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CASE NO: CO/6215/2008

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

The Courthouse
1 Oxford Row, Leeds LS1 3BG
19 June 2009

Before:

**His Honour Judge Behrens
sitting as a Judge of the High Court**

**IN THE MATTER OF AN APPLICATION
UNDER PART 6 OF SCHEDULE 9 OF THE
ROAD TRAFFIC REGULATION ACT 1984.**

(1) GEOFFREY WILSON

(2) WILLIAM TROUGHEAR

**(on their own behalves and on behalf of the
members of the**

**MOTORING ORGANISATIONS' LAND
ACCESS AND RECREATION ASSOCIATION) Claimants**

AND

**YORKSHIRE DALES NATIONAL PARK
AUTHORITY**

Defendant

HTML VERSION OF JUDGMENT

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1. Definitions and Abbreviations

1. In this Judgment I shall adopt the acronyms and abbreviations contained in Mr Pay's skeleton argument:

Acronym	Meaning
BOAT	Byway Open to All Traffic
DMMO	Definitive Map Modification Order
LARA	Motoring Organisations' Land Access and Recreation Association.
NPA	National Park Authority
TRO	Traffic Regulation Order
UCR	Unclassified County Road
YDGLAG	Yorkshire Dales Green Lane Advisory Group
YDNPA	Yorkshire Dales National Park Authority
NYTMAG	North Yorkshire Trail Management Advisory Group
	Legislation
NPACA 1949	National Parks and Access to the Countryside Act 1949
WCA 1981	Wildlife and Countryside Act 1981
RTRA 1984	Road Traffic Regulation Act 1984
EA 1995	Environment Act 1995
NERCA 2006	Natural Environment and Rural Communities Act 2006
2007 Regulations	National Park Authorities' Traffic Orders (Procedure) (England) Regulations 2007

2. The routes to which these proceedings relate are referred to by the letters adopted in the Amended Particulars of Claim, reproduced in the table below.

A	Street Gate to Arncliffe Cote
B	Harber Scar Lane
C	Stockdale Lane
D	The Highway
E	Old Ing to Cam End via Ling Gill

F	Gorbeck Road
G	Horton Scar Lane / Foxup Road
H	Cam High Road

2. Introduction

3. On 30th May 2008 YDNPA gave notice that under section 22B(2)(a) RTRA 1984 it had made TROs in respect of the 8 roads/green lanes set out above the effect of which was to prohibit access by mechanically propelled vehicles to the roads. The purpose of the orders was stated to be "*for the purposes of preserving amenity and conserving the natural beauty of the area*".
4. The Claimants are members of LARA, an unincorporated association for promoting the responsible use of the environment for motor sports and recreation. They bring this application on their own behalf and on behalf of LARA.
5. This application is, in effect, a statutory appeal under Schedule 9 of Part VI RTRA 1984 against the making of the orders.
6. There were 8 pleaded grounds of objection in the Re-Amended Particulars of Claim. As a result the Claimants sought orders that the TROs be quashed, orders requiring YDNPA to provide reasons for making the TROs and an order requiring compliance with Reg 14 of the 2007 Regulations. YDNPA contended that none of the grounds were made out.
7. In fact LARA has modified its position. It no longer seeks an order that all of the 8 TROs be quashed. In particular whilst it maintains that the procedure was flawed it no longer seeks any relief in respect of routes D, E, G and H. In respect of each of these routes it accepts that YDGLAG recommended that full TROs be made. It accepts that recommendation and thus does not seek that the orders be quashed.
8. It has also modified the nature of the challenge. There are now in effect 4 grounds of complaint:
 1. In making the TROs the Access Committee failed to consider and/or to take into account YDNPA's duty under section 122 RTRA 1984. This is the central allegation and affects both Grounds 1 and 2 of the pleaded grounds.
 2. Routes A, B, C and H are each routes where it is not clear whether there is a vehicular right of way at all. In each case there is an application (as yet undetermined) under section 53(5) NERCA 2006 for a DMMO to establish vehicular rights of way. LARA contends that YDNPA made a full TRO on these routes because a partial or limited TRO might have given the impression that YDNPA were condoning vehicular rights where none in fact existed. LARA contend that this was an irrational reason and should not have influenced the decision as to whether to make a full or limited TRO. YDNPA do not accept that the decision was irrational. In respect of routes A and H it contends that this was not a factor that influenced the decision to make full TROs. This is Ground 4 of the original objection.
 3. In relation to routes B, C and F LARA complains that YDNPA wrongly and irrationally excluded the possibility of TROs limited in time on the apparent basis that members of the public would not understand such restrictions. YDNPA accept that this reason formed part of the reason for the making of the TRO in respect of route F but do not accept it was irrational. This is Ground 5 of the original complaint.
 4. Following the meeting of the Access Committee on 17th January 2008 YDNPA prepared draft orders and statements of reasons for the purpose of consultation. LARA criticises the reasons given on a number of grounds. In particular the reasons make no mention of section 122 RTRA, the view that where there was an application for a DMMO it was inappropriate to make anything other than full TROs and the view that partial TROs were too complicated for the public to understand. LARA alleges that the reasons given were inadequate and that it has been prejudiced by the failure. YDNPA contends that the reasons given were perfectly adequate and that there has been no prejudice to LARA.

3. Statutory Framework

9. The statutory framework is not controversial and can be taken from Mr Pay's skeleton argument:

3.1 Road Traffic Regulation Act 1984

10. Section 22BB RTRA 1984 was inserted by section 72 NERCA 2006 and came into force on 1 October 2007. It provides as follows:

22BB Traffic regulation on byways etc in National Parks in England and Wales

(1) This section applies to a road—

(a) which is in a National Park in England or Wales,

(b) which is—

(i) shown in a definitive map and statement as a byway open to all

traffic, a restricted byway, a bridleway or a footpath, or

(ii) a carriageway whose surface, or most of whose surface, does

not consist of concrete, tarmacadam, coated roadstone or other prescribed material, and

(c) in respect of which no relevant order is in force.

(2) The National Park authority may—

(a) for a purpose mentioned in section 1(1)(a) to (g) or 22(2), by order make in respect of the road any such provision as is mentioned in section 2(1), (2) or (3) or 4(1);

...

1. This Act has effect, subject to subsection (4) and any prescribed modifications, in relation to an order by a National Park authority under subsection (2)(a), (b) or (c) as it has effect in relation to an order by a local traffic authority under section 1, 9 or 14(1).

2. Before making any order under subsection (2), the National Park authority must consult any authority which is a highway authority for the road.

In summary:-

1. In relation to roads which satisfy the conditions in subsection 22BB(1), the power to make TROs, which is normally conferred on the local traffic authority, is conferred on a National Park authority ("NPA");

2. A TRO may be made under this section for any of the purposes set out in section 1(1)(a)-(g) RTRA 1984 or for that mentioned in section 22(2).

11. Among the statutory purposes in section 1(1)(a)-(g) RTRA 1984 are:

...

(b) for preventing damage to the road or to any building on or near the road, 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

...

(f) for preserving or improving the amenities of the area through which the road runs

12. The statutory purpose mentioned in section 22(2) RTRA 1984 is:

"the purpose of conserving or enhancing the natural beauty of the area, or of affording better opportunities for the public to enjoy the amenities of the area, or recreation or the study of nature in the area."

13. Section 122 RTRA 1984 imposes a duty on authorities in exercising their functions:

(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.

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

14. By paragraphs 34 to 37 of Schedule 9 RTRA 1984, any person may challenge a TRO by application to the High Court within 6 weeks of the making of the order. It is common ground that all the usual grounds of judicial review are available in a challenge to a TRO by way of application under Schedule 9 RTRA 1984.

3.2 The 2007 Regulations

15. The procedure whereby an NPA can make a TRO is provided for in the 2007 Regulations. In summary:

1. Regulation 4 provides that an NPA must consult with specified organizations (including LARA and the highway authority) prior to proposing a TRO.
2. Regulation 5 requires the NPA to publish a notice setting out its proposals (in a local newspaper and on its website).
3. Regulation 6 requires the NPA to keep available for inspection documents including a statement setting out the reasons for the proposed order (Reg. 6(2)(d)).
4. Regulation 7 allows any person to make representations in writing as to the proposal.
5. Regulation 8 provides that the NPA "may cause a public inquiry to be held before making an order". Regulations 9 and 10 make further provision in relation to public inquiries.
6. Regulation 11 requires the NPA to consider all representations made by persons consulted under Regulation 4 and made by persons under Regulation 7.
7. Regulation 14 requires the NPA to publish a notice of the order (in a local newspaper and on its website) and give notice in writing that the order has been made to any person who made representations under Regulation 7. The NPA must give its reasons for not acceding to any objector's objections in that notice (Regulation 14(2)).

3.3 National Parks and Access to the Countryside Act 1949

16. National Parks were established by NPACA 1949. National Park Authorities, including the YDNPA, were established by the EA 1995 and the National Park Authorities (England) Order 1996 (SI 1996/1243). EA 1995 amended section 5 NPACA 1949 to provide that the statutory purposes for the exercise of functions in relation to National Parks are as follows:

- 1. The purpose of conserving and enhancing the natural beauty, wildlife and cultural heritage of the National Parks;*
- 2. The purpose of promoting opportunities for the understanding and enjoyment of the special qualities of those areas by the public.*

(by section 11A NPACA 1949, in case of conflict, the first purpose is to be accorded greater weight).

1. The Facts

4.1 Background

17. There are over 2,000 km of rights of way and over 100 km of unsealed unclassified county road in the Yorkshire Dales National Park. A 2005 survey established that recreational motor vehicles were using over 400 km of this network. The use of these routes by recreational motor vehicles can give rise to problems that need to be addressed by effective management. The use of unsealed routes by recreational motor vehicles can affect the enjoyment of other users, impact on the local community and damage the habitat and landscape of the Yorkshire Dales.
18. The term "green lane" is often used in respect of an unsealed road, often of some antiquity. It has no legal meaning whatsoever and gives no indication of the public's rights over the road. In fact the public may have a variety of rights over the road. These include footpaths (right of way on foot only), bridleways (rights of way on foot, horse and bicycle) and BOATs (right of way for vehicular and all other kinds of traffic).
19. The status of the public rights in respect of an unsealed road is recorded on the Definitive Map. However, it is clear from section 56 WCA 1981 that the recorded status of routes on the Definitive Map is without prejudice to higher rights existing. Thus, a route may carry vehicular rights although no such rights are recorded on the Definitive Map. Thus, a route marked on the Definitive Map as a bridleway may carry vehicular rights.

20. Higher rights can be recorded on the Definitive Map by an application by any person under section 53(5) and Schedule 14 WCA 1981 and the relevant authority is obliged itself to keep the definitive map under regular review (section 53(2)(b) WCA 1981). The important point is that whether or not vehicular rights are recorded on the definitive map is entirely neutral as to whether or not vehicular rights exist.
21. Section 67 NERCA 2006 had the effect of extinguishing rights for mechanically-propelled vehicles on all routes where such rights were not recorded on the Definitive Map. Section 67(3) excepted from extinguishment routes which were subject to an outstanding application for a Definitive Map Modification Order.
22. Routes A, B, C and H all fall within this category. In each case there are no vehicular rights recorded on the Definitive Map. In each case there is an outstanding unresolved application for a DMMO. Those applications will, in due course, be resolved by an inspector following a public inquiry.

4.2 Meeting of YDGLAG on 1st March 2007

23. YDGLAG were formed as an advisory group to provide guidance and advice to YDNPA on the management of individual unsealed routes with possible or proven vehicular rights within the Yorkshire Dales National Park. It is clear from the terms of reference of YDGLAG that in providing advice it was required to have regard to

...The management and maintenance of recreational access whilst balancing this against the needs of nature conservation, agriculture, the interests of landowners and managers and countryside management projects within the Yorkshire Dales.

24. The first meeting of YDGLAG was held in November 2006. It considered a desktop sensitivity exercise to identify sensitive routes. The second meeting was held on 1st March 2007. It considered routes A, B, C and D. The advice/ recommendation of YDGLAG may be summarised:

A	That the route needed careful ongoing management in relation to damage and use by motor vehicles. If damage became evident an emergency TRO be placed on it to prevent further damage
B	Some repair work is needed to one section. That a TRO be placed to restrict the use of motor vehicles on Sundays. Regular monitoring needed to ensure use is not displaced to other days of the week
C	An important route for walkers cyclists and horse riders. That a TRO be placed to restrict use on Saturdays and Sundays
D	That the route is badly damaged and in need of repair. A full time TRO be placed on it which should be reviewed after 5 years or when repairs were carried out

25. On 15th March 2007 Jon Avison, the Head of Park Management prepared a report in which he recommended that the advice of YDGLAG be noted and that no comment on the extent or type of TRO be made at that stage.

4.3 Meeting of YDGLAG – 23rd May 2007

26. On 23rd May 2007 there was a meeting of YDGLAG to consider routes E, F G and H. The advice/ recommendation of YDGLAG may be summarised:

E	There was no consensus. The majority believed that a Full TRO was the best management option
F	There was no consensus. However the advice was that there should be a one way TRO in the winter months and that this be regularly monitored and reviewed.
G	Damage was evident on the route. It was also one of the best routes for experiencing the natural beauty of the Yorkshire Dales. A Full TRO was recommended reviewable after 5 years.
H	There was no concensus. The majority believed that a Full TRO was the best management option

27. Jon Avison prepared a report for the Access Committee in which he included the minutes of the YDGLAG meeting for information.

4.4 Management of the Use of Green Lanes

28. On 1st October 2007 section 22BB RTRA 1984 came into force with the result that YDNPA had the power to make TROs in respect of the Yorkshire Dales.

29. In November 2007 YDNPA produced a final framework document in relation to the management of the use of green lanes in the Yorkshire Dales. In the course of his submissions Mr Pay took me through the document in a little detail. It contains a summary of recent legislation and government guidance on the management of recreational motor vehicles and what actions should be taken to implement the policies of YDNPA. It is not necessary to refer to this document in any detail. It is perhaps worth noting that in Section 4 it refers to two key strategies for managing the access resources in the Yorkshire Dales and goes on to consider what actions are necessary to achieve the broad strategies. At the end of the document is a checklist for making a TRO. Under Part B of that check list there is a whole page devoted to section 122 RTRA 1984 which is ticked as being "*always relevant to consider*". Mr Pay points out that there is no evidence that the check list was considered in this case. No documents have been produced to demonstrate that the boxes in the check list have been filled in.

4.5 Consultation under regulation 4

30. On 15th November 2007 YDNPA in pursuance of its obligation to consult under Reg 4 of the 2007 Regulations sent a letter to LARA in respect of each of the 8 routes. The letter indicated that YDNPA was minded to make a TRO, and included a report outlining the evidence in support of the TRO.

31. NYTMAG responded on behalf of a number of Groups including LARA. The responses are contained in a Table. In summary NYTMAG agreed with YDGLAG in relation to routes B, C, D F and G but made a number of comments in relation to routes A, E and H.

4.6 Jon Avison's report to the Access Committee – 21st December 2007

32. On 21st December 2007 Jon Avison made a report on the proposed management of 15 green lanes in the Yorkshire Dales. The purpose of the report was to seek decisions on the future management of the 15 routes. Only in 8 cases was a TRO proposed.

33. The report is a long one, extending to 61 pages. It is plainly important in that the Access Committee made the initial decision on the basis of this report.

34. In paragraphs 5 to 7 of the report Jon Avison referred to the November 2007 Framework document. He listed the factors that need to be considered in evaluating the impact of recreational motor vehicles on green lanes and listed the options for management of individual routes including the making of full or partial TROs.

35. In paragraphs 10 and 11 he stresses the importance of an evidence based approach. In paragraphs 12 to 15 he summarises the TRO making process. Paragraph 14 refers to section 122:

S122 RTRA 1984 places a duty on Authorities to exercise their powers to make a TRO so as to secure the expeditious convenient and safe movement of vehicular traffic (including pedestrians) and the provision of suitable and adequate parking facilities on and off the highway.

36. In Appendix 3 Jon Avison refers to

the general duty to seek to secure the expeditious convenient and safe movement of vehicular traffic (including pedestrians) and to have regard to other relevant matters including the desirability of securing and maintaining reasonable access to premises, the effect of local amenities and the importance of facilitating the passage of public service vehicles. In every case where a TRO is being considered attention needs to be paid to these general criteria as well as whether at least one of the specific grounds for making an order are met.

37. Mr Pay is critical of these formulations. He submits that they do not accurately reflect the balancing exercise

inherent in section 122. I shall return to this submission later.

38. It is also worth noting that in Appendix 3 Jon Avison also expresses the view:

that any management solution proposed, at this stage, should not condone use by recreational motor vehicles ahead of any motor vehicle rights being proven. For example, it would be difficult to suggest a weekend only TRO, prohibiting recreational motor vehicles on a route where vehicular rights are unproven as this could suggest some use is 'acceptable' when in fact it may turn out to be unlawful.

39. In Appendix 5 Jon Avison summarises and comments on the responses to the first consultation process. Amongst the responses from the North Yorkshire Police are:

Many of the proposed regulations are too complex in terms of restrictions on certain days or months of the year. A one way system, a route with an order which still allows access along part of a road and a route which will be made subject to an emergency order should damage occur to it. I would suggest that regulations of this nature have the potential for large amounts of confusion amongst recreational motorised users and the potential for unintentional breaches of the proposed regulations with the failure of any attempted prosecutions as a consequence.

40. YDNPA noted the concern about complexity.

41. Appendix 5 also contains detailed comments on each of the 8 routes.

42. Appendix 7 contains detailed recommendations for the management of each of the 8 routes:

A	There is a good case for using a full pre-emptive TRO in line with Defra guidance because of the misunderstanding about what an application for BOAT status actually means ... The evidence shows this to be a very sensitive route with many special qualities ... Consult on full permanent TRO.
B	Agree the route is well used ... at week-ends so put in place a week-end TRO to minimise conflict with other users. This assumes the DMMO claim does suggest BOAT status and this may need to be revisited when the fuller DMMO evidence is available. Consult on intention to make a week-end TRO ... but this to be revisited if the application for BOAT status is not confirmed.
C	Research for the claim for BOAT status suggests that the route is bridleway only and there are likely to be objections. A full TRO is merited on a pre-emptive basis given the findings of historical research and the sensitivity of the route. If the route were found to have BOAT status the position should be revisited ... Consult on the intention to make a full (24/7) TRO.
D	Some immediate initial repairs. The route has many special qualities which are diminished whenever recreational motor vehicles are encountered. Consult on a full permanent TRO.
E	The route has many special qualities which are diminished whenever recreational motor vehicles are encountered. The conclusions in the assessment report have been endorsed in the consultation process. Consult on a full permanent TRO.
F	A week-end TRO would remove the vast majority of user conflict. ... A week-end TRO has a clear understandable message and is consistent with other proposals Consult on the intention to make a week-end permanent TRO.
G	The route has many special qualities which are diminished whenever recreational motor vehicles are encountered. Consult on a full permanent TRO.
H	Route is being repaired to carry the occasional motor vehicle in keeping with BOAT status but it is suggested that a full permanent TRO be placed on the route as the route has many special qualities which are diminished whenever recreational motor vehicles are encountered. Consult on a full permanent TRO.

43. In the course of his submissions Mr Pay drew to my attention what he described as the nuanced approach of Jon Avison. He made the point that in the case of route B where the evidence pointed to a successful DMMO application Jon Avison recommended a partial TRO whereas in the case of route C where the evidence was less strong he advised a total TRO.

4.7 Meeting of the Access Committee – 17th January 2008

44. Jon Avison's report was considered by the Access Committee at the meeting on 17th January 2008. The minutes of the discussion on 15 green lanes (including the 8 routes the subject of this application) extend to 2 full pages. Amongst the comments that are minuted:

[Jon Avison] drew members' attention to the purpose of the report and said that decisions would result in some cases moving on to the next stage of consultation. He referred to the importance of the report, the training that members had undergone, and the advice that was offered that would enable members to make informed decisions.

Members were taken through the report paragraph by paragraph...

Members were also reminded of the policy ... regarding ... "continued monitoring". The Authority was committed to reviewing any permanent TRO within five years of it having been made.

Members considered each case individually. A member suggested that in the cases where the recommendation was to consult on the intention to make 'weekend only' restrictions, it could cause confusion for users and the general public and he stated a preference for all (TRO) restrictions to be on a full 24/7 basis.

In all cases where a TRO was proposed the reason was to preserve both the "amenity" and conserve the "natural beauty" of the National Park ... It was noted that where a TRO was proposed the following motor vehicular usage would be permitted in all cases: [There followed a list of permitted users such as emergency services, access for work or premises on or near the highway]

In considering [route B] a member ...questioned whether a weekend TRO would be appropriate especially when the status of the route was unclear.

The Access and Recreation Manager drew Members' attention to the Government Guidance in Appendix 3 and the fact that an Order could be used 'pre-emptively' where the status of the route was unclear. She stated that, having reconsidered the matter in the light of this guidance and the unconfirmed status of the route, the recommendation to members should be amended to [a full TRO].

45. The Access Committee resolved to consult on the intention to make a full permanent TRO in respect of each of the 8 routes.

46. In the course of his submissions Mr Pay pointed out that there is nothing in the minutes to suggest that the Access Committee expressly considered the balancing exercise required by section 122 RTRA 1984.

4.8 Consultation under regulation 5

47. Following the meeting of the Access Committee YDNPA prepared draft orders and statements of reasons in respect of each of the 8 routes. The statement of reasons was in each case approximately one page in length. The purpose of the order was stated to be:

Preserving the amenity and conserving the natural beauty of the area through which the route passes.

48. The reasoning gives some detail as to the amenity and natural beauty of the area which it is not necessary to reproduce.

49. Mr Pay points out that none of the statements of reasons make any reference to section 122, the balancing exercise required under section 122, or the reason for making a full TRO as against a weekend or more limited TRO (whether it be for reasons of clarity or because of the uncertain status of the route).
50. On 7th February 2008 YDNPA wrote to consultees, including NYTMAG seeking comments. On 6th March 2008 NYTMAG responded on behalf of a number of organisations including LARA.
51. NYTMAG's comments were similar to those that had been made in the regulation 4 consultation. Two specific comments were drawn to my attention:

1.10 One Member present at the Access Committee meeting ... expressed the view that day or weekend TROs were too complicated for users to understand. NYTMAG wishes to know on what evidence that member reached that view. NYTMAG can show that this assertion has no grounds in evidence and that recreational motor vehicle users are used to such 'intelligent' TROs being in place. The evidence is that users are more likely to respect specifically focussed TROs for which the reasons are clear and well founded.

2.3 DEFRA suggests that a definition of the amenity of an area may be considered to be the benefits afforded to people as a consequence of what is seen and experienced. NYTMAG suggests that recreational motor vehicle users are entitled to have a certain share in that amenity, especially when the 'amenity' that others seek, free of the presence of motor vehicles, is available in most other areas of the national park. YDNPA's proposals for regulating use of the routes in question denies significant amenity to trail drivers and riders.

4.9 Jon Avison's report to the Access Committee – 30th March 2008

52. On 30th March 2008 Jon Avison made a further report to the Access Committee. The purpose of the report was to seek decisions on the 8 routes in the light of the responses to the regulation 5 consultation.
53. In paragraph 7 Jon Avison points out that in all 8 cases a TRO is being proposed for expediency in relation to the "amenity" and "natural beauty" of the National Park and he refers to sections 1(1)(f) and 22(2) RTRA 1984. In paragraphs 8 – 10 he refers to the exceptions to the order and suggests the addition of a further exception – namely use by invalid carriages. In paragraphs 11 – 25 he summarises the responses to the second stage consultation process including a reference to the NYTMAG response.
54. In paragraph 28 Jon Avison pointed out that members were being asked to make a decision on the basis of the evidence and the consultation responses. He pointed out the 5 options open to the Members including the possibility of a public inquiry. In paragraph 30 Jon Avison summarised the position by stating that before deciding to make an order the Authority must consider all representations made by consultees (and, if a public inquiry is held, the inspector's report and recommendation).
55. Jon Avison's conclusion is expressed in paragraph 31:

Following consultation, there is clearly overwhelming support for the TROs for the reasons proposed from many individuals. A wealth of evidence has been provided in the assessment reports which support the making of [TROs] on these 8 routes. However this matter needs careful, and impartial, consideration as it is about whether to remove individuals 'rights'. In a number of instances the proposals will take away proven public rights for recreational motor vehicle use, for others these rights are 'unproven' but are being taken away as a pre-emptive measure. For all the routes that are the subject of this report it is the view of the officers that TROs need to be made as a matter of expediency to preserve the amenity and conserve the natural beauty of the area.

56. Accordingly Jon Avison recommended that all 8 TROs be made subject to the amendment in relation to invalid carriages.
57. In his submissions Mr Pay made two points about this report. First it made no reference to section 122 RTRA 1984 at all. Second it encouraged members to think that all they needed to consider was the responses to consultations.

1.1 Access Committee Meeting - 17th April 2008

58. At the meeting of the Access Committee on 17th April 2008 the Members resolved to the making of all 8 full TROs subject to the amendment in relation to invalid carriages.

59. The Minutes relating to this item are short:

Members were taken through the report paragraph by paragraph and, in response to a comment about 'established motor trials' he drew members' attention to the reference in the following report to such events and the proposal to make exceptions where appropriate.

4.11 Further reasons/Correspondence

60. On 18th May 2008 LARA wrote to YDNPA seeking a copy of the minutes of the 17th April 2008 meeting or a note of members' reasons. On 21st May 2008 the Solicitor for YDNPA answered the letter. The relevant part reads:

...prior to reaching its decision on 17th April [YDNPA] consulted relevant persons. As part of the consultation a 'statement of reason' setting out why [YDNPA] proposed to make each order ... were made available. These statements of reason together with the detailed route assessment reports ...were the basis of Members' decision of 17 April 2008. ...

61. She also enclosed a copy of the draft minutes of the meeting.

62. On 26th May 2008 YDNPA wrote to NYTMAG informing them of the making of the orders and setting out in detail a response to NYTMAG's objection. It is not necessary for me deal with the letter in detail. There was, however a response to paragraph 2.3 of the objection:

"[t]he Authority recognises that motor vehicle users also enjoy the 'amenity' of the area. Use of recreational motor vehicles on green lanes with proven rights is a legitimate activity. In the National Park 54 routes with possible or proven rights for motor vehicles have been identified as used by recreational motor vehicles. Of these 28 have been identified as potentially 'sensitive' to this use. Access Committee, in considering the management of the first 15 of these 'sensitive' green lanes used by recreational motor vehicles, agreed to consult on TROs on 8 of these routes only."

63. On 25th June 2008 solicitors for LARA sent a letter before action to YDNPA. On 1st July 2008 this application was issued.

5. Section 122 RTRA 1984

64. There is a large degree of agreement between Counsel as to the effect of section 122. The agreement is not total and as section 122 is central to LARA's application it is necessary to consider the section in a little detail.

65. I have included section 122 in Section 3 above but repeat it for convenience

(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.

66. Section 122 has been considered by the Courts on a number of occasions. It is, however agreed between Counsel that the guidance offered by Carnwath J (as he then was) in UK Waste Management v West Lancashire DC [1996] RTR 201 at 209 C – G:

*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.*

67. The section was further considered by Sir Christopher Bellamy QC in R(LPC Group) v Leicester CC [2002] EWHC 2485 (Admin) between paragraphs 50 and 59 of the judgment. A number of matters emerge from Sir Christopher Bellamy's judgment:

1. if the Defendant has not had proper regard to the matters set out in section 122(1) and (2) it did not direct its mind to matters it was bound to consider.

2. Section 122(1) requires the local authority to exercise its functions to secure two objectives, namely " the expeditious, convenient and safe movement of vehicular and other traffic" , and " the provision of suitable and adequate parking facilities on and off the premises" . The exercise of functions to achieve those twin objectives is, however, expressed to be " so far as practicable" , having regard to the matters specified in section 122(2)

3. Whether the defendant took into account the relevant statutory considerations must, it seemed to Sir Christopher, be ascertained primarily from the document "Supporting Information" . That document constitutes the statutory statement setting out the reasons why the authority proposed to make the order, and is required to be deposited and made publicly available pursuant to Schedule 2 of the 1996 Regulations: see, in particular, paragraph 2(d) of Schedule 2. This statement of reasons must be prepared and deposited before the stage of objections is reached.

68. Mr Pay accepts that the duty imposed in section 122(1) is not an absolute duty. He also accepts that the effect of many TROs will be to derogate from the 'expeditious' or 'convenient' movement of traffic. He recognises that the authority has to perform a balancing exercise between the duty in section 122(1) and the factors in section 122(2). However he submits that it is a balancing exercise of a particular sort:

The primary duty is that set out in section 122(1), and it is only to the extent that the subsidiary considerations make compliance with the primary duty impracticable that an authority can properly derogate from the primary duty. To put it more loosely, foremost in the decision-maker's mind should be the purpose of securing the expeditious, convenient and safe movement of vehicular traffic. Given the primary duty, it should also follow that a decision-maker should tend towards the least restrictive TROs necessary to achieve a particular purpose.

69. Mr Evans does not accept this analysis. In particular he does not accept the characterisation of the section 122(1) duty as being primary and the section 122(2) matters as being subsidiary. In his view the section 122(1) duty is subordinated to the section 122(2) matters and the relationship between the section 122(1) and 122(2) factors are the reverse of those submitted by Mr Pay.

70. In my view the duty to secure the expeditious, convenient and safe movement of vehicular traffic is that prescribed by section 122(1). However that duty takes effect so far as practicable in the light of the matters to be taken into account under section 122(b). Whether one describes the section 122(2) factors as primary or secondary does not seem to me to matter much.

71. Mr Pay submits that it is clear from the contemporaneous documents that YDNPA did not consider the duty under section 122(1) nor carry out the balancing exercise required. He relies on the following matters:

1. the statements of reasons prepared pursuant to regulation 6(2)(d) made no mention of section 122 or of the balancing exercise.

2. the letter of 21st May 2008 from YDNPA's solicitor made no mention of section 122. Indeed it relied on the same reasons as those set out in the original statements of reasons.

3. the Minutes of the meetings of the Access Committee on 17th January 2008 and 17th April 2008 make no mention of section 122.

4. Paragraph 30 of Jon Avison's report to the Access Committee of 30th March is positively misleading in that it specifically fails to mention that YDNPA were required to consider the matters in section 122.

72. Mr Pay recognises that there are references to section 122 in the Management of Green Lane final document and in Jon Avison's first report. However he relies on the fact the check boxes were not completed. Furthermore he makes the point that Jon Avison's report does not accurately set out section 122. Furthermore if section 122 had been brought to the attention of the Members he would have expected it have been mentioned in the Minutes.

73. Mr Pay also recognises that the reasons given do include the preservation of amenity (which is within section 122(2)(b)) and "natural beauty" (which could be said to be within section 122(2)(d)) but he makes the point that these are both matters which YDNPA is bound to have regard under sections 1(1)(f) and 22(2) RTRA 1984 before it can make a TRO at all. Thus he submits that it is not possible to infer that the necessary balancing exercise was in fact carried out.

74. These are formidable submissions. Mr Evans seeks to deal with them in paragraphs 13 to 19 of his skeleton argument. He adopted what he described as a belt and braces approach.

75. His first submission was that this was a case where it was impractical to secure the expeditious, convenient and safe movement of vehicular traffic on the routes in question. The core of this submission

13. As to compliance with section 122(1), it is submitted that, once the YDNPA had decided, as it did, that it was expedient on grounds of both amenity and conservation of natural beauty to prohibit the use of mechanically propelled vehicles (save for those in excepted classes) from the particular TRO routes in question, it was impracticable thereafter for there to remain any duty to secure the movement of such vehicular traffic in any particular manner on those routes, whether expeditiously, conveniently safely or otherwise.

14. There can be no doubt that the decision which was made in the case of each TRO was that it

was expedient on grounds of both amenity and conservation of natural beauty to prohibit the use of mechanically propelled vehicles (save for those in excepted classes) from the particular TRO routes in question. The TROs are expressed in terms of that prohibition. The statements of reasons for each TRO record that the particular qualities associated with the amenity of the area through which the particular TRO routes ran (the feeling of wildness, remoteness, and associated tranquillity) would be preserved by the TROs as the presence of recreational motor vehicles, or anticipation of their presence, and/or evidence of their passing detracted significantly from these qualities. The noise from the vehicles was also highlighted. In connection with the conservation of natural beauty each statement of reasons also explained that the presence of recreational motor vehicles on the particular TRO routes in question would detract from the features of such beauty.

76. I cannot accept this submission. As already noted in order to make a TRO there has to be a ground within section 1 or 22 RTRA 1984. That does not mean that YDNPA are absolved of their duty under section 122 to carry out the balancing exercise required.
77. In paragraph 15 of his skeleton argument Mr Evans recognises that YDNPA did not at any point direct 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 TRO routes in question; however he invites the Court that it was impracticable to do so. I cannot accept this submission either. It seems to me to be clear that even if some form of TRO was inevitable on all the routes it does not follow that a full 24/7 TRO was necessary. It is not in my view open to the Court to substitute its view for that of the properly directed YDNPA. It follows that the first submission fails.
78. Mr Evans' alternate submission – developed in paragraph 16 to 19 of his skeleton argument was that YDNPA did in fact carry out a sufficient balancing exercise to satisfy the statute. He referred me to a number of documents in support of this submission:
1. the reference to section 122(1) in the report of 21st December 2007
 2. the framework document of November 2007
 3. the reference in the Minutes of the Meeting of 17th January 2008 to the Members being taken through the report paragraph by paragraph.
 4. paragraph 31 of Jon Avison's report of 30th March 2008
 5. YDNPA response to point 2.3 of YDGLAG's objections
 6. the late amendment of the exception to include invalid carriages showed questions of access had been taken into account.
79. Mr Evans submitted that these documents demonstrated a general balancing of rights in respect of green lanes such as to satisfy section 122.
80. I cannot accept this submission. Whilst I accept that the Access Committee considered a number of matters and carried out a degree of balancing, I cannot accept that it has been demonstrated that it carried out the balancing exercise required by section 122 in respect of each of the TROs. The necessity to carry out such an exercise was not brought sufficiently to its attention and there is no evidence that the exercise was in fact carried out.
81. It follows that LARA's primary ground of complaint succeeds with the result that the TROs in respect of routes A, B, C and F will be quashed.

6. Ground 4 – DMMO irrationality

82. In the light of my conclusion on the main ground I propose to deal with the other grounds of complaint relatively briefly.
83. The approach of YDNPA was to exclude from consideration anything other than a permanent TRO in relation

to routes where higher rights were not recorded. In paragraph 46 of his skeleton argument Mr Pay sets out all the references to this. I have set out some of the comments in section 4 above.

84. Mr Pay submits that this is an irrational approach because it treats a route, which may or may not carry vehicular rights, as if it certainly does not carry vehicular rights for the purpose of what management options are available. As Mr Wilson puts it:

"the passage on the report, effectively assumes that existing usage is not lawful where this is not yet established: the proposition amounts to saying that, simply because vehicular rights are not recorded (whether or not these exist which was an entirely open question), no management options are available except a complete ban."

85. Mr Pay drew to my attention what he described as the "nuanced approach" of Jon Avison in his first report in relation routes B and C. He recommended initially a partial TRO for route B because he believed on the evidence available that the DMMO application for full BOAT status was likely to succeed.

86. Mr Evans accepted that YDNPA did indeed adopt the approach suggested by Mr Pay. He also accepted that that approach was material in the decisions relating to routes B and C. He submitted that the approach was not irrational and cannot be shown to have affected the decision in respect of routes A and H.

87. In the course of the hearing there was some discussion about a possible analogy between making a TRO and the granting of an interlocutory injunction in a private law dispute over (say) the existence of a private right of way obtained by prescription. In such a case the Court would routinely take into account a number of factors before deciding whether to grant such an injunction and on what terms it would be granted. If the Court were to say that it would only consider a total injunction because otherwise it would be condoning possible illegal use I have little doubt that such a decision would be challengeable. It is inherent in the granting of interlocutory injunctions that the decision made might turn out to be wrong.

88. In my view a similar position relates to TROs. It is in my view irrational to consider only making a total permanent TRO in any case where BOAT status has not been established. In such a case there is no reason for anyone to believe that YDNPA are condoning what may turn out to be illegal use. I see no reason why the strength of the DMMO application cannot be taken into account as a factor in determining the extent of any TRO but, in my view it should only be one of a number of factors.

89. It follows that I would have quashed the decisions in respect of routes B and C on this ground as well. There is no application to quash route H and it is not in the circumstances necessary for me to decide whether this was a factor in the decision in route A. My provisional view is that it was not.

7. Ground 5 – complexity of reasons

90. I have set out the facts in section 4 above. It is plain from the response of the North Yorkshire Police that it was concerned at the complexity of the proposals then being proposed. In my view the issue of complexity was certainly a factor that the Access Committee were entitled to take into account when deciding whether to make full or partial TROs.

91. The issue of complexity was raised in paragraph 1.10 of NYTMAG's response to the regulation 5 consultation. Members' attention was specifically drawn to the responses in Jon Avison's report.

92. In all the circumstances the decision of the Access Committee to reject the criticism in NYTMAG's response cannot be said to be irrational in the Wednesbury sense. Thus I would reject this ground of review.

8. Sufficiency of Reasons

93. As Mr Evans pointed out there is considerable overlap between this ground of challenge and the other grounds. He did, however, point out that in order to succeed under this head LARA had to show prejudice. In my view no prejudice has been shown. Mr Pay submitted that prejudice was shown because if fuller reasons had been given other people might have submitted objections. I cannot accept that this amounts to prejudice to LARA. I would have rejected this ground of review.

9. Conclusion

94. The application succeeds on grounds 1, 2 and 4. I would quash the TROs in respect of routes A, B C and F.

JOHN BEHRENS

Friday 19 June 2009