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Case No: AC-2024-LON-001103

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14th February 2025

Before :

TIM SMITH
(sitting as a Deputy High Court Judge)

- -

Between :

MARCUS TROWER	**Claimant**
- and –	
ELMBRIDGE BOROUGH COUNCIL	**Defendant**

- -

James Stark (instructed by **Community Law Partnership**) for the **Claimant**
Francis Hoar (instructed by the **Legal Department of Elmbridge Borough Council**) for the **Defendant**

Hearing dates: 20th and 21st November 2024

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Approved Judgment

This judgment was handed down remotely at 10.00am on 14 February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR TIM SMITH (sitting as a Deputy High Court Judge):

Introduction

1. This claim is a statutory challenge brought by the Claimant against an Order made by Elmbridge Borough Council ("the Council") regulating the unauthorised mooring of boats on the river in parts of its administrative area.

2. Section 59 of the Anti-social Behaviour, Crime and Police Act 2014 ("the 2014 Act") empowers a local authority to make a Public Spaces Protection Order (a "PSPO") affecting land in its administrative area. The purpose of a PSPO is to impose measures to restrict or prevent incidences of anti-social behaviour.

3. On 19th February 2024 the Council made a PSPO entitled the "Elmbridge Borough Council (Unauthorised Mooring) Public Spaces Protection Order 2024" ("the Order"). In broad terms the effect of the Order is to restrict the ability of boat-users to moor boats within certain defined areas of riverbank in the Borough. Contravening a PSPO is a criminal offence.

4. The Claimant, Marcus Trower, is described in the claim form as an "itinerant boat-dweller", meaning that he lives permanently aboard a boat and travels the waterways of the south east of England, mooring up temporarily in different places rather than at one permanent mooring. He usually visits the Council's administrative area aboard his boat and stays for several weeks each year, moving location periodically. He has family who live in the Borough and a seven-year old son who lives aboard the boat with him and whom Mr Trower home schools.

5. The Claimant is clearly a person affected by the Order. He is a regular visitor to the Borough and the Order restricts his ability to moor his boat on parts of the riverbank – something which (in a public law context at least) he would otherwise be entitled to do by virtue of the public right of navigation ("PRN") enjoyed by users of the River Thames. By this claim he challenges the lawfulness of the Order, pursuant to the statutory right of challenge afforded by section 66 of the 2014 Act, on multiple grounds.

Background facts

6. In 2019 the Council began the process of considering whether or not to make one or more PSPOs in respect of land in its administrative area. A recommendation by officers that consultation on the proposed PSPOs be commenced was considered by the Council's Cabinet on 5th June 2019. The recommendation was approved but no further steps were taken at the time, it is assumed because of the intervening Covid-19 pandemic.

7. Consideration of the proposals did not resume until early 2022. On 8 February 2022 the Council's Cabinet received a further report recommending that consultation commence on potential PSPOs to tackle issues of the use of portable fire pits and barbecues (for which the Council's evidence uses the shorthand of the "naked flames" PSPO), overnight camping and fishing, and unauthorised mooring on the riverbank within five areas owned by the Council (being land at Ditton Reach, Albany Reach, Cigarette Island, Cowey Sale, and Hurst Park) and one owned by Surrey County Council (being land adjacent to Hampton Court bridge). The same report considered

the possibility of a fourth PSPO relating to anti-social behaviour involving dogs but it was not pursued.

8. It is appropriate at this juncture to set out the operative parts of the proposed PSPO on unauthorised mooring and to review what ended up being the terms of the Order as made. This exercise also helps to place into context some of the consultation responses received by the Council during the promulgation of the Order.

9. The preamble paragraphs in the Order as made include – at paragraph 3 – a justification for the making of the Order in the following terms:

> "3. The Council is satisfied that the conditions set out in Section 59(2) & (3) of the [2014] Act have been met, namely:
>
> a) That the activities of Unauthorised Mooring(s) and the associated littering, noise, and preventing other users of the River Thames from temporary mooring for 24 hours in association with the Public Right of Navigation in a Restricted Area has a detrimental effect on the quality of life of those in the locality; and
>
> b) That the effect, or likely effect, of the activities is, or is likely to be, of a persistent or continuing nature and accordingly, these activities are unreasonable and justify the restrictions imposed by the Order"

10. The Order then prescribes an offence of engaging in a "Prohibited Activity within, or on, or by, or at, any of the Restricted Areas" without reasonable excuse unless at the relevant time the Environment Agency has issued a red or yellow warning about dangerous river conditions between Molesey Lock and Teddington Lock advising river users to find a safe mooring.

11. As to the relevant definitions in the Order:

> a) "Prohibited Activity" is defined as "a prohibition against activities of an Unauthorised Mooring and the associated littering, noise and prevention of other users of the River Thames from temporary mooring for 24 hours in association with the Public Right of Navigation",
>
> b) "Restricted Area" is defined as being one of the six locations identified by the Council, in each case identified on a plan accompanying the Order, and
>
> c) "Unauthorised Mooring" is defined as "a mooring that has stayed for longer than 24 hours within, or at, or by a Restricted Area, without the written consent of the Council, and no right of return within 72 hours to that Restricted Area"

12. The report to the Council's Cabinet on 8 February 2022 included a proposed timeline for undertaking consultation on the proposals. As reported, this would have seen consultation taking place from 21 February until 20 March 2022 with the results of consultation being collated and then considered by Cabinet in early July 2022. As it

happens there were further delays, with consultation not taking place until the period from 18 February 2023 to 4 June 2023.

13. The results of that consultation were then considered by the Council's Cabinet on 5 July 2023. Officers recommended the making of the proposed PSPOs relating to naked flames and overnight fishing. In relation to unauthorised mooring, whilst the report noted "strong support" for this proposed PSPO the view was expressed by officers that some aspects of the proposals "require further clarity" and so a second consultation was recommended. This recommendation was agreed to. The report nevertheless summarised the questions in the first consultation and analysed the responses received to date.

14. At this point it suffices to note that the Claimant challenges the objectivity of the consultation questions asked, and of the weight accorded to some of the more tendentious responses. I consider in more detail the nature of the criticisms when summarising the Claimant's submissions.

15. The Claimant engaged with the Council during the consultation period. A detailed response to the consultation was also provided by the National Bargee Travellers Association ("NBTA"). The Claimant, as well as being an individual boat user affected by the Order, was also the Deputy Chair of the NBTA at the time. The Claimant attended a virtual meeting with the Council's officers on 18th October 2023 in his capacity as Deputy Chair of the NBTA. This meeting was minuted by the Claimant and the minutes are before the court as part of his witness evidence in the case. The Council accepts the accuracy of these minutes.

16. The NBTA also provided a written response to the consultation. The text of the NBTA's response was set out in full in the Committee report, punctuated by comments offering the officer's replies to what was said in the response.

17. Amongst other things the NBTA made the following comments in its response: (a) that mooring for a reasonable period was a right enjoyed under the public rights of navigation ("PRN") which are protected by both common law and statute; (b) that whether a "reasonable excuse" exists is only determined *ex post facto* by the relevant regulator or, ultimately, in the Magistrates Court following a prosecution for a prima facie breach and so its existence provides limited comfort (at best) to boat users wishing to know whether what they are about to do will be considered a breach of the Order; (c) that limiting the relaxation of the Order to circumstances where the Environment Agency has issued river warnings in the area between Molesey and Teddington Locks – an area downstream of the restricted areas - ignores potential risks to river users of a similar nature upstream of those areas; (d) that the consultation did not include a lawful Equality Impact Assessment under the Equality Act 2010 and hence there was no way for the Council to judge whether the proposed PSPO would have a disproportionate effect on vulnerable boat users with protected characteristics, for example those who are pregnant or with physical disabilities; (e) that the proposed measures would unlawfully infringe the human rights of boat users contrary to articles 8 and 14 of the European Convention on Human Rights, and (f) that the Council should take account of the findings of its own housing needs assessment for boat users before reaching any decision on the proposed PSPO.

18. Again, the detail of these objections and of the Council's responses to them are analysed in more detail when summarising the grounds of challenge.

19. On instructions Mr Hoar (who appeared for the Council) informed me that the second consultation agreed to by the Council did not ask any specific questions but invited comments generally. This further consultation took place between 10 November 2023 and 29 December 2023. The results of the consultation were assimilated and reported to the Council's Cabinet on 7 February 2024 with a recommendation that the Order be made.

20. The consultation responses were extensive in number. Over one thousand responses had been received between the two consultations. A majority of the comments supported the making of the Order but a significant minority were opposed to it, articulating various different reasons for their opposition. Some of those opposed to the Order were clearly boat users themselves. Others were local residents who nevertheless felt that either the Order was not necessary or that the measures contained within it to restrict anti-social behaviour were inappropriate and/or excessive.

21. As will be seen from the discussion that follows, the February 2024 Cabinet report set out in exhaustive detail the responses that had been received, quoting from them extensively. One can therefore gain a good impression of where supporters and objectors alike focused their attention.

22. At the 7 February 2024 Cabinet meeting the Council resolved to make the Order. It came into effect on 19 February 2024. No notice of making of the Order has been published by the Council.

23. Reference is made in some of the consultation responses, and again in the claim, to the Council's Environmental Enforcement Policies ("EEP"). These are policies providing guidance to the Council's officers and members of the public about enforcement by the Council of measures contained in (amongst other things) PSPOs. It is necessary to trace the evolution of this document.

24. The first draft EEP in place during the period relevant to this claim was the Interim Policy (2023). This was consulted upon by the Council at the same time as the second consultation on the Order and it referred, for example, to the two PSPOs confirmed by the Council in July 2023 in relation to naked flames and overnight fishing. It also referred to what was then a draft PSPO, but which was subsequently made as the Order in this case, commenting upon it as follows:

> "**PSPO mooring**
>
> The proposed PSPO prohibits mooring without consent for longer than 24 hours in the ordinary course of navigation with no return within 72 hours within the listed areas
>
> UNLESS – the Guidance on River Thames: current river conditions advise boats either not to navigate, or to find a safe mooring (on Yellow boards unpowered craft

should not navigate, this might include some houseboats without engines, and on Red boards no craft should navigate).

In these cases, the PSPO would not be enforced before river conditions return to no stream warnings"

(Note that the underlining reproduced above appears in the original text to signify a hyperlinking from the text to another document)

25. The above Interim Policy was updated later in 2023 but the relevant provisions were unchanged.

26. Then in June 2024, after the Order was made and had come into force, the draft EEP was amended again. The equivalent extract to that cited above reads as follows in the amended document (the differences being those I have highlighted in bold in the extract below):

> "The proposed PSPO prohibits mooring without consent for longer than 24 hours in the ordinary course of navigation with no return **to that same open space**, within 72 hours within the listed areas. **For the avoidance of any confusion, it would be permitted to return to a different area within the same 72 hour period**.
>
> UNLESS – the Guidance on River Thames: current river conditions advise boats either not to navigate, or to find a safe mooring (on Yellow boards unpowered craft should not navigate, this might include some houseboats without engines, and on Red boards no craft should navigate). **This would apply to all reaches within the Borough boundaries, but also mindful of adjacent areas that boats may need to move to, this will also apply on adjacent reaches up to Bell Weir**.
>
> In these cases, the PSPO would not be enforced before river conditions return to no stream warnings"

27. Finally the EEP was updated again in August 2024 and became a final document. The same extract from the policy now reads as follows, with the changes from the June 2024 version again indicated below by the bold text (additions) and strike-out text (deletions):

> "The proposed PSPO prohibits mooring without consent for longer than 24 hours in the ordinary course of navigation with no return to that same open space, within 72 hours within the **different named** listed areas. For the avoidance of ~~any confusion~~ **doubt, a boat may return to a different, named area within the Restricted Areas in**~~, it would be permitted to return to a different area within~~ the same 72 hour period, **provided it does not return to the same named area in that period**.

UNLESS – the Guidance on River Thames: current river conditions advise boats either not to navigate, or to find a safe mooring (on Yellow boards unpowered craft should not navigate, this might include some houseboats without engines, and on Red boards no craft should navigate). This would apply to all reaches within the Borough boundaries ~~but also mindful of adjacent areas that boats may need to move to, this will also apply on~~ **and** adjacent reaches up to Bell Weir.

In these cases, the PSPO would not be enforced before river conditions return to no stream warnings"

The current proceedings

28. Section 66 of the 2014 Act entitles a person to challenge a PSPO in the courts. The challenge is a statutory challenge under the 2014 Act rather than a judicial review, although for practical purposes the parties accept that there is little substantive difference between the available grounds for a statutory challenge and for a judicial review in this context.

29. The claim was issued and served on 2nd April 2024. These being statutory challenge proceedings rather than a judicial review there is no requirement for the permission of the court to be granted before the claim can proceed.

30. The Claimant applied for permission to amend the grounds of claim after the claim had been commenced. On 22nd July 2024 Clare Padley (sitting as a Deputy High Court Judge) made a Directions Order for the conduct of the claim. By this Order the Claimant's Amended Grounds of Claim were accepted, as were the Defendant's Grounds of Resistance. The Claimant was granted permission to file a Reply to the Defendant's Grounds and he took advantage of that permission, filing a Reply on 6th September 2024.

31. The Amended Grounds of Claim cite fifteen separate grounds of challenge. The grounds may be summarised as follows:

    a) Ground 1: the terms of the Order are too uncertain to be enforceable;

    b) Ground 2: there were no reasonable grounds on which the Council could conclude that mooring temporarily for a short period of time met the conditions of section 59(2) of the 2014 Act;

    c) Ground 3: the prohibitions contained in the Order go beyond what is reasonable, contrary to the requirements of section 59(5) of the 2014 Act;

    d) Ground 4: the Council failed to have any, or adequate, regard to the statutory guidance on PSPOs issued under section 73 of the 2014 Act;

    e) Ground 5: the Order has been made for an improper purpose

    f) Ground 6: the Council failed to make necessary enquiries prior to making the Order, in breach of its Tameside duty;

g) Ground 7: the restrictions in the Order are an unlawful interference with the Claimant's rights under the European Convention on Human Rights and the unreasonableness and disproportionate limited nature of the exception to the order in respect of Environment Agency warnings against navigation;

h) Ground 8: the restrictions in the Order are disproportionate to any legitimate aim;

i) Ground 9: the consultation undertaken by the Council prior to making the Order was procedurally unfair;

j) Ground 10: in making the Order the Council failed to have regard to relevant facts and/or had regard to irrelevant facts;

k) Ground 11: whilst the Council did carry out an Equality Impact Assessment (the "EqIA") it failed to identify all groups with a protected characteristic who may be impacted;

l) Ground 12: the EqIA failed adequately to address the impact of the proposed Order;

m) Ground 13: the Council failed to consider adequately the Boat Dwellers Accommodation Assessment which it had conducted in 2022 pursuant to its duties as a local planning authority under section 124 of the Housing and Planning Act 2016;

n) Ground 14: the Council failed to comply with its public sector equality duty ("PSED") under section 149 of the Equality Act 2010; and

o) Ground 15: the Council failed to comply with the requirement in section 59(8) of the 2014 Act and related secondary legislation to publicise the making of the Order

32. It can be seen at a glance that there is a fair degree of overlap between some of the grounds. In many cases later grounds are a recharacterisation of earlier grounds but based on the same set of facts. For this reason Mr Stark (who appeared for the Claimant) elected at times to group together several of the grounds when making his oral submissions in respect of them. I have found it convenient to do the same in this judgment.

The Law

33. Section 59 of the 2014 Act provides for the making of a PSPO as follows:

"**59 Power to make public spaces protection orders**

(1) A local authority may make a public spaces protection order if satisfied on reasonable grounds that two conditions are met.

(2) The first condition is that—

(a) activities carried on in a public place within the authority's area have had a detrimental effect on the quality of life of those in the locality, or

(b) it is likely that activities will be carried on in a public place within that area and that they will have such an effect.

(3) The second condition is that the effect, or likely effect, of the activities—

(a) is, or is likely to be, of a persistent or continuing nature,

(b) is, or is likely to be, such as to make the activities unreasonable, and

(c) justifies the restrictions imposed by the notice.

(4) A public spaces protection order is an order that identifies the public place referred to in subsection (2) ("the restricted area") and—

(a) prohibits specified things being done in the restricted area,

(b) requires specified things to be done by persons carrying on specified activities in that area, or

(c) does both of those things.

(5) The only prohibitions or requirements that may be imposed are ones that are reasonable to impose in order—

(a) to prevent the detrimental effect referred to in subsection (2) from continuing, occurring or recurring, or

(b) to reduce that detrimental effect or to reduce the risk of its continuance, occurrence or recurrence.

(6) A prohibition or requirement may be framed—

(a) so as to apply to all persons, or only to persons in specified categories, or to all persons except those in specified categories;

(b) so as to apply at all times, or only at specified times, or at all times except those specified;

(c) so as to apply in all circumstances, or only in specified circumstances, or in all circumstances except those specified.

(7) A public spaces protection order must—

(a) identify the activities referred to in subsection (2);

(b) explain the effect of section 63 (where it applies) and section 67;

(c) specify the period for which the order has effect.

(8) A public spaces protection order must be published in accordance with regulations made by the Secretary of State"

34. Section 73(1) of the 2014 Act provides:

"**73 Guidance**

(1) The Secretary of State may issue—

(a) guidance to local authorities about the exercise of their functions under this Chapter and those of persons authorised by local authorities under section 63 or 68;

(b) guidance to chief officers of police about the exercise, by officers under their direction or control, of those officers' functions under this Part"

35. Pursuant to section 73 the Secretary of State issued as guidance the "Anti-social behaviour powers – Statutory guidance for frontline professionals", the latest version of which incorporates revisions made in March 2023.

36. Section 66 of the 2014 Act provides for legal challenges to a PSPO as follows:

"**66 Challenging the validity of orders**

(1) An interested person may apply to the High Court to question the validity of—

(a) a public spaces protection order or an expedited order, or

(b) a variation of a public spaces protection order or an expedited order.

"Interested person" means an individual who lives in the restricted area or who regularly works in or visits that area.

(2) The grounds on which an application under this section may be made are—

(a) that the local authority did not have power to make the order or variation, or to include particular prohibitions or requirements imposed by the order (or by the order as varied);

(b) that a requirement under this Chapter was not complied with in relation to the order or variation.

(3) An application under this section must be made within the period of 6 weeks beginning with the date on which the order or variation is made.

(4) On an application under this section the High Court may by order suspend the operation of the order or variation, or any of the prohibitions or requirements imposed by the order (or by the order as varied), until the final determination of the proceedings.

(5) If on an application under this section the High Court is satisfied that—

(a) the local authority did not have power to make the order or variation, or to include particular prohibitions or requirements imposed by the order (or by the order as varied), or

(b) the interests of the applicant have been substantially prejudiced by a failure to comply with a requirement under this Chapter,

the Court may quash the order or variation, or any of the prohibitions or requirements imposed by the order (or by the order as varied).

(6) A public spaces protection order or an expedited order, or any of the prohibitions or requirements imposed by the order (or by the order as varied), may be suspended under subsection (4) or quashed under subsection (5)—

(a) generally, or

(b) so far as necessary for the protection of the interests of the applicant.

(7) An interested person may not challenge the validity of a public spaces protection order or an expedited order, or of a variation of such an order, in any legal proceedings (either before or after it is made) except—

(a) under this section, or

(b) under subsection (3) of section 67 (where the interested person is charged with an offence under that section)"

37. The Anti-social Behaviour, Crime and Policing Act 2014 (Publication of Public Spaces Protection Orders) Regulations 2014 (SI 2014/2591) provides, in regulation 2, for publicising a made PSPO as follows:

"2. In relation to a public spaces protection order that a local authority has made, extended or varied, that local authority must—

(a) publish the order as made, extended or varied (as the case may be) on its website; and

(b) cause to be erected on or adjacent to the public place to which the order relates such notice (or notices) as it considers sufficient to draw the attention of any member of the public using that place to—

(i) the fact that the order has been made, extended or varied (as the case may be); and

(ii) the effect of that order being made, extended or varied (as the case may be)"

38. The section of the River Thames affected by the Order is non-tidal. Ordinarily there would be no presumed PRN over it in the same way that users of tidal waters enjoy such a right. However it is accepted by the parties that a PRN can arise at common law from a variety of means, one of which is "immemorial usage" (Orr-Ewing v Colquhoun (1877) 2 AC 839), and that the existence of a PRN over this part of the River Thames has been recognised at common law in prior cases. The existence of a PRN over the river in this case is not disputed by the Council.

39. The common law PRN "includes a reasonable right to stop and moor temporarily" (per Arnold J, Couper and ors v Albion Properties Limited [2013] EWHC 2993 (Ch)).

40. In addition to the common law, sections 79(1) and (2) of the Thames Conservancy Act 1932 ("the 1932 Act") grants a PRN on the River Thames in the following terms:

"79.—(1) Subject to the provisions of this Act it shall be lawful for all persons whether for pleasure or profit to go be pass and repass in vessels over or upon any and every part of the Thames through which Thames water flows including all such backwaters creeks side-channels bays and inlets connected therewith as form parts of the said river …

(2) The right of navigation in this section described shall be deemed to include a right to anchor moor or remain stationary for a reasonable time in the ordinary course of pleasure navigation subject to such restrictions as the Conservators may from time to time by byelaws determine and the Conservators shall make special regulations for the prevention of annoyance to any occupier of a riparian residence by reason of the

loitering or delay of any house-boat or launch and for the prevention of the pollution of the Thames by the sewage of any house-boat or launch"

41. The rights and duties of the former Thames Conservators under the 1932 Act are now vested in the Environment Agency.

42. Article 8 of the European Convention on Human Rights provides as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others"

The grounds of challenge – Claimant's submissions

43. As indicated above, in both written and oral submissions Mr Stark for the Claimant chose to address a number of grounds together. I have adopted the same approach to summarising the arguments made by both Mr Stark (for the Claimant) and Mr Hoar (for the Council).

Ground 1 – certainty of the Order

44. Mr Stark submitted that the terms of the Order were too uncertain to comply with the statutory requirements in section 59 of the 2014 Act, rendering the Order unlawful. He developed this overarching submission in a number of ways.

45. Section 59(3) requires a consideration of whether the reasonableness and frequency of the undesirable activities "justifies" the restrictions imposed (section 59(3)(c)). Use of the word "justifies" requires a proportionality test, and for that to be conducted there needs to be sufficient certainty around what activities are prohibited and in what restricted area (section 59(4)), not least because of the penal sanctions attaching to a breach. Mr Stark sought to draw an analogy with the approach of the Courts to breaches of ambiguous injunctions, citing the trade-mark case of Redwing Limited v Redwing Forest Products Limited [1947] RPC 67 and commentary in section 26.4 of "Bennion on Statutory Interpretation" (the section is entitled "Principle against doubtful penalisation"), all of which illustrate (he submitted) that insufficiently clear provisions to which penal sanctions attach cannot be enforced.

46. Applying these principles to the facts of the present case Mr Stark emphasised four points: (i) that it was unclear from the wording of paragraph 3(a) of the Order whether unauthorised mooring was only prohibited if it resulted in associated littering and/or noise and/or preventing others from using temporary moorings, or whether the fact of unauthorised mooring alone was a prohibited activity; (ii) it is unclear whether it is a breach of the Order to moor for less than 24 hours and then litter, cause noise or cause an obstruction; (iii) it is unclear whether the Order permits a boat user to move from one Restricted Area to another or whether it prohibits unauthorised mooring for more

than 24 hours in any of the Restricted Areas (noting that the evolving EEPs have commented variously on this point); (iv) it is unclear whether mooring "by" a Restricted Area for more than 24 hours and then moving into a Restricted Aea within 72 hours was prohibited; and (v) that the order had to be clear on its face and it was not open to the Council to rewrite or informally vary the Order by means of amending its EEP.

47. Taken together or individually, submitted Mr Stark, these shortcomings in the Order were fatal to its lawfulness.

Ground 2 – grounds for concluding the terms met a s59(2) purpose
Ground 3 – prohibitions go beyond what is reasonable
Ground 4 – failure to have regard to statutory guidance issued under s73

48. Mr Stark's first submission was that if short-term unauthorised mooring alone constituted a prohibited activity under the PSPO, rather than having to be accompanied by one or more of littering, noise and restricting other access to mooring, then that basic prohibition did not meet the requirements of section 59(2)(a). There was, he submitted, no evidence to show that boats moored for longer than 24 hours were any more likely to have (for example) caused littering than boats moored for less than 24 hours. Mr Stark added that all of the witness evidence in support of the Council's case illustrated that, to the extent that the problem of littering could be shown to be associated with unauthorised moorings, the evidence was confined to long-term moorings. This was echoed in the minutes of the meeting held by the Council with the Vice Chair (i.e. the Claimant) and the Chair of the NBTA in October 2023. In those circumstances the Council could not show that the prohibition was necessary, hence the criterion of justification in section 59(3)(c) could not be made out.

49. For essentially the same reasons, submitted Mr Stark, the Council could not show that the prohibitions in the Order were confined to measures that were "reasonable in order … to prevent the detrimental effect … from continuing, occurring or recurring" (s.59(5)(a)) or to "… reduce that detrimental effect or to reduce the risk of its continuance, occurrence or recurrence" (s.59(5)(b)).

50. Finally Mr Stark also referred to the prevailing statutory guidance issued by the Secretary of State pursuant to section 73 of the 2014 Act, and submitted that the terms of the Order did not accord with the guidance. Where statutory guidance has been issued then regard must be had to it unless there are good reasons not to (R v Islington Borough Council, ex p Rixon [1998] 1 CCLR 119). An example of a failure to observe the guidance – he submitted - is that the terms of the Order fail to respect the following advice found on page 64 of the guidance:

> "Given that these orders can restrict what people can do and how they behave in public spaces, it is important that the restrictions imposed are focused on specific behaviours and are proportionate to the detrimental effect that the behaviour is causing or can cause, and are necessary to prevent it from continuing, occurring or recurring"

51. In support of these related submissions Mr Stark cited the case of Summers v Richmond Upon Thames London Borough Council [2018] 1 WLR 4729, a decision of May J following a challenge to a PSPO under the 2014 Act. The challenge in Summers

attacked in particular the provisions of a PSPO restricting the number of dogs that any one person could take to a public space without a specific licence. Mr Stark relied in particular on [25], [26] and [30] of the judgment:

> "25. The Act therefore envisages use of PSPOs to curb activities which it is possible that not everyone would view as detrimentally affecting their quality of life. Taken together with the absence of any further definition of the key terms "activities" or "detrimental" this strongly points to local authorities being given a wide discretion to decide what behaviours are troublesome and require to be addressed within their local area. This requires local knowledge, taking into account conditions on the ground, exercising judgment (i) about what activities need to be covered by a PSPO and (ii) what prohibitions or restrictions are appropriate for inclusion in the order. There may be strong feelings locally about whether any particular activity does or does not have a detrimental effect, in such cases a local authority will need to weigh up competing interests. Deciding whether, and if so what, controls on certain behaviours or activities may be necessary within the area covered by a local authority is thus the very essence of local politics.
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> 26. It is important to bear in mind, however, as Mr Porter emphasised, that the behaviours which PSPOs are intended to target are those which are seriously anti-social, not ones that are simply annoying. He referred me in this respect to the following passage in the Home Office information note (Reform of Anti-Social Behaviour Powers: Public and Open Spaces) from 2017:
>
> > "Our aim in reforming the anti-social behaviour powers is to give the police, councils and others more effective means of protecting victims, not to penalise particular behaviours. Frontline professionals must use the powers in [the 2014 Act] responsibly and proportionately, and only where necessary to protect the public"
> >
> > …
>
> "30. Those prohibitions/requirements are subject to provisions as to reasonableness specified in subsection (5), assessed by reference to the detrimental effect of the activities in question. Any evaluation of the reasonableness of specific prohibitions or requirements taken to deal with the detrimental effect of activities within a particular area must be a matter of judgment for the local authority, taking into account the particular needs of, and circumstances pertaining to, the local area"

Ground 5 – the Order has been made for an improper purpose

52. Mr Stark submitted that the overriding purpose behind the PSPO appeared to be a desire to match the similar restrictions imposed by neighbouring local authorities (in his written grounds a passing reference was also made to the Council appearing to be motivated by difficulties in charging for moorings of longer than 24 hours but this was

not pursued orally). To support this submission he relied on the following extract from the report for the Council's initial Cabinet Meeting on the issue on 5th June 2019:

> "The problem has grown recently with increased enforcement in Kingston grown recently with increased enforcement in Kingston and Richmond displacing boats into Surrey, and an increase in the number of complaints received in all three boroughs. Further displacement is anticipated in future years as regular mooring areas and marinas within anticipated London are developed"

Ground 6 – the Council failed in its Tameside duty of enquiry

53. The Council's report to Cabinet on 7th February 2024 responded to various of the consultation responses received, including an objection from Heine Planning Consultancy. The Heine response queried the current number of unauthorised moorings assessed by the Council in its preparation for making the Order and drew a comparison with the numbers assessed by the Council as part of its Boat Dwellers Accommodation Assessment to support the Local Plan review. The Heine response posed the following question for the Council:

> "The 2022 Boat Dwellers Assessment only identified a need for just 10 moorings yet the Council recently confirmed that there are an estimated 116 boats moored without consent in the Elmbridge area with 26 currently moored on Elmbridge owned land"

54. Mr Stark submitted that the failure of the Council to investigate whether (a) (for example) any of the 26 unauthorised moorings on the Council's land were responsible for littering or noise and (b) as to the identity and character of those causing the identified nuisance in particular whether they were long term moorers rather than temporary moorers was a failure of its duty to enquire as established by the House of Lords in Secretary of State for Education v Tameside Metropolitan Borough Council [1977] AC 1014.

Ground 7 – unlawful interference with the Claimant's article 8 rights
Ground 8 – restrictions are disproportionate to any legitimate aim

55. Mr Stark reiterated that a restriction on mooring to just 24 hours would have a considerable adverse effect on the Claimant. He cares for his child alone on the boat, and a requirement effectively to move every 24 hours (a risky activity which only he can perform, and moving the boat with his son aboard the boat alone) puts his son in danger. In addition, having to move every 24 hours interrupts the Claimant's home schooling of his son. All of this represents a significant interference with the Claimant's right to family life, contrary to article 8 of the Convention.

56. Although the Council now concedes that the restrictions should be suspended during periods of river safety warnings by the Environment Agency, this suspension is unreasonably confined to downstream warnings and ignores the same risks to boat users whilst upstream warnings are in place.

57. In addition, submitted Mr Stark, there is no evidence that the restrictions are necessary to prevent the nuisance which the Council relies upon as the rationale for the Order. Allowance for a longer stay than 24 hours would still meet the Council's aims and would result in much less of an interference with the Claimant's article 8 rights.

58. Mr Stark accepted that article 8 is not an unqualified right and that it requires a consideration of proportionality as against the aims the Council seeks to achieve. Applying the principle of proportionality to the facts Mr Stark submitted that there had been a failure to consider less intrusive means as a way of achieving the Council's objectives, for example allowance for a longer stay than 24 hours before boat users had to move on.

Ground 9 – the Council's consultation was procedurally unfair

59. The first consultation was the only one in which specific questions were asked. Of these the Claimant takes particular issue with questions 6 to 10 because, Mr Stark submitted, they are framed in a way which presupposes that boats moored unlawfully are the cause of littering and noise problems.

60. The wording of questions 6 to 10 asked consultees to respond (by ticking one of five categories ranging from "strongly agree" to "strongly disagree") to the following questions:

> *"6. If the littering resulting from vessels moored without permission on* [the six Restricted Areas] *caused problems for residents and visitors*
>
> *7. If the littering resulting from vessels moored without permission on* [the six Restricted Areas] *caused damage to the environment*
>
> *8. If the littering resulting from vessels moored without permission on* [the six Restricted Areas] *caused problems for the council*
>
> *9. If the noise pollution from vessels mooring without permission on* [the six Restricted Areas] *caused problems for residents and visitors*
>
> *10. The noise pollution* [sic.; the word "if" is omitted from the beginning of this question] *from vessels mooring without permission on* [the six Restricted Areas] *caused problems for the council"*

61. The Claimant also complains that question 14 in the first consultation, asking whether *"A Public Space Protection Order to prevent mooring without permission on* [the six Restricted Areas] *was the best way to protect these open spaces for all and to preserve them",* was unfair because the consultation failed to include a draft of the proposed Order. Mr Stark concedes that the second consultation cured the alleged defect with question 14, because the proposed draft Order was published alongside it, but he maintained his complaints about questions 6 to 10 as they were present in the same form in the second consultation.

62. Mr Stark also submitted that it was unreasonable for neither the first nor the second consultation to ask consultees to comment on whether restricting stays to 24 hours was necessary or whether (for example) an alternative period should be used instead.

63. By reason of these failings, submitted Mr Stark, the consultation was unlawful having regard to the long-established 'Gunning' principles on how to conduct a lawful consultation.

Ground 10 – failure to have regard to relevant facts/having regard to irrelevant facts

64. Mr Stark submitted that the facts relied upon in support of other grounds also supported this formulation of a ground of challenge.

Ground 11 – the Equality Impact Assessment ("EqIA") failed to identify all groups with protected characteristics who may be affected
Ground 12 – the EqIA failed adequately to address the impact of the proposed Order
Ground 14 – the Council failed to comply with its PSED

65. These grounds taken together challenge the adequacy of the EqIA and the Council's compliance with its PSED, for which purpose the EqIA was commissioned.

66. The Claimant's primary complaint is that the EqIA failed to identify and assess the impact of the Order upon boat users with the protected characteristics of age, disability, or pregnancy and maternity (s149(7) of the Equality Act 2010).

67. Mr Stark submitted that the judgment of the Court of Appeal in R (Bracking) v Secretary of State for Work and Pensions [2013] EWCA Civ 1345 set out, at [25], the eight principles relevant to the fulfilment of the PSED distilled from the case-law placed before the court. He emphasised in particular principle (4) which, per the judgment of McCombe LJ, provides as follows:

> "[A decision-maker] must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy and not merely as a "rearguard action", following a concluded decision …"

68. A "rearguard action", submitted Mr Stark, is precisely what the Council is fighting in this case. It never undertook a proper assessment of potential users with all relevant protected characteristics and the effects upon them of the prohibitions in the Order despite the consultation response made by the NBTA pointing out its failure.

Ground 13 – failure to consider adequately the outcome of the Council's Boat Dwellers Accommodation Assessment undertaken as part of the Local Plan Review

69. As to this ground Mr Stark's submission was simply that, whilst the Council maintains that the results of the Boat Dwellers Accommodation Assessment and related Boat Dwellers Site Assessment were taken into account (for example to reach the conclusion that there were no boat users with disabilities likely to be affected by the Order), there was no evidence that this was the case.

Ground 15 – the Council failed to publicise the making of the Order contrary to the requirements of s59(8) of the 2014 Act

70. The simple point made by Mr Stark is that the Order should have been publicised when it came into effect. The Council's approach, of saying that it will publicise the Order if and when these proceedings are dismissed, is insufficient to meet the clear requirements of s59(8).

The grounds of challenge – Defendant's submissions

71. For the Council Mr Hoar made a series of overarching submissions before responding to the specific grounds of challenge.

72. He submitted firstly that there was sufficient precision in the wording of the Order for it to satisfy the statutory requirements; secondly that all grounds of claim bar those relating to article 8 and to the PSED were rationality grounds where the court could easily be satisfied that the Council's approach was lawful; thirdly that case-law demonstrates that article 8 is not engaged in circumstances such as those that pertain in this case; and fourthly that when considering whether the Council discharged its PSED the court must consider what material was before the Council when the decision to make the Order was taken, as well as what it was reasonable to bring to the Council's attention.

73. Turning then to the specific grounds of challenge raised by the Claimant in this case Mr Hoar submitted as follows.

Ground 1 – certainty of the Order

74. Mr Hoar accepted that this was "not the most straightforward order" to construe because it needs to set out the restricted activities and the prevailing exceptions, but - he submitted – it does all that it needs to do. The interpretation of the Order should be based on the actual meaning of the words used and whether they were sufficiently clear for anyone reading it to understand what was prohibited and when exceptions from the prohibition were made.

75. Mr Hoar characterised paragraph 3 of the Order as akin to a recital. It referenced unauthorised mooring as a detriment as well as associated littering, noise and the obstruction of other river users from mooring. The Council accepts that the Claimant himself cannot be shown to be guilty of either unauthorised mooring noise or littering but that does not need to be shown.

76. As to the prohibited activities Mr Hoar submitted that the Order aims to reduce the opportunities for unauthorised mooring. In response to my question as to what the references to littering and noise added to this, Mr Hoar submitted that the Council had evidence that unauthorised mooring results in littering and noise. He submitted that there are two steps to the Claimant's rationality challenge: (a) whether the Council had found evidence of anti-social behaviour and detriment to the public, and (b) how they chose to address those problems in the Order. On neither basis could the Council's approach be said to be legally flawed.

77. As to the Council's EEP, in oral argument Mr Hoar conceded that at times some of the wording "could have been clearer" but now that it had been updated it was sufficiently clear. The purpose of the policy was not to attempt to vary the terms of the Order but to explain how the Council would enforce it by setting out a further explanation of what the provisions mean. This was not unreasonable and it is, submitted Mr Hoar, precisely what was intended by the statutory guidance published under s73 of the 2014 Act. He likened the relationship between the Order and the EEP to the relationship between an Act of Parliament and the explanatory notes published alongside it. Moreover the Council is bound by its EEP and, as a matter of public law, must follow it. In the event of any uncertainty in the interpretation of the Order the EEP helps to explain it by binding the Council to follow a particular interpretation.

78. The Claimant's complaint about a "lack of clarity", submitted Mr Hoar, failed on the interpretation of the Order itself. The terms of the EEP did not concede that there was a lack of clarity since the interpretive comments were made for the avoidance of any doubt. This was felt by the Council to be important because others had alleged that there was some confusion over the terms, although in publishing the EEP the Council was not conceding that there was confusion caused.

79. Mr Hoar accepted the Claimant was right to submit that there was a particular need for clarity in any order enforceable by penal sanctions, respecting (by analogy with cases involving statutory interpretation) what the Court of Appeal in R (Good Law Project) v Electoral Commission [2020] 1 WLR 1157 acknowledged to be "the principle against "doubtful penalisation"" (per [78] of the judgment of the Court).

80. In this case, submitted Mr Hoar, the prejudice to anyone contravening a restriction in the Order was relatively minor and hence the principle should be applied lightly.

81. As to the particular parts of the Order which the Claimant complained of Mr Hoar submitted as follows:

    a) References to "mooring" must be to circumstances in which a boat is connected physically to the bank. The Order was made in February 2024, a month after the case of London Borough of Richmond on Thames v Trotman [2024] EWHC 9 (KB) was decided. Trotman was a case in which HHJ Blair KC had to consider whether mooring by the defendant constituted a trespass contrary to byelaws and he concluded that 'mooring' required some degree of physical connection between the boat and the land. References in the Order to "mooring" must therefore be construed in that light;

    b) The Order does not prohibit all moorings to the river bank, only "unauthorised" moorings. A boat user wishing to moor on the Council-owned part of the bank may make a written request for permission to do so. The Order does not prevent this;

    c) The activity of unauthorised moorings is associated with littering and noise and with the prevention of access to the river bank by other users contrary to their PRN; the activities are persistent in nature; and the activities are detrimental to local residents. As such, submitted Mr Hoar, the Order meets the requirements of the 2014 Act;

d) On a fair reading of the Order, "unauthorised mooring" alone is sufficient to put a boat user in breach. The Council does not need to demonstrate that there has also been littering, noise or obstruction of other boat users;

e) There can be no serious complaint about the interpretation of the terms "unauthorised mooring" or "restricted area". As to the latter, "restricted area" is defined as meaning the several different areas identified in the Order by reference to the Order plan. If there were any doubt about whether the Order prevents a boat user from moving from one part of the restricted area to any other part of the restricted area, or just to the same part of the restricted area, Mr Hoar submitted that the latter is the less restrictive possible meaning and so by convention it is the meaning to be applied. Moreover – he submitted – to the extent that there is any doubt it is dispelled by the wording of the Council's EEP which the Council is bound to abide by as a matter of public law; and

f) All of these factors can be derived from a fair reading of the Order itself, alongside (as necessary) the EEP.

Ground 2 – grounds for concluding the terms met a s59(2) purpose
Ground 3 – prohibitions go beyond what is reasonable
Ground 4 – failure to have regard to statutory guidance issued under s73

82. The starting point for the Council was to note that the guidance of May J from Summers, which has been adopted by the Court of Appeal without dissent.

83. Having regard to the first sentence in [25] of the judgment of May J – "The Act therefore envisages use of PSPOs to curb activities which it is possible that not everyone would view as detrimentally affecting their quality of life" – Mr Hoar noted that the evidence from the consultations demonstrated that many residents did suggest the proscribed activities were troublesome to them.

84. Based upon the guidance in Summers Mr Hoar submitted that the court should apply a two-stage test to the restrictions in the Order:

a) Ascertaining the activities that are restricted, and

b) Considering the appropriateness of the restriction, an essential part of which was to consider how effectively the restrictions could be enforced

85. As to the specific guidance Mr Hoar submitted (by reference to paragraphs in the judgment of May J):

a) that the Council could fairly conclude on the evidence that the restricted activities were "seriously anti-social, not … simply annoying" ([26]),

b) that the Council could also fairly conclude that the activities were or were likely to be of a "persistent or continuing nature" ([27]),

c) that "the scope of any review under section 66 is supervisory only, akin to the jurisdiction exercised on a judicial review, as distinct from any merits-based assessment" ([33]),

d) that the correct legal test to apply can be derived from the following passage of the judgment ([38]) which May J endorsed:

"Although in the course of argument Mr Porter appeared to me to draw back from a test at the highest end of the *Wednesbury* scale, he nevertheless maintained that the correct test was higher than standard and certainly no lower than that enunciated by Lord Denning MR in Ashbridge Investments Ltd v Minister of Housing and Local Government [1965] 1 WLR 1230, 1326:

> "The court can only interfere on the ground that the minister has gone outside the powers of the Act or that any requirement of the Act has not been complied with. Under this section it seems to me that the court can interfere with the minister's decision if he has acted on no evidence; or if he has come to a conclusion to which on the evidence he could not reasonably come; or if he has given a wrong interpretation to the words of the statute; or if he has taken into consideration matters which he ought not to have taken into account, or vice versa; or has otherwise gone wrong in law"""; and

e) The witness statement of Mr Burrows for the Council suggests that the Council has received complaints about littering and noise consistently since 2014. This is relevant also to later comments made by May J in [25], all of which indicate that the Council has a broader discretion than usual to identify the consequences of anti-social behaviour.

86. Mr Hoar submitted that every PSPO would inevitably be arbitrary in the restrictions it fixes. Not every boat user would engage in anti-social behaviour but the line has to be drawn somewhere.

87. Applying the above principles to the facts, whilst the Claimant was right to say that there was no evidence that those mooring for a short-term were inherently more likely to cause litter or noise or obstructions, the point was more about the general importance of preventing those activities by a proportion of those who were mooring unauthorised. By limiting the period for unauthorised moorings the restrictions in the Order were reasonable and appropriate to prevent the defined anti-social behaviour from taking place, even though some boats mooring for longer than the 24-hour period will not engage in that behaviour (and, by the same token, some mooring even for less than 24 hours may litter or create noise or obstruct other boat users).

88. By reason of the above the Council's decision to limit the duration of unauthorised moorings is a reasonable means of reducing the harm caused by a proportion of them, and is therefore proportionate. The restrictions are also – Mr Hoar noted – confined mostly to areas owned by the Council where unauthorised mooring amounts to a

trespass. In such circumstances there can be no reasonable expectation that a boat owner would be able to moor on the bank anyway because the Council as landowner has a legal right to have them moved on.

89. So far as the failure to have regard to statutory guidance is concerned, Mr Hoar submitted that a response to this ground is difficult because the Claimant did not identify which particular aspect of the statutory guidance he said the Council failed to observe, but the Council was satisfied that its approach to the Order respected the provisions of the guidance.

Ground 5 – the Order has been made for an improper purpose

90. The Claimant's complaint about an improper purpose now appears to be based on the fact that the Order is a response by the Council to neighbouring Boroughs imposing similar restrictions. But – submitted Mr Hoar – it is necessary to explore why this factor was relevant to the promulgation of the Order. The Council was reasonably concerned that the imposition of similar orders by neighbouring Boroughs could result in the displacement of boat users from those Boroughs, leading to an increase in the pressure to seek unauthorised moorings in the Council's administrative area (and thereby an increase in incidences of anti-social behaviour).

Ground 6 - the Council failed in its Tameside duty of enquiry

91. Mr Hoar submitted that the Tameside duty only requires that 'reasonable' enquiry be made by the Council to inform the exercise of its discretion. In this case that duty was discharged. It was unnecessary, and practically impossible, to ascertain (for example) how long each of the boats which officers had identified had been moored for, and whether the owners of those boats was responsible for anti-social behaviour.

Ground 7 – unlawful interference with the Claimant's article 8 rights
Ground 8 – restrictions are disproportionate to any legitimate aim

92. As noted above, part of the case for the Council is the fact that there can be no reasonable expectation by boat users that they would be able to moor on the restricted areas without authorisation anyway. The land is owned by the Council and so, irrespective of the PSPO, the Council as landowner would have a right to take action in trespass to move unauthorised boats on in any event. Mr Hoar submitted that authority to moor can be granted on written application but whether it is granted is at the discretion of the Council as landowner. The terms of the Order do not therefore remove a right which the Claimant or those like him can enjoy without the consent of the Council as landowner.

93. Mr Hoar also cited the case of Akerman v Richmond London Borough Council [2017] PTSR 351, a judgment of the Divisional Court. In that case an appeal was mounted by Mr Akerman against his conviction in the Magistrates Court for a breach of byelaws passed by Richmond Council relating to boat users. The breach in question was unauthorised mooring for more than one hour in a 24-hour period. The appeal grounds included an alleged infringement of article 8.

94. Mr Hoar submitted that the conclusion of the Court in Akerman applied with equal force to the present case. He submitted further that in the present case it was perfectly rational for the Council to conclude that a 24-hour restriction (which, he noted, was significantly longer than the one-hour period allowed by the byelaws in Akerman) was a reasonable and proportionate response to the harm caused by anti-social behaviour revealed in the evidence.

95. Finally Mr Hoar submitted, in reliance on Akerman, that the threshold was much higher for a claimant who (as here) sought to challenge the lawfulness of a policy as a whole rather than (in Akerman) the application of the policy to a prosecution in an individual case. Both Akerman and Jones were dealing with challenges at the individual level of prosecution, not the lawfulness of policy.

Ground 9 – the Council's consultation was procedurally unfair

96. Mr Hoar recognised that the Gunning principles were applicable to the consultations but submitted that the consultations were lawful when considered against those principles. He noted in particular the following points:

    a) Consultation was undertaken at a formative stage. Despite the complaints from the Claimant there was no evidence of a pre-determined conclusion, and the fact that a second consultation was opened up voluntarily by the Council is strong evidence indicating otherwise;

    b) The consultation adequately explained the scope of what was being consulted upon. It established, as the rationale for the Order, the anti-social behaviour associated with unauthorised moorings. It identified clearly the spaces proposed to be covered by the Order. It drafted a series of questions to elicit views on the proposed restrictions, both for and against;

    c) The Council conscientiously considered the results of the consultations. They were addressed in detail in reports to the Council's Cabinet and, again, the fact that a second consultation was commissioned is evidence of the Council's diligence, as is its bespoke engagement with those most likely to be affected by the restrictions;

    d) Consultation has taken place directly with boat users moored along the river who were most likely to be affected. In many cases further discussion was offered and the offer taken up by consultees. This demonstrates an even-handed approach to those likely to be impacted by the proposals both positively and negatively; and

    e) Considered fairly and as a whole the consultation allowed all consultees to understand what was proposed in the Order, why the restrictions fell within the scope of the 2014 Act, and what evidence supported the view provisionally taken by officers upon which consultation responses were sought

Ground 10 – failure to have regard to relevant facts/having regard to irrelevant facts

97. Noting that this ground, as advanced orally, relied on the same facts as other grounds but with a different legal formulation, Mr Hoar submitted that the issues the Claimant complained were absent from the Council's thinking were either not relevant, or else they were fully considered and rational conclusions upon them reached.

98. Developing this theme Mr Hoar submitted that it was reasonable for the Council to consider a blanket ban on unauthorised mooring even once it was accepted that not every unauthorised mooring results in anti-social behaviour. Similarly, he submitted, any period of restriction selected by the Council would to a degree be arbitrary but some period nevertheless has to be fixed for the restrictions to be effective and for the Council to be satisfied that the PRN for other river users is preserved.

99. Mr Hoar added that the Council considered the impact of the restrictions on those who lived on moored boats but sought out evidence to be able to judge the impact on them, including direct engagement with a sample of boat dwellers and taking careful note of the views expressed by a representative organisation (the NBTA).

Ground 11 – the Equality Impact Assessment ("EqIA") failed to identify all groups with protected characteristics who may be affected
Ground 12 – the EqIA failed adequately to address the impact of the proposed Order
Ground 14 – the Council failed to comply with its public sector equality duty

100. Mr Hoar submitted firstly that boat dwellers do not have a protected characteristic as a group in the same way that (for example) the traveller community does. Despite this, submitted Mr Hoar, the evidence shows that the Council's consultation recognised boat dwellers as a "near equivalent" to a group with a protected characteristic, and the consultation was undertaken accordingly.

101. As to the individual protected characteristics said by the Claimant to have been ignored – disability, age, and pregnancy or maternity – the Council reached a rational conclusion that these characteristics were unlikely to be found in any significant numbers amongst the affected group. Nobody surveyed in person mentioned that they had one of these protected characteristics. Despite this, when disability was in fact mentioned in the abstract by one of the consultees (i.e. a suggestion that a longer permitted period would be fairer to disabled people "who may need to rest before moving moorings again") that view was reported to Cabinet to allow a reasoned decision to be taken of the impacts on people with disabilities.

102. Mr Hoar accepted that the PSED was a duty of substance and not just form. But, he submitted, protected characteristics were considered appropriately by the Council and so it follows that the Council has discharged its PSED.

Ground 13 – failure to consider adequately the outcome of the Council's Boat Dwellers Accommodation Assessment undertaken as part of the Local Plan Review

103. Mr Hoar submitted that the Assessment in question included details of interviews with boat dwellers from which officers had indicated any concerns and particular accommodation needs. The conclusion from that Assessment was that there were likely to be 40 boat dwellers living on boats moored to the river bank in the Council's

administrative area. The results of the Assessment were relevant to the consultation on the Order but there was ample evidence from which to reach the conclusions which the Council had reached.

Ground 15 – the Council failed to publicise the making of the Order contrary to the requirements of s59(8) of the 2014 Act

104. Mr Hoar acknowledged the requirements of s59(8) of the 2014 Act and of the fact that the process of publicising the Order had not yet been undertaken. Notwithstanding that the Council intends in good faith to publicise the Order in the required manner after these proceedings have been disposed of, Mr Hoar accepted that the failure to publicise it thus far this amounted to what he characterised as a "technical breach" falling within s66(2)(b) of the 2014 Act.

105. However, submitted Mr Hoar, the only basis on which the court could quash the Order would be if it felt that "the interests of the applicant have been substantially prejudiced by a failure to comply with a requirement under this Chapter" (s66(5)(b)). In this case because the Council had elected not to enforce the Order yet, the interests of the Claimant – or indeed of anyone else – could not fairly be said to have been "substantially prejudiced" by the failure to publicise the Order at this time.

Discussion and conclusions on the grounds of challenge

106. Despite the multiplicity of pleaded grounds there are fewer points of substance between the parties than the sheer number of grounds might suggest. There are, as Mr Stark fairly acknowledges, several grounds which rely upon the same facts in the case but which seek to position the legal complaints in different ways.

107. As I have indicated above I consider it appropriate to discuss the grounds of challenge in the same groupings as they were submitted to me orally, but because of the overlap between many of them my conclusions on some grounds should also be read across as appropriate to other grounds.

Ground 1: the terms of the Order are too uncertain to be enforceable

108. It is convenient also to consider part of Ground 7, as to the unreasonableness of the limited exceptions to the Order when there are Environment Agency warnings upstream, under this head as considerations as to the relationship between the Order and the EEP arise. The starting point must be to consider the actual words of the Order and to apply a fair and impartial reading of them.

109. To the extent that there is any lack of clarity in the words used there are then two potential aids to interpretation: one is the application of the legal principle of "doubtful penalisation", and the other is to interpret the Order alongside the Council's own self-imposed rulebook in the form of the EEP.

110. The first step, therefore, is to consider the parts of the Order complained of by the Claimant to see whether there is any lack of clarity in them (or in other words – to borrow a phrase from the planning world giving guidance on interpreting decision letters – whether there is "room for genuine as opposed to forensic doubt" about the meaning of the words (per Sir Thomas Bingham MR, Clarke Homes v Secretary of

State for the Environment (1993) 66 P & CR 263)). If there is no real doubt then the second stage, of applying an aid to interpretation, does not need to be followed.

111. Mr Hoar for the Council accepted that the Order was "not the most straightforward" but he submitted that it was nevertheless intelligible on its face, and so lawful.

112. Mr Stark for the Claimant identified the following aspects of the Order as being too uncertain:

a) Whether an unauthorised mooring alone was a prohibited activity or only if it resulted in littering, noise or obstruction of other river users,

b) Whether an unauthorised mooring present for less than 24 hours but which caused litter or noise or an obstruction of other river users constituted a breach of the Order,

c) whether the Order permits a boat user to move from one restricted area to another or whether it prohibits unauthorised mooring for more than 24 hours in any of the restricted areas, and

d) whether mooring "by" a restricted area for more than 24 hours and then moving into a restricted area within 72 hours was prohibited

113. I deal with the first three of these in turn:

a) It is tolerably clear to me that the prohibited activity is unauthorised mooring alone. I accept Mr Hoar's characterisation of paragraph 3 of the Order as being akin to a recital, and that the references to "associated littering, noise and preventing other users of the River Thames from temporary mooring for 24 hours …" do no more than establish that the statutory criteria for a PSPO are met by associating the prohibited activity with anti-social behaviour. The operative part comes in paragraphs 4 and 5 of the Order, with the related definitions, from which I see no real doubt that it is unauthorised mooring without more which is prohibited. If there were any residual doubt then the Council's EEP dispels it completely by summarising the terms of the Order as follows (with no mention of littering, noise or obstruction):

> "The proposed PSPO prohibits mooring without consent for longer than 24 hours in the ordinary course of navigation with no return to that same open space"

b) In my judgement there is even less room for doubt about whether a mooring for less than 24 hours is prevented if it causes littering, noise or obstruction. Nowhere in the Order is there any suggestion that a mooring for less than 24 hours could be a prohibited activity. Even the paragraph 3 'recital' confines its references to "temporary mooring for 24 hours". Whilst a river user who causes littering, noise or obstructions whilst mooring for less than 24 hours may find themselves subject to other

types of enforcement action by the Council under different powers they will not find themselves to be in breach of the Order;

c) Whilst I accept that, at first glance, use of the word "restricted area" to refer to more than one actual area is unfortunate, on a fair reading of the Order it is still clear what is being prohibited and where. Paragraph 4 of the Order restricts the carrying out of a prohibited activity within etc. "any of the restricted areas", from which it is clear that the several separate areas within that definition are to be disaggregated from one another despite the definition in the Order being expressed as "restricted area" (singular). Any residual doubt is once again dispelled by the Council's EEP which – responding to prior criticisms about a supposed lack of clarity in this wording – tackles the point directly with the following guidance:

> "For the avoidance of doubt, a boat may return to a different, named area within the Restricted Areas [sic.] in the same 72 hour period, provided it does not return to the same named area in that period"

114. To my mind that leaves two aspects of the Order which on their face are less clear:

a) Whether mooring "by" a restricted area for more than 24 hours and then moving into it within a 72-hour period is prohibited, and

b) Whether the Order removes from the scope of a "prohibited activity" mooring when Environment Agency river warnings are in force upstream of the restricted areas

It is therefore necessary to consider the two aids to interpretation I have mentioned above.

115. The principle of doubtful penalisation was referred to by both parties. Indeed both cited the same section from *Bennion,* although they drew different conclusions from it and from the related case-law when applied to the facts.

116. Having cited the broad principle by reference to Good Law Project Mr Hoar for the Council sought to advance two separate propositions: firstly that if the true intent of the provision is clear from the totality of relevant factors surrounding it then the court may apply a "rectifying interpretation" of it to correct an obvious mistake (Bogdanic v Secretary of State for the Home Department [2014] EWHC 2872, per Sales J (as he then was)), although Mr Hoar subsequently accepted that this case was probably not apt for such an interpretation; and secondly that the application of the principle against doubtful penalisation had to be calibrated to the degree of detriment that would be suffered.

117. In support of the latter contention Mr Hoar relied upon the same part of *Bennion on Statutory Interpretation* as was cited by Mr Stark, namely section 26.4. The passage in question, having quoted from the judgment of Sales J in Bogdanic at [48], went on to state as follows:

> "The weight to be given to the presumption will necessarily depend upon the circumstances of the particular case. One factor that is likely to influence the weight given to the presumption is the severity of the detriment. If the detriment is minor, the presumption may be expected to carry little weight. If the detriment is severe, the principle will be correspondingly powerful"

118. Mr Hoar sought to characterise the detriment in this case as minor. A successful prosecution for breach would, in all likelihood, result in little more than a fixed penalty notice attracting a small fine. Unless liability were disputed by the recipient, no court appearance would be needed.

119. The role played by the EEP in interpreting the Order is more contentious. There are passages within it which offer support in interpreting aspects of the Order which may be unclear. I have commented on these above when dismissing the Claimant's complaints about three aspects of the Order. In each of those instances my primary conclusion is that there is no significant doubt about what the Order means and that the EEP is a helpful but not essential aid to interpretation. The EEP is uncontroversial in those instances because what it says reinforces how the Order is reasonably interpreted in the first place. But for other aspects of the EEP, whilst it is helpful in understanding how enforcement officers will exercise their prosecutorial discretion in any given case, all it can deal with is "how" enforcement takes place. "What" can be enforced against must be based on the terms of the Order itself.

120. For the most part the content of the EEP guides the exercise of discretion by enforcement officers, but it does not circumscribe it. Thus one sees references within the content to enforcement officers acting in a way that is "partial and objective", to "normally" offering the chance to discharge liability on conviction with a fixed penalty notice, and to issuing fixed penalty notices where a breach has been witnessed by the officer or where there is "reliable" witness testimony. Each of these examples still admits of the exercise of discretion by the enforcement officer (for example as to what are "normal" circumstances or what is "reliable" witness testimony). A person prosecuted for breach cannot use as a defence the mere fact that it was unreasonable to conclude that they should be prosecuted for a prima facie breach in the first place; if a breach has been established then how the discretion to prosecute for it has been exercised does not avail the defendant of a defence to the charge.

121. In addition the EEP sets the level of fine for offences dealt with by fixed penalty notices. These parts of the EEP are more definite and prescriptive. For breaches of a PSPO generally the EEP fixes the level of fine where a fixed penalty notice is used, stating emphatically that "The amount of the Fixed Penalty Notice shall be £100" with an appropriate deduction for prompt payment. But it is relevant to note two things about this. Firstly, to the extent that this is a concession it is a concession applying only to sanction not to liability. Secondly, the wording of this part of the EEP mirrors almost exactly the wording of the Order (omitting only the statutory reference – section 67 – under which a person who does not pay the fixed penalty notice may be prosecuted). Nothing in this part of the EEP seeks to embellish or re-interpret the provisions of the Order itself. In my judgement the same cannot necessarily be said for the section of the EEP dealing with the enforcement of the Order.

122. I consider now the two parts of the Claimant's complaint about the certainty of the Order where I harbour more doubts.

Mooring 'by' a Restricted Area

123. A prohibited activity is mooring "within, or on, or by, or at, any of the restricted areas". Most of these are clear as to their meaning. But "… or by …" is not so readily understandable, it seems to me.

124. In oral argument I posited with Mr Hoar for the Council that prohibiting an activity "by" a restricted area looked worryingly imprecise. How close does one have to be to a restricted area before one is "by" it? Less than one full boat-length away from it, or more than that?

125. Mr Hoar's response was that this would be for the Magistrates Court on a prosecution to assess. But he did accept that activities which took place outside of a restricted area defined in the Order could not be prohibited. This is by reason of section 59(4)(a) of the Act, which provides as follows:

> "(4) A public spaces protection order is an order that identifies the public place referred to in subsection (2) ("the restricted area") and –
>
> a) prohibits specified things being done **in the restricted area** …" (my emphasis)

126. This lack of precision in paragraph 4 of the Order is undesirable. A boat user may well be uncertain as to whether he or she is about to moor "by" a restricted area. The explanation offered by Mr Hoar requires a detailed knowledge of the statutory provisions to realise that use of the word "by" cannot mean something which is wholly outside a restricted area because otherwise the Order would be unlawful in its scope.

127. All things considered, the words "… or by …" would be much better excised from paragraph 4 of the Order, but I am prepared to accept that in this instance those words are superfluous because by virtue of section 59(4)(a) they cannot be interpreted to mean mooring which is not at least partly within a restricted area.

The relevance of upstream river warnings

128. A comparison between the wording of the Order and the wording of the relevant part of the EEP is revealing.

129. The dispensation in the Order for carrying out what would otherwise be a prohibited activity when the Environment Agency has issued river warnings states as follows:

> "UNLESS - The Environment Agency's Guidance on River Thames: current river conditions for the area between Molesey Lock to Teddington Lock has issued a Red or Yellow Warning Board, which advises, depending on the warning issued, that users of powered and/or unpowered boats, either not to navigate, or to find a safe mooring"

130. As I have noted already, the section of river which these words cover – Molesey Lock to Teddington Lock – is a section downstream from the restricted areas.

131. Compare this with the wording of the EEP (August 2024 version) which states as follows:

> "The proposed PSPO prohibits mooring without consent for longer than 24 hours in the ordinary course of navigation with no return to that same open space, within 72 hours within the different named listed areas. For the avoidance of doubt, a boat may return to a different, named area within the Restricted Areas in the same 72 hour period, provided it does not return to the same named area in that period.
>
> UNLESS – the Guidance on River Thames: current river conditions advise boats either not to navigate, or to find a safe mooring (on Yellow boards unpowered craft should not navigate, this might include some houseboats without engines, and on Red boards no craft should navigate). **This would apply to all reaches within the Borough boundaries and adjacent reaches up to Bell Weir**.
>
> In these cases, the PSPO would not be enforced before river conditions return to no stream warnings" (my emphasis)

132. The highlighted passage describes a larger section of the River Thames than the Order does. Bell Weir, for example, is upstream of all the restricted areas. Thus the EEP describes something which the NBTA says <u>should</u> be a wider exception to the definition of prohibited activity in the Order but which is not.

133. The misalignment between the EEP and the Order is clear. Whilst the EEP can assist in the interpretation of the Order where there are passages which may be unclear, it cannot change what the Order clearly says. That would be to relegate the terms of the Order to being subordinate to the EEP. That is clearly not the intent of the legislation.

134. There is therefore a clear distinction in my mind between (on the one hand) using the EEP to help interpret what the Order means and (on the other hand) using it to enlarge what the Order actually says. The Order is specific in defining the parts of the river for which an in-force Environment Agency river warning suspends what would otherwise be a prohibited mooring. Those parts of the river are all downstream of the restricted areas. Warnings confined to upstream areas do not suspend the control over prohibited moorings.

135. Put at its highest for the Council we are left, therefore, with the possibility of an activity which <u>could</u> be prosecuted under the Order but which the Council has said it <u>would</u> not prosecute for.

136. The "would not" assurance, in my view, is insufficient to bring the Order within the scope of the statutory criteria. I say this for three reasons:

    a) The primary source for any affected user to ascertain what is lawful is the Order itself. Regulations require the publication of the Order. They do not extend to requiring publication of the EEP. To require an affected user to alter its understanding of the clear terms of the Order by reference

to a separate document whose existence it may not even be aware of defeats the purpose of the statutory safeguards requiring publication,

b) There is a difference between the two scenarios – "could not" and "would not" - regarding how a prosecution could be defended when upstream warnings are in place. If the existence of upstream warnings is provided for as an exception to the prohibition in the Order itself – as downstream warnings are – then any prosecuted river user has a copper-bottomed defence to the prosecution. No offence has been committed. But as things stand a river user prosecuted when an upstream warning is in place would have to rely instead on the assurance given in the EEP that he "would" not be prosecuted. Whilst a court may well be sympathetic to a defendant faced with a prosecution in these circumstances, and whilst a defence founded on (for example) breach of a legitimate expectation may yet prevail, all of that is less certain than a defence resting solely on the words of the Order itself; and

c) Recognition of the limitation to prohibited activities "without lawful excuse" in the Order does not rescue it, in my view. The fact that there is specific reference to river warnings downstream of the restricted areas would, in all likelihood, persuade a court that the omission of comparable upstream warnings was deliberate and that they were not intended as an exception to prohibition

137. If some may consider that my conclusion produces an unfair outcome then it must be remembered that the Council could at any time have suspended its consideration of the draft Order to insert wording specifically about upstream warnings, in the same way it has done about downstream warnings. Why it did not do this is unclear to me.

138. What is clear is that on this point the evolving terms of the EEP appear to be a tacit acceptance of what the Order should have said but does not. The EEP attempts to rescue the Order by including a commitment not to prosecute when downstream or upstream warnings are in place. But in my judgement the EEP cannot have the effect which the Council contends, because that would be to amend what is otherwise the clear wording of the Order.

139. It is irrational for the Order not to include a relaxation of the prohibition when upstream river warnings are in place. For this reason I conclude that the Order is unlawful.

140. I should say that I have analysed and ruled on the arguments about the absence of upstream warning notices in the context of Ground 1 because that is primarily how it was argued. I could equally have applied the same rationale to find against the Council on Ground 3 and part of Ground 7, on the basis that omitting from the Order an effective dispensation when upstream warnings are in place goes beyond what is reasonable, but the overall result is the same and the route to it is of far less importance.

141. For these reasons Ground 1 succeeds.

142. Strictly speaking that conclusion is sufficient to dispose of the substantive challenge. However, in deference to the comprehensive submissions made by both Counsel (and on the assumption that the Council may now wish to reconsider whether and how to

make the Order again in light of my findings and what it may wish to change about the content of the Order or the process it adopts, and so will benefit from hearing my conclusions on the other grounds of challenge) I turn now to consider the other grounds.

Ground 2: there were no reasonable grounds on which the Council could conclude that mooring temporarily for a short period of time met the conditions of section 59(2) of the 2014 Act

Ground 3: the prohibitions contained in the Order go beyond what is reasonable, contrary to the requirements of section 59(5) of the 2014 Act

Ground 4: the Council failed to have any, or adequate, regard to the statutory guidance on PSPOs issued under section 73 of the 2014 Act

143. I remind myself of the two conditions in section 59(2)-(3) of the Act which have to be satisfied before a PSPO can be made:

> "(2) The first condition is that—
>
> (a) activities carried on in a public place within the authority's area have had a detrimental effect on the quality of life of those in the locality, or
>
> (b) it is likely that activities will be carried on in a public place within that area and that they will have such an effect.
>
> (3) The second condition is that the effect, or likely effect, of the activities—
>
> (a) is, or is likely to be, of a persistent or continuing nature,
>
> (b) is, or is likely to be, such as to make the activities unreasonable, and
>
> (c) justifies the restrictions imposed by the notice"

144. In considering these grounds I accept as being correct the approach for the court to take as advanced by Mr Hoar for the Council, namely:

> a) To consider the activities which are restricted, and
>
> b) To consider the appropriateness of the restrictions in tackling the anti-social behaviour identified by the Council, and having regard in particular to how effectively the restrictions can be enforced

145. Both Counsel rely upon the judgment of May J in Summers, in particular passages between [25]-[38] of her judgment. I gratefully adopt May J's clear and cogent summary of the relevant criteria to be applied when considering the court's approach to considering the lawfulness of a PSPO.

146. The starting point is to apply the guidance from Lord Denning MR in Ashbridge Investments - which May J expressly endorsed at [38] of Summers - to the grounds of challenge advanced by the Claimant. I emphasise in particular May J's

acknowledgement at [33] that "the scope of any review under section 66 is supervisory only, akin to the jurisdiction exercised on a judicial review …".

147. In my judgement, having regard to the evidence in this case it was well within the range of reasonable responses for the Council to conclude that the incidences of anti-social behaviour described – littering, noise, obstruction of other boat users – was "seriously anti-social, not … simply annoying" (per [26]). There was a wealth of evidence concerning how local people have been affected adversely by these activities and of the fact that they are of a "persistent or continuing nature" [27]. The witness evidence presents details of numerous complaints received by the Council about these activities in the period from 2014.

148. There was also plenty of evidence to associate the activities complained of with unauthorised mooring. The Claimant's complaints that he is not personally responsible for any of the anti-social behaviour, and that the anti-social behaviour is not confined to those who engage in unauthorised mooring, are accepted by the Council but neither are a prerequisite for the Order to be considered lawful.

149. The Claimant's complaints about whether the anti-social behaviour can be linked with long-term mooring, and about where to fix the threshold for length of stay, potentially have more traction but ultimately I am not persuaded by them:

    a) as to the first, I accept that some of the evidence (for example photographs of steps being cut into the river bank or of trees being cut down) strongly suggests mooring for a long period, because there would be neither the time nor the necessity to carry out such activities for short-term moorers. But I also accept that some of the evidence – for example of littering, filling up of the refuse bins provided, and noise – can equally be tied to those mooring for a short space of time;

    b) as to the second, by any analysis 24 hours is not a long period of time. However, Mr Hoar was right to submit that the line needs to be drawn somewhere. Whilst some may question whether 24 hours was the right limit to select, I cannot conclude that the selection of it was irrational in the face of the evidence. There was extensive consultation in two stages which elicited over 1,000 consultation responses. Some respondents supported the proposal for 24 hours, others suggested that a longer period was more appropriate. The NBTA provided a detailed response to consultation in which it queried the suitability of 24 hours, both in terms of practicalities and because (it submitted) a 24-hour restriction would infringe the PRN enjoyed by boat dwellers contrary to both common law and (in this location) section 79 of the 1932 Act. In the Cabinet report one of the "other comments" summarised by officers stated: "Give consideration to a 2 week restriction (similar to Henley) or a 36 to 72 hour restriction would be fairer especially for visitors, or disabled people who may need to rest before moving moorings again". The possibility of still utilising a PSPO but with a longer period of permitted mooring had therefore been raised by consultees and reported as such to members. The Council's officers provided a reasoned justification for why they did not agree with either contention. In his witness evidence Mr Burrows confirms that variations on a 24-hour restriction were considered by

> members when the proposal was debated at Cabinet. Mr Stark highlights the fact that there are no minutes of the Cabinet discussions available to verify that fact. That is true, but equally nobody has been able to gainsay the sworn evidence of Mr Burrows about what was discussed. I am therefore prepared to take at face value the fact that other possibilities besides a 24-hour restriction were discussed. This would also not be at all surprising given the focus of a lot of the objections

150. To succeed on these grounds the Claimant would need to show that the Council's decision was irrational. In short I see nothing in the Council's conclusion which suggests irrationality.

151. Mr Hoar was also right to submit that the selection of a time period will always be arbitrary to an extent. This is not at all unusual. As Mr Hoar submitted, some 17 year olds may be better able to cope with the consumption of alcohol than will some 19 year olds, yet the law fixes the threshold for lawful alcohol purchase (other than in pubs and restaurants) at 18 years old. Similarly some boat users mooring for less than 24 hours may be guilty of littering when some mooring for a lot longer than that may be much more responsible and cause no such problems. There is a need to impose a defined limit such that enforcement can be effective. It was rational for the Council to conclude that fixing the limit at 24 hours will make a significant contribution towards preventing a recurrence of the anti-social behaviour which prompted the promotion of the PSPO. Whilst in no way a comparative exercise I also noted that, set side by side with the one hour limit imposed through byelaws in Akerman (which passed without adverse comment by the Divisional Court notwithstanding a complaint about infringement of the PRN), 24 hours in this case looks generous.

152. In my judgement the reformulation of the complaint in Ground 4, that the Council has failed to have regard to the statutory guidance, takes matters no further. The statutory guidance which the Claimant prays in aid requires the Council to do no more than it has done. The passage from the guidance selected by Mr Stark to make good his submission – at page 64 - merely reminds the Council of the importance of focusing on specific behaviours, on selecting proportionate restrictions, and of the overarching objective of preventing anti-social behaviour from occurring or recurring. This guidance, it seems to me, is no more than a reminder of the statutory criteria. The Claimant may dispute the conclusions which the Council reached when applying the criteria but the guidance affords no independent ground of complaint.

153. Grounds 2 to 4 are therefore dismissed.

Ground 5: the Order has been made for an improper purpose, namely that it is motivated more by the desire to match what other local authorities in the vicinity are doing than with the fact that the statutory criteria are met

154. This ground can be dealt with very simply on the evidence.

155. In my judgement the motivation for the Council pursuing the Order is clear. Whilst there is reference to other neighbouring Boroughs imposing similar restrictions, the motivation for the Council is not to mirror the approach of other Boroughs for the sake of it but to protect against the very realistic possibility that boat users in neighbouring

areas will now likely be displaced into the Council's administrative area, thus resulting in greater pressure on the Council's public spaces and a greater likelihood of anti-social behaviour being experienced. This much can be seen from the very passage of the Council's Cabinet report upon which Mr Stark based his submissions about ulterior motive:

> "The problem has grown recently with increased enforcement in Kingston and Richmond displacing boats into Surrey, and an increase in the number of complaints received in all three boroughs. Further displacement is anticipated in future years as regular mooring areas and marinas within anticipated London are developed"

156. That conclusion by the Council is both understandable and an entirely legitimate factor in its decision whether to pursue the Order or not.

157. Ground 5 is therefore dismissed.

Ground 6 – the Council failed in its Tameside duty of enquiry

158. Ground 6 attacks what is said to be the unlawful failure of the Council to pursue further enquiries regarding the activities of boats moored on the Council's land without authority, partly because (Mr Stark submitted) the Council could not without further enquiry rationally conclude how long boats had been moored and could not ascertain whether the owners of those boats were responsible for anti-social behaviour.

159. The duty to enquire was, submitted Mr Stark, underlined by an inconsistency between the numbers gathered in the process promoting the Order and the numbers gleaned from the 2022 Boat Dwellers Accommodation Assessment. The latter concluded that there was a need for just 10 moorings on the river banks in the Council's administrative area whereas the former estimated that there were 116 unauthorised moorings in the Borough at the time, 26 of which were boats moored on the Council's land. Reference to this apparent inconsistency was made by Heine Planning Consultancy in its consultation response.

160. For the Council Mr Hoar submitted that this duty of reasonable enquiry was discharged by what the Council did. There was, he maintained, sufficient evidence for the Council rationally to conclude that the measures proposed in the Order would be effective at limiting or preventing future incidences of anti-social behaviour.

161. For every piece of evidence garnered during consultation there will always arguably be scope to improve upon what it reveals through further enquiry. But that does not of itself impose a duty on the Council to make further enquiry. The Tameside duty is limited to making reasonable enquiry. Per Lord Diplock (Secretary of State for Education v Tameside MBC [1977] AC 1044, at [1065]):

> "… 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?" (my emphasis)

162. In the circumstances of this case I accept that the Council reasonably concluded that it had sufficient information upon which to make a decision, and that the Tameside duty did not require it to make further enquiry. The Council had plenty of evidence from which to connect the evidence of anti-social behaviour to unauthorised moorings. That is all that it had to do: take "reasonable steps" to assemble relevant information. Whether it could have improved still further the information it had available to it does not mean that the information upon which it based its decision to confirm the Order was deficient.

163. Ground 6 is therefore dismissed.

Ground 7: the restrictions in the Order are an unlawful interference with Mr Trower's rights under the European Convention on Human Rights

Ground 8: the restrictions in the Order are disproportionate to any legitimate aim

164. I accept that the restrictions in the Order will have an impact on the rights of any boat user who lives on their boat and passes through the Council's area. The Claimant is an example of such a person.

165. Both Counsel accept that article 8 rights under the Convention are qualified. A proportionality assessment needs to be undertaken. Mr Stark submitted that the proportionality assessment had to be conducted in a structured way (relying on Canal & River Trust v Jones [2018] QB 305) and that had not happened on the facts of this case.

166. Jones was a case that involved a boat user who lived aboard his boat and had a licence to moor it on a canal controlled by the claimant. Mr Jones's licence had been terminated for an alleged breach of one of the licence terms. The claimant sought a declaration from the court that it was entitled in the circumstances to remove the defendant's boat. The defendant resisted the claim on grounds which included an alleged infringement of his article 8 rights.

167. The defendant's article 8 defence was struck out and the Court of Appeal allowed his appeal against the strike out, holding (per McCombe LJ at [41] and [44]-[45]):

> "41. The difficulty that I perceive in cases of the present type is that the balance between public interests and requirements of hard pushed local authority landlords on the one hand and the relative claims of individual tenants wishing to assert and to preserve rights under Article 8 on the other are well tried and tested before the courts.
>
> …
>
> 44. I am deeply conscious that, in this case, we are being invited to interfere with the exercise of the "good sense" of an experienced county court judge. However, neither he, we nor other judges (with whatever good sense we may have respectively) do have the same experience of balancing the competing weight of the public management rights and duties of an authority such as this Respondent in

> a context such as this. We are not dealing with a case where the relative weight of the boat operator's Article 8 rights can be so readily assessed against the authority's obvious public responsibilities. Nor is this a case like Akerman (supra) where the boat owner could not assert prior licence rights and a dispute as to lawful restriction of them.
>
> 45. In my judgment, in parity with the housing cases, in cases of the present type the court will usually be able to proceed on the basis that the authority has sound management reasons for wishing to enforce rigorously its licensing regime, without such reasons being distinctly pleaded and proved. As in the housing cases, the court cannot make the judgment of how best it is for the Respondent to manage the waterways …"

168. Mr Stark also relied upon the four point requirements for a structured proportionality test set out in *De Smith's Judicial Review* (8th edition), cited by Turner J at first instance in Dulgheriu v London Borough of Ealing [2018] 4 All ER 881 and repeated with implicit approval by the Court of Appeal at [70] of its judgment ([2020] 3 All ER 545) dismissing an appeal against the decision of Turner J:

> "It requires the court to seek first whether the action pursues a legitimate aim (i.e. one of the designated reasons to depart from a Convention right, such as national security). It then asks whether the measure employed is capable of achieving that aim, namely, whether there is a "rational connection" between the measures and the aim. Thirdly it asks whether a less restrictive alternative could have been employed. Even if these three hurdles are achieved, however … there is a fourth step which the decision-maker has to climb, namely, to demonstrate that the measure must be "necessary" which requires the courts to insist that the measure genuinely addresses a "pressing social need", and is not just desirable or reasonable, by the standards of a democratic society"

169. Both Counsel referred me to the case of Akerman v Richmond London Borough Council [2017] PTSR 351, although (unsurprisingly, given the decision) Mr Hoar placed more emphasis upon it in his submissions than did Mr Stark.

170. In Akerman the Court acknowledged the statutory PRN granted by section 79 of the 1932 Act (this also being part of the river network falling within the jurisdiction of the former Thames Conservators). But it addressed the article 8 ground in this way (per Beatson LJ, delivering the judgment of the Court, at [29] and [43]):

> "29. I turn to the submission that byelaws are not valid because the respondent failed to consider the housing implications and the article 8 rights of boat dwellers or less drastic alternatives to the time restrictions imposed on mooring …
>
> 43. The authorities show that a trespasser will only be able to trump the rights of an owner of property by invoking article 8 in an exceptional case: see Manchester City Council v Pinnock, [2010] UKSC 45, [2011] 2 AC 6 , and London Borough of Hounslow v Powell [2011] UKSC 8, [2011] 2 AC 186 and the summary by

> Etherton LJ, as he then was, in Thurrock BC v West [2012] EWCA Civ . 1435 at [22] – [31]. This is particularly so where the owner is a public authority which holds the land for the general public good such as the respondent in this case. It follows that in my judgment an interference with article 8 rights such as that by the byelaws restricting the mooring of boats in certain places was not, in the circumstances of this case, disproportionate where the boats subject to the restriction were homes. There was no evidence that the effect of the byelaw would preclude the appellant from living on a boat in the borough. The judge found (case stated at [12(b)] that other permanent moorings were available in the borough and on the river. Moreover, in the present case the article 8 defence cannot be said to have been pleaded in a sufficiently particularised way to meet the high threshold required to make it seriously arguable: London Borough of Hounslow v Powell at [33] and [34] *per* Lord Hope. Accordingly, while it may be possible to envisage a situation in which byelaws concerning waterways are so restrictive that it becomes impossible to live on a houseboat in the local authority's area, that is not the position in the circumstances of these byelaws and this local authority"

171. I am satisfied that the Council had firmly in mind the article 8 rights of the Claimant and others like him when considering whether to make the Order, and that the exercise which it went on to conduct was a fair and proportionate one. There are several instances in the reports to Cabinet where this can be identified. The most relevant is probably the detailed response offered by officers to the NBTA's consultation response, because it confronts directly the allegation that the proposed Order would infringe the article 8 rights of those who live on boats and visit the Council's area. I note, for example, the following commentary by officers having summarised the scope of article 8:

> "The above right [i.e. article 8] is a qualified right and an interference of that right may be necessary in a democratic society for a variety of reasons.
>
> The PSPO does not threaten to remove the boat in which the Bargee Travellers live but to manage the activity of the overstaying and/or persistent overstaying and the consequences of that activity in accordance with the [2014 Act]"

172. The Council's assessment of the impact of the Order on article 8 rights and of the basis on which it is proportionate to interfere with them is, in my judgement, perfectly adequate to discharge its legal duties. Each one of the four steps commended in Dulgheriu is tackled.

173. There are also six other points which I identify which make the Claimant's article 8 grounds in this case especially difficult for him to sustain:

    a) the statutory requirements of the 2014 Act have channelled the Council into conducting a surrogate exercise for that suggested by the authors of *De Smith* and endorsed by Turner J in Dulgerhiu. Each of the four steps in the structured approach identified there have been gone through by the Council as a necessary part of addressing the section 59 criteria, with the fourth step – the requirement that measures should address a

"pressing social need" – mirroring very closely the statutory criteria in section 59 of the 2014 (as elaborated upon by May J in Summers);

b) as was the case in Akerman the restricted areas in the Order are all owned by public authorities, five of them by the Council and the other one by Surrey County Council. Absent the Order each authority would still have a right to restrict access to their land to prevent unauthorised moorings by relying on the law of trespass. As such, and unlike a public authority exercising (for example) its statutory duties under the Housing Acts, there can be no general expectation by any boat user that they will be entitled as of right to moor on that land;

c) the Order cannot interfere with the PRN. In this location the PRN is established both by case-law and by the 1932 Act. But again, whilst the PRN recognises a right to moor on land temporarily, that aspect of the right does not define a specific period. Instead s79(2) of the 1932 Act confers "a right to anchor moor or remain stationary for a reasonable time". The Council maintains that 24 hours is a duration which it has identified from custom and practice (for example that adopted by the Environment Agency) as being reasonable and that it would not amount to an unlawful interference with the PRN. The Claimant has not been able to gainsay this;

d) the PRN also does not vest solely in the first boat user to moor their boat to the bank but to river users as a whole. Other boat users have a similar right to moor for a reasonable period, and if another boat user is already there and is overstaying a reasonable period then the later arriving boat user's PRN is being interfered with. The Council can thus reasonably maintain that in restricting unauthorised moorings to a defined period the terms of the Order are actually preserving the PRN for other river users. That this point was in the mind of officers can be seen from the following comment made in response to the NBTA's consultation response:

> "The aim of the PSPO is to ensure that the PRN and the temporary right to moor and to remain stationary for a reasonable time is open to all those navigating the River Thames. It is to ensure that temporary moorings are not monopolised by the few overstayers and potentially causing a risk of obstruction along the River Thames";

e) Mr Hoar rightly submitted that a challenge to a policy as a whole is always going to be more difficult to sustain than a challenge to individual actions founded on that policy. Beatson LJ observed in Akerman at [38]:

> "[In the case of] R (Bibi) v Secretary of State for the Home Department (Liberty intervening) [2015] 1 WLR 5055 … Baroness Hale of Richmond DPSC stated, at para 2, that the claimants had set themselves a difficult task because, while it may be possible to show that the operation of the rule in an individual case is a disproportionate infringement of an

> individual's article 8 rights, it is much harder to show that the rule itself is "inevitably lawful" on article 8 grounds because (para 55) "[there] will be some cases in which the interference is not too great". Lord Hodge JSC, at para 69, stated that "the court would not be entitled to strike down the rule unless satisfied that it was incapable of being operated in a proportionate way and so was inherently unjustified in all or nearly all cases""
>
> In my judgement this challenge does not clear the elevated hurdle of impugning the underlying policy; and finally

f) it must not be forgotten that the prohibited activity is "unauthorised" mooring. The Council as landowner is capable of granting permission on application for a boat user to moor on a restricted area. The Claimant complains that there are no details available of how such an application should be made and whom it should be made to, but equally this is not a case where the Claimant has attempted to apply for authorisation and his application has been unreasonably rejected or left unanswered. It seems to me that the absence of practical administrative details about where and whom to apply to cannot lead to the inference that mooring in a restricted area will never be authorised

174. For these reasons Grounds 7 (save for the part of Ground 7 which I have addressed under Ground 1 earlier in this judgment) and 8 are dismissed.

Ground 9 – the Council's consultation was procedurally unfair

175. It was common ground between the parties that a lawful consultation should observe the 'Gunning' principles. These derive from the judgment in R v Brent London Borough Council, ex p Gunning (1985) 84 LGR 168 at [189] and have been endorsed by the Courts on many occasions since (for example by the Supreme Court in R (Moseley) v Haringey London Borough Council [2014] 1 WLR 3947 at [25], per Lord Wilson JSC).

176. The four 'Gunning' principles may be summarised as follows:

a) The consultation must be undertaken at a time when proposals are still at a formative stage and capable of being influenced by consultation responses,

b) There must be sufficient information given in the consultation to allow intelligent consideration to be given to the proposals by consultees,

c) There must be adequate time given to consultees to consider the consultation and respond to it, and

d) "Conscientious consideration" must be given to the consultation responses by the decision maker prior to making a decision

177. The reports to the Council's Cabinet summarise the steps that were taken by the Council to consult on the proposals. On any analysis these were extensive. Consultation was open for a number of weeks and several background documents accompanied the consultation. In total across the two parts of the consultation over one thousand consultation responses were received. The Council actively prompted engagement in the consultation by interested stakeholders including river user groups and the NBTA. Having considered the results of the first consultation the Council elected to go out to a second consultation.

178. The Cabinet reports set out in great detail a breakdown of the consultation responses received. Sometimes the analysis was quantitative, citing the numbers of those responding who were in favour or not in favour of the proposals. Sometimes the analysis was qualitative, quoting from actual consultation responses. Even though numerically there was a large percentage of respondents who supported the proposals the summary of consultation responses was even-handed in that it quoted from comments both for and against the Order.

179. The two most substantial responses were from Heine Planning Consultancy and the NBTA. Both gave detailed comments in opposition to the Order. The Cabinet reports set out the full text of each of these two consultation responses and punctuated them with officers' own replies to the objections there set out.

180. What is clear from the record of the responses received is that several respondents challenged whether a PSPO was an appropriate means of tackling anti-social behaviour. Several respondents are recorded as saying in terms that (for example) "A PSPO/ASB order is the wrong way to go about this". Others challenged whether there was evidence connecting littering or noise with unauthorised moorings. Whilst some respondents specifically supported the 24-hour limit others challenged whether a restriction to 24 hours was reasonable, including (for example) one comment that: "We need to be moored in each place for a reasonable time, two weeks as I get the train or bus to work most weekdays in west London".

181. In all there are pages and pages in the Cabinet reports reciting the actual text of responses received. Contrary to Mr Stark's complaints about what he saw to be the partiality of questions 6 to 10 there is a wealth of evidence to be able to conclude that respondents were not misled by the phrasing of the questions into assuming a link between unauthorised moorings and littering or noise. Some positively railed against it, for example one response said:

> "This is just so unimaginative, lazy and elitist. You have provided no evidence that it's moored boats causing the problem, in my experiences its almost always middle and upper class kids and young adults binge drinking and behaving obnoxiously that causes the problems like noise and littering"

182. Applying the evidence to the four Gunning principles I note that:

a) Consultation took place over a significant period before the Order was made. The fact that the Council voluntarily undertook a second consultation after harbouring concerns that the first consultation would

benefit from some further clarification illustrates an even-handed approach to assessing the consultation results;

b) The consultation was accompanied by plenty of background information to help inform the proposals. The second consultation included a copy of the proposed Order. I agree with Mr Stark that without it there may have been a procedural complaint against the consultation, but Mr Stark also fairly conceded that this complaint cannot be sustained in light of its inclusion in a further voluntary stage of consultation. As to the complaint that the consultation did not identify alternatives for consultees to consider, I agree with Mr Hoar that it is self-evident when considering a proposal for a 24-hour limitation that other time periods could be considered as reasonable alternatives. As I have shown above, one of the consultees is recorded as having suggested consideration of two weeks, 36 hours or 72 hours as alternatives. The fact that a period longer or shorter than 24 hours was an alternative that could be considered did not need to be spelled out in the consultation. The absence of an express reference to alternative timescales does not, contrary to Mr Stark's submission, put this consultation in conflict with the guidance at [27] of Moseley;

c) Plenty of time was given for people to consider and respond. The sheer number of consultation responses is evidence of the fact that respondents were not disadvantaged by the period allowed for their response; and

d) The consultation responses were conscientiously – exhaustively – summarised and considered. This is especially evident from the officers' considered response to the two most detailed consultation responses, both of which were from objectors to the Order

183. In short, I am entirely satisfied that the consultation undertaken by the Council was fair and lawful.

184. Ground 9 is therefore dismissed.

Ground 10 – failure to have regard to relevant facts/having regard to irrelevant facts

185. This ground is – as Mr Stark fairly acknowledged – a reformulation of other grounds of challenge based on the same facts.

186. I agree with this characterisation. Orally and in writing Ground 10 seemed to be parasitic variously on the arguments advanced for Grounds 1-3, 8, and 13. I have set out my conclusions in relation to each of these elsewhere in this judgment and I have dismissed all of them. Ground 10 discloses no independent consideration capable of succeeding.

187. Ground 10 is therefore dismissed.

Ground 11 – the Equality Impact Assessment ("EqIA") failed to identify all groups with protected characteristics who may be affected

Ground 12 – the EqIA failed adequately to address the impact of the proposed Order

Ground 14 – the Council failed to comply with its public sector equality duty

188. Taken together these three grounds challenge the adequacy of the EqIA undertaken by the Council and, as a consequence, whether the Council adequately discharged its PSED.

189. The EqIA accompanied the consultation on the draft Order and was reported to the Council's Cabinet. Mr Hoar submitted that whilst the bargee/boat dwelling community do not constitute a protected characteristic in themselves the EqIA nevertheless assessed the impact upon them as if they did. That, however, is not the primary complaint advanced by Mr Stark for the Claimant. Instead he identifies the failure (as he sees it) of the EqIA to assess the impact on boat users with the protected characteristics of disability, age, and pregnancy/maternity.

190. Mr Stark is right to submit that the PSED is a duty of substance and not merely of form. Mr Hoar accepted as much in oral argument.

191. Mr Stark drew my attention to the case of Jones v Canal & River Trust, where McCombe LJ considered in some detail the potential impact of section 17 of the British Waterways Act 1995 and the Trust's policies and practices in that case on the defendant by reason of disability. But in my judgement there are two important distinctions between the present case and the case of Jones. The first is that the defendant in Jones had a disability himself and so the potential impact of the Trust's policies and practices was tangible. The second distinction is that, as I read it, the judgment in Jones focused very much on the relevance of the defendant's disability to the article 8 arguments advanced on his behalf rather than on any criticism of the adequacy of an EqIA or discharge of the PSED.

192. By contrast Summers is potentially closer on the facts to the present case, because there the complaint about disability discrimination related to the impact of an order restricting dog use upon disabled people who used assistance dogs but the claimant herself was neither disabled nor the owner of an assistance dog. However there is no guidance offered by May J on this point because her judgment makes clear (at [86]) that the argument about a breach of the PSED was introduced too late in the proceedings to be considered by the court.

193. In this case it cannot be said that the impact on the protected characteristics of disability, age, and pregnancy/maternity were ignored by the Council. The EqIA used a checklist for all statutory protected characteristics. In respect of these three characteristics the officer completing the assessment had ticked the box indicating "No impact". There was thus a comment showing some level of engagement with the issue by officers.

194. We are left, then, with the question of whether the Council's consideration of the issues was adequate.

195. Mr Stark made submissions regarding the eight-point approach set out by the Court of Appeal in Bracking. I agree that these are applicable to this case. I emphasise in particular principle 8(i) at [25] of the judgment which cites with approval the judgment of Elias LJ in R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills [2012] EWHC 201 (Admin) (Divisional Court) at [77]-[78]:

> "[77] … Provided the court is satisfied that there has been a rigorous consideration of the [PSED], so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then as Dyson LJ in Baker (para [34]) made clear, it is for the decision maker to decide how much weight should be given to the various factors informing the decision.
>
> [78] The concept of 'due regard' requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker. In short, the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors"

196. In this case the Claimant does not point to a significant proportion of the people affected by the Order as having one or more of the protected characteristics. The Claimant himself does not have any of the protected characteristics, unlike the defendant in Jones. His complaint is therefore that there might be boat users with one of these protected characteristics and that the impact on them has not been considered adequately.

197. I do not accept this criticism on the facts of the case.

198. Firstly there is scant evidence that the people likely to be affected by the Order include, as a significant proportion, those likely to have the protected characteristics complained of. None of the respondents identified themselves as being or having recently been pregnant (although I accept that unlike age or some disabilities this is a more transient circumstance). None identified themselves as being elderly or suggested that by reason of their age they may be adversely affected by the Order, although by contrast some respondents who supported the Order did identify elderly residents as being adversely affected by the anti-social behaviour which the Order is intended to curtail. Only one respondent identified him/herself as having a disability. This response to the second consultation, sent on 8th December 2023, is recorded in the addendum to the February 2024 Cabinet report as follows:

> "Hi as a boater who's disabled I feel that 24 hrs is sometimes not enough as having travelled to a destination I often need time to rest for 24 hours or more plus time to do shopping or washing etc depending how long I've been travelling, while I do think that limiting unauthorised mooring is a good thing as there are lot of overstayers that making visiting places hard I feel 48 or 72 hours would be much more reasonable"

199. Secondly the Council had a good impression of the likely make-up of the boat dwelling community from the interviews it conducted as part of its Boat Dwellers Accommodation Assessment. 85% of boat dwellers interviewed were under the age of 65. None were observed to be pregnant or with young children. None were observed to have, or claimed to have, a disability.

200. The evidence does not demonstrate that a significant proportion of those affected by the Order did have one of the protected characteristics claimed to be absent from the consideration. The Claimant's complaint is therefore an hypothetical one. In my judgement the Council's consideration of the arguments for and against the making of the Order displays an even-handed assessment and an appropriate balance between the benefits of the Order and the ways in which the proposed Order could be moderated to affect those with protected characteristics in a less severe way (namely the duration of stay allowed to unauthorised moorers). And there is in any event, as I have noted above, the ability to turn what would otherwise be an unauthorised mooring into an authorised one by procuring the Council's permission to moor on its land, at which point the special circumstances of any boat user (amounting to a protected characteristic or otherwise) could be referred to as part of the request for authorisation.

201. Read fairly and as a whole I see nothing in the Council's EqIA or in the way it discharged its acknowledged PSED to render the decision to make the Order unlawful. The requirement is to have "due regard" to the PSED (see Bracking at [67]), viewed through the lens of [25] principle 8(i) that I have cited above, and I am satisfied on the evidence that this is what the Council did.

202. Grounds 11, 12 and 14 are therefore dismissed.

Ground 13 – failure to consider adequately the outcome of the Council's Boat Dwellers Accommodation Assessment undertaken as part of the Local Plan Review

203. The Boat Dwellers Accommodation Assessment was commissioned by the Council in February 2022 to inform its revisions to the Local Plan. Based on its conclusions a separate Boat Dwellers Site Assessment was produced by the Council in June 2022. For the purposes of this ground I refer to the two documents together as "the Assessments".

204. A number of the criticisms made by the NBTA relate to the use of the Assessments in the Local Plan review process, and - in particular – the complaint that the Council elected to allocate no additional moorings in the draft Local Plan despite what some respondents considered to be clear evidence of need. That, of course, is a complaint which is not directly relevant to the present proceedings (which challenge the lawfulness of the Order, not the Local Plan review process). Nevertheless I accept that the data collected as part of the Assessments is relevant to the process leading to the making of the Order even though that is not the purpose for which they were commissioned. Data on, for example, the age profile of boat dwellers surveyed is relevant to the Claimant's PSED grounds and I have referred to it in this context above.

205. I have commented above on the relevance of the Assessments to the EqIA undertaken by the Council. The Assessments were two of the several documents which accompanied the Council's second consultation. The NBTA, as I have noted above, made a series of criticisms about how the Assessments had been used by the Council.

Heine Planning Consultancy was also critical about this point. The Cabinet report appended a copy of the two consultation responses interspersed with officers' comments on them. Members of the Cabinet will therefore have been aware of what was said about the Assessments by both two objectors to the Order and by the Council's officers in reply.

206. It is true that the main body of the Cabinet report does not comment on the Assessments themselves, nevertheless the contents of the Assessments will have been in the minds of the officers who responded to the NBTA objection. Moreover as the (unchallenged) witness statement of Mr Burrows for the Council confirms:

> "Phase 2 of the consultation was open to the public to respond from 1 November 2023 to 29 December 2023 and included a copy of the Boat Dwellers Site Assessment (2022). The responses to the consultation, including that of the NBTA and Heine Planning Consultancy, were also included in the 7 Feb 2024 Cabinet paper (para 45 & 46) and the appendices to the February 2024 Cabinet report … Both responses highlighted the lack of alternative provision. Members took this into consideration as part of their debate over the proposed PSPO …"

207. On this basis I do not see how it can be maintained that the Council did not have regard to the Assessments when deciding whether or not to confirm the Order.

208. Ground 13 is therefore dismissed.

Ground 15 – the Council failed to publicise the making of the Order contrary to the requirements of s59(8) of the 2014 Act

209. I need spend little time on Ground 15. In light of my conclusions on Ground 1, with the consequence that the Order as made cannot stand anyway, Ground 15 is now moot.

210. The Council accepts that it did not publicise the Order in the manner required by the relevant regulations. Instead it took what some might see as being the pragmatic decision not to publicise it until these proceedings had been disposed of.

211. I agree that the failure to publicise the Order at the relevant time was a procedural flaw. Nevertheless this is not a case in which the Claimant is attempting to resist enforcement of the Order by the Council in part on procedural grounds. Similarly it is not a case where the Claimant is alleging he has been prejudiced by being unaware of the existence of the Order because there had been a failure in carrying out post-confirmation notifications. Had this been either type of case then the question of whether the process leading to the making of the Order and the notification procedures which are required to follow it would have been more directly relevant. But as things stand nobody can be said to have been prejudiced by the failure.

212. Had this ground of challenge not already been moot then for the reasons given above there is some force in Mr Hoar's submission that section 66(5)(b) of the 2014 Act ("the interests of the applicant have been substantially prejudiced by a failure to comply with a requirement under this Chapter") is not engaged, although I would have preferred the conclusion that given the absence of prejudice it would have been apt for the court to

exercise its inherent discretion not to grant substantive relief on account of a technical breach of the relevant regulations which was capable of being remedied late.

213. Ground 15 is therefore dismissed.

Conclusions

214. I have upheld the challenge on Ground 1. All other grounds of challenge are dismissed.

215. I will invite the parties to make submissions upon an appropriate form of order consequent upon my findings, which should include submissions as to the appropriate remedy. If such an order can be agreed then so much the better.

216. Finally the parties will have observed that in circulating a confidential draft of this judgment I have enlarged upon the normally restricted circle of recipients. This follows a request made to me at the conclusion of the hearing by Mr Hoar, for reasons which he explained. There was no objection from Mr Stark and the request seems sensible to me in the circumstances. It will, of course, be important for the Council's legal team to impress upon the additional recipients the terms of the embargo (which are otherwise unchanged from the standard form) especially if they are unused to receiving draft judgments under these circumstances.

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