements (A303 Stonehenge (Amesbury to Berwick Down scheme)) proposed a dual-carriageway via a tunnel through the WHS past Stonehenge which will protect or enhance the WHS.	[No reference at all to the outcome or findings of the 2011 Public Inquiry.].
Para. 7 The apparent increase in motorised traffic using the byways on a regular basis since 2013 is now causing damage to sections of the byways to an	[No evidence of any increase in MPV usage. Clear from para. 8 statement of reasons that Wiltshire CC only rely upon 'anecdotal evidence'].

extent that some sections are now more difficult for smaller vehicles to pass through. The damaged sections would also be expected to cause significant difficulties for pedestrians, equestrian users and cyclists. The byways are unsealed and are not designed for the current levels of traffic throughout the year.	Para. 7.36 'I have seen no evidence of actual, as opposed to potential, adverse effects on pedestrians as a result of use of the BOATs by motor vehicles. Such evidence as there is, and my own observations, suggest that other than in the vicinity of Stonehenge, use of these routes by pedestrians is low. Given the level of use by motor vehicles, conflicts between these classes of users are likely to be infrequent and the substantial widths of many parts of the BOATs allow ample room for passing.'. Para. 7.38 'The prevention of continuing damage to the monuments and archaeological features within the WHS is a further reason given by the Council and EH for the proposed TRO. No evidence other than anecdotal comments by third parties was provided to the Inquiry regarding the extent of ongoing damage caused by recreational vehicles as opposed to agricultural vehicles which tend to be larger and heavier and which, a number of objectors suggest, are more likely to cause such damage. Even if the TRO were introduced, agricultural vehicles would still be able to use the BOATs…, the introduction of the TRO would be likely to result in an unquantified but probably only minor reduction in the damage to the monuments and architectural features within the WHS. I also consider that there remains potential for other measures to prevent or at least mitigate damage to such interests and that insufficient consideration has been given to appropriate and sensitive application of such measures as alternatives to a blanket TRO.' Para. 7.66 '…there is scant evidence that … damage [to the archaeological features] has in the past been, or more importantly, would in the future be exacerbated by, recreational use of these routes as opposed particularly to agricultural vehicles… It seems to me that the potential for addressing such matters other than through the TRO has not been fully considered.'. Para. 7.67 '…I consider that the effect of use of the BOATs by motor vehicles, other than for the purpose of parking near Stonehenge, has negligible effect on

	the settings of other Ancient Monuments. Similarly, there is little evidence of an adverse effect on nature conservation interests.'. <u>Para. 7.68</u> 'In the light of the above factors and all other material considerations, I am not persuaded that the gain to the overall amenity of the WHS would outweigh the loss of amenity of motorised users and consequently I consider that the TRO should not be implemented with respect to the BOATs.'.
Para. 8 Anecdotal evidence indicates the byways have become far more widely used since 2013 and there has been an apparent increase in motor vehicles using particular sections of the byways since the A344 was closed to motor vehicles in 2013. With the expected changes to the A303 through the A303/A358 Corridor Improvements (A303 Stonehenge (Amesbury to Berwick Down scheme it is considered very likely that the levels of motorised vehicles using the byways within the WHS will continue to increase to the potential detriment of non-motorised users of the byways and visitors to the WHS.	[Cf. the comments / citations above. No evidence relied upon other than 'anecdotal evidence'. Wiltshire CC rely upon the same considerations as were rejected at the 2011 Inquiry.].
Para. 8 (cont.) There is now considered to be a potential danger to non-motorised highway users (pedestrians, equestrians and cyclists) who are now having to negotiate around increasing numbers of both moving and disordered parked vehicles (cars, motor homes, and large vans) when using the byways where the public would normally expect levels of motorised traffic to be lower than that of other users.	<u>Para. 7.10</u> [Para. 5.21 records Wiltshire CC as having unsuccessfully relied upon safety as a ground for the proposed TRO]. 'No evidence has been put forward to show that any accidents have occurred on the BOATs.' (para. 7.10) [Para. 7.31-2. 7.60 records that the effect of the proposed TRO would be to divert trail riders from BOATs onto roads, to the detriment of their safety. This is an aspect, therefore, which Wiltshire CC were well aware of but did not consider]. <u>Para. 4.31-4.37, para. 7.57-59</u> [BOAT confers no right to park] <u>Para. 7.64</u> 'Nevertheless, I am not satisfied that there are no alternative means of addressing the issue of parking more directly without also adversely

	affecting other users of these routes. Examples of such means might include more rigorous enforcement of existing legal powers to prevent such use (though I recognise the difficulties involved), making and enforcing an Order specifically prohibiting parking on the relevant lengths of BOATs, and/or physical measures such as reducing the widths of the BOATs.'.
Para. 9 It is considered that the proposals will generally assist to secure the safer movement of non-motorised highway users of the byways; create a safer and more pleasant environment for non-motorised highway users of the byways and visitors to the WHS therefore improving the amenities of the WHS; will reduce instances of obstructive, dangerous and displaced parking; will reduce the ongoing damage to the byways arising from the increased levels of motorised traffic and reduce incidents of anti-social behaviour in the area. It is anticipated that the proposals will also promote increased levels of non-motorised access to the WHS	[Cf. the above-cited passages to the effect that (i) there was no evidence of safety concerns; (ii) there was no substantial impact from MPVs on the amenity; (iii) the BOATs do not confer a right of parking: other methods are available to address problems arising from parking.].
Para. 11 It is considered that the proposals will generally assist to secure the safer movement of non-motorised highway users of the byways; create a safer and more pleasant environment for non-motorised highway users of the byways and visitors to the WHS therefore improving the amenities of the WHS; will reduce instances of obstructive, dangerous and displaced parking; will reduce the ongoing damage to the byways arising from the increased levels of motorised traffic and reduce incidents of anti-social behaviour in the area. It is anticipated that the proposals will also promote increased levels of non-motorised access to the WHS is also provision for public transport for visitors to Stonehenge from Salisbury. Landowners and occupiers within the Stonehenge WHS have indicated to the Council that restrictions on motor vehicles will not affect their reasonable access to their premises and land as the landowners and occupiers have not objected to the temporary restrictions put in place on the byways for motor vehicles during the Solstice Events. It is accepted that use by agricultural use has caused some damage to the sections of the byways south of the A303. Agricultural vehicles will be subject to an exception to the order but landowners and	[Does not address (i) the 'the substantial loss of amenity to recreational motor vehicle users' identified in the 2011 Report as a powerful factor against making the order to be factored into the section 122 duty; and (ii) the adverse effect to safety of trail riders caused by displacement.].

occupiers have indicated they would find alternative routes to access their land. It is therefore considered that the proposals will affect the matters as specified in section 122 as follows: (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 area through which the roads run;	