

POOLE v. HUSKINSON.(a) Exch. of Pleas. 1843.—There may be a dedication of a way to the public for a limited purpose, as for a footway, &c. ; but there cannot be a dedication to a limited part of the public, as to a parish. And such a partial dedication is simply void, and will not operate in law as a dedication to the whole public.—In order to constitute a dedication of a way to the public by the owner of the soil, there must be an intention so to dedicate, of which the user by the public is evidence, subject to be rebutted by contrary evidence of interruption by the owner.

[Approved, *Bermondsey Vestry v. Brown*, 1865, 35 Beav. 226 ; L. R. 1 Eq. 204. Referred to, *Mercer v. Woodgate*, 1869, L. R. 5 Q. B. 32 ; *Healey v. Batley Corporation*, 1875, L. R. 19 Eq. 388 ; *Vernon v. Vestry of St. James, Westminster*, 1880, 16 Ch. D. 455 ; *Mann v. Brodie*, 1885, 10 A. C. 386 ; *Abercrombie v. Fermoyle Town Commissioners*, [1900] 1 Ir. R. 313 ; *Neaverson v. Peterborough Rural Council*, [1901] 1 Ch. 22 ; *Farquhar v. Newbury Rural Council*, [1909] 1 Ch. 19 ; *Coates v. Herefordshire County Council*, [1909] 2 Ch. 591 ; *Central London Railway v. City of London Land Tax Commissioners*, [1911] 2 Ch. 481 ; *Folkestone Corporation v. Brockman*, [1914] A. C. 338.]

Trespass for breaking to pieces certain gates and posts of the plaintiff, and taking and carrying away the materials thereof. Pleas—first, not guilty ; secondly, as to breaking &c. one gate, and taking and carrying away the materials thereof, a justification under a right of public way, claimed generally for all the liege subjects &c., on foot, and with cattle and carriages ; thirdly, a justification under a right of private carriage-way for the defendant, as the occupier of a messuage and land in the parish of East Bridgeford, in the county of Nottingham, alleging an enjoyment thereof as of right and without interruption for 20 years next before the commencement of the action. To the second plea the plaintiff replied, traversing the right of way as therein alleged ; and new assigned also, that the defendant committed the trespasses in a greater degree, &c. than was necessary for using the way, and for other and different purposes, &c. There was a similar new assignment to the third plea.

(a) This case was decided in last Hilary Term, (Jan. 19), but was unavoidably postponed.

The defendant took issue on the replication, and, after relinquishing so much of the plea of not guilty as applied to the trespasses newly assigned, pleaded payment into Court of 10s. as to these trespasses, which the plaintiff accepted in satisfaction thereof.

At the trial, before Patteson, J., at the Summer Assizes for the county of Northampton, 1842, it appeared that this was an action brought by the plaintiff, who was the surveyor of the highways of the parish of East Bridgeford, in the county of Nottingham, for a trespass committed by the [828] defendant, a farmer in the same parish, in the user of an alleged public carriage-way, called Mill Close Lane, communicating with the Newark turnpike-road. The learned Judge ruled, after argument, that, upon these pleadings, the defendant was entitled to begin; and he accordingly called a great body of evidence to shew that the road in dispute (which by an award of certain commissioners under an act of Parliament for inclosing lands in the parish of East Bridgeford, made in the year 1801, was set out as a public bridge and drift, and private carriage-road, to be repaired by the owners of the adjoining lands) had been, since the award, used generally by the public; from which it was sought to infer a dedication of it to the public by the owner of the soil, whoever he might be. On the part of the plaintiff, it was alleged that this user had taken place, partly without the knowledge of the parties interested in retaining the road as a private carriage-road, and more recently under protest; that, since the date of the award, many persons had been turned back who had attempted to use it; that, at various times, notice-boards had also been affixed in the lane, (by whom it did not appear), cautioning persons against using it as a public carriage-road; and that, within the last twenty years, a gate had stood across it in the same situation as that which the plaintiff had put up and which was broken down by the defendant, and so continued for several years. It appeared, however, that a notion had existed that, under the award, all the parishioners of East Bridgeford had acquired a right to use the road, and some of them had accordingly remonstrated on several occasions with other persons, not parishioners, for using it. In the course of his summing up, the learned Judge stated to the jury, that it did not appear to whom the soil belonged; probably to the lord of the manor; but that, to whomsoever it belonged, the use of it by the public generally would be evidence of a dedication; and that a dedication to the inhabitants of the parish, and persons resorting to their houses, would be in effect a dedication to [829] the public at large. The jury having found a verdict for the defendant,

Whitehurst, in the following Michaelmas Term, obtained a rule nisi for a new trial, on two grounds: first, that the plaintiff ought to have been allowed to begin at the trial; and, secondly, that the learned Judge had misdirected the jury as to the effect of a partial dedication. Against this rule, in last Hilary Term (Jan. 19),

Hill shewed cause. The case was properly left to the jury by the learned Judge, and the verdict is in accordance with the weight of the evidence. The continued user by the public of a carriage-road over the locus in quo, since the award is abundantly sufficient to raise a presumption of the dedication to the public of such a road by the owner of the soil, whoever he might have been. [Lord Abinger, C. B. The objection is to that part of the summing up of the learned Judge in which he said that there would be a dedication to the public, if the owner intended to dedicate to a particular part of the public, as the inhabitants of a parish. It is quite correct to say that the owner cannot make a valid dedication to a part of the public; but is the consequence that which the learned Judge stated, namely, that it became a dedication to the public? In that the direction appears to be incorrect.] It must be admitted that that was erroneous. But this part of the summing up was quite immaterial, and the jury could not have been misled by it.

Whitehurst, (with whom was Waddington), in support of the rule. It was very material. The jury went out, and returned to ask the opinion of the learned Judge whether there had been a dedication; and he told them that they were to decide upon the fact, not himself; but if they thought the owner intended to give the use of the road to the inhabitants of the parish, it would amount to a dedication of the road to the public.

[830] LORD ABINGER, C. B. The direction may have had a great influence on the minds of the jury, and there must be a new trial. The user by the public with carriages, since the award, is no doubt evidence of a dedication by the owner to the public; and the notices which were fixed on posts, and which may be presumed to

have been done with the consent of the owner of the soil, are strong evidence to the contrary. The interruptions also by the overseers, who had the herbage, are very material in the case.

PARKE, B. I agree with my Lord. There may be a dedication to the public for a limited purpose, as for a footway, horse-way, or drift-way; but there cannot be a dedication to a limited part of the public. In that respect the direction of the learned Judge was quite correct; not so the alternative, that, as such a partial dedication was invalid in law, it would nevertheless operate, against the intention of the owner of the soil, in favour of the whole public. I think it would be merely void. In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an intention to dedicate—there must be an *animus dedicandi*, of which the user by the public is evidence, and no more; and a single act of interruption by the owner is of much more weight, upon a question of intention, than many acts of enjoyment. As to the ownership of the soil, I do not apprehend that there is any difficulty. It remains in the lord of the manor, for that portion of the soil only is taken from him for which he receives compensation, and which is allotted to others.

ALDERSON, B., and GURNEY, B., concurred.

Rule absolute.^(a)

(a) The cause was tried again at the Summer Assizes, 1842, before Alderson, B., who ruled that the plaintiff was entitled to begin, and he obtained the verdict.

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incapacity." He then alludes to transactions of newly married people, and proceeds to say, "In the present case the opportunities recorded in the evidence were far too numerous to account for it without a distinct defect of virile power." Then he enters into details, such as the defender communicated to him, or he has heard in his evidence. He adds, "And these," that is, the conditions which the defender has himself described, "are just the conditions in which we find the worst cases of impotency in the male." According to that medical evidence the defender had in his statements indicated the worst features of permanent incapacity; and yet we are asked to act upon his own belief founded only upon the possibility that if time and opportunity were given to him, and if the adjuncts which I have already described were supplied to him, he might in the end find means of consummating his marriage.

The inference which I draw is the very opposite. From the defender's history, from his two months of abortive attempts, from his one year and six months of lying beside this desirable young woman without even making an attempt to exercise his rights, I come to the conclusion, clear and plain to my mind, not alone that he was incapable as to her, but that he was impotent at the time of the marriage, and that that impotency was permanent.

It is said that the pursuer ought sooner to have instituted the suit. I ventured to observe in the course of the case, and I repeat it now, that there is not one of us who cannot recall to memory the experience of some case in which a woman submitted to the worst of treatment, treatment degrading and humiliating, and allowed it to continue rather than permit her name to become the subject of a public scandal. And when we add to this that the lady in question had two sisters, young and unmarried, who would necessarily be implicated in any disclosure as to her character, that would greatly strengthen her motives for silence, and probably she would have submitted to much more if she had not been driven to her present course by the institution of the action for divorce.

Upon these grounds, my Lords, I entirely concur in your Lordships' judgment.

INTERLOCUTORS appealed from affirmed, and appeal dismissed, with costs.

ANDREW BEVERIDGE—BEVERIDGE, SUTHERLAND, & SMITH, S.S.C.—STIBBARD, GIBSON, & Co.—BOYD, JAMESON, & KELLY, W.S.

No. 6.

May 4, 1885.
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Brodie, &c.

THOMAS MANN (Defender), Appellant.—*Lord-Adv. Balfour*—*C. S. Dickson*.

ANDREW BRODIE AND ANOTHER (Pursuers) Respondents.—*R. B. Finlay, Q.C.*—*James Reid*.

Road—Public right of way—Presumption—Prescription.—In an action brought in 1883 for declarator of public right of way over a road leading from one public road to another public road, it was proved that during the thirty-seven years from 1846 to the date of the action the public had been excluded from the use of the road—that from 1820 to 1846 the public had used the road as of right. The evidence as to the remainder of the forty years prior to 1846 was insufficient *per se* to prove that the public had used the road as of right.

Held (in *rev.* judgment of the First Division) that the presumption arising from the exclusion of the public from the road for thirty-seven years without

challenge overcame the presumption that the use prior to 1820 had been of the same character as that between 1820 and 1846, and that, therefore, in the absence of any distinct evidence as to that use, the pursuers had failed to instruct a prescriptive right to the road.

(In the Court of Session, June 13, 1884, 11 R. 925.)

The defender appealed.

LORD BLACKBURN.—In this case the Lord Ordinary (M'Laren) pronounced an interlocutor, in which he “finds it proved that the defender and his predecessors in title have excluded the public from the use of the road in question since the year 1846, and that there is no proof of the assertion of a right on the part of the public since that year: Finds it not proved that the road in question had been a public road during the period of forty years antecedent to the year 1847,” and he gave judgment for the defender.

The pursuers reclaimed, and the Judges of the First Division recalled the interlocutor, and found it proved that “the road in question had been a public road during the period of forty years antecedent to the commencement of the year 1847,” and gave judgment for the pursuers. The First Division differed from the Lord Ordinary, not as to any question of law, but as to the effect of the evidence.

There was not anything in the nature of the evidence to give the Lord Ordinary, though he heard the witnesses, better means of judging than the Judges of the First Division or your Lordships, who only read the notes; and the Judges, I think, owed it to the respondents to form their own opinion, and to act upon it if it was different from that of the Lord Ordinary. I think now that your Lordships owe it to the appellant to form your own opinion and to act upon it, though it is different from that of the Inner-House. I need not say that I should not lightly differ from them, even though in so doing I agreed with the Lord Ordinary.

The evidence is voluminous, but there is no difference between the Judges below except as to the effect that ought to be given to the evidence relating to the period, I think I may say, between 1805 and 1810, which is directly touched by only a very little of the evidence; and as to the weight to be given to the contrary presumptions arising, one in favour of the pursuers, from the fact, which they all agree is proved by preponderating evidence, that the road was used by the public during a period between 1820 and 1846, affording some reason for acting on slighter evidence during the earlier fourteen years which are required to make up the forty, and one the other way, arising from the fact, which they all agree in finding, that the public have been excluded from 1846, and that there is no proof of the assertion of a right on the part of the public since that year.

Though exclusion for less than forty years will not extinguish a public road which is proved to have been created, the fact of no right having been asserted during an exclusion of so long a period as thirty-seven years affords some reason for requiring more evidence to establish that such a right really existed. There must have been many alive in the period between 1846 and, say, 1856, and now dead, who must have known much more as to what really was the state of user of the road between 1805 and 1820 than those now alive, and if they did not assert a right, it affords some ground for surmising that they did not think that right existed, and, therefore, some ground for looking more critically at the evidence produced to prove that it did.

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The case is to be governed by the law of Scotland. Any reference to English law is apt to mislead, unless the difference of the law of the two countries is borne in mind. In both countries a right of public way may be acquired by prescription. In England the common law period of prescription was time immemorial, and any claim by prescription was defeated by proof that the right claimed had originated within the time of legal memory, that is, since A.D. 1189. This was, no doubt, an unreasonably long period. And sometimes, by legal fictions of presumed grants, and in part, by legislation, the period required for prescription as to private rights has, in many cases, been practically cut down to a much shorter definite period—(See *Angus v. Dalton*.)¹ But this has never been done in the case of a public right of way. And it has not been required, though in the way in which the evil of the period of prescription being too long has been avoided, an opposite evil of establishing public rights of way on a very short usurpation has sometimes been incurred.

In *Poole v. Huskisson*² Baron Parke says,—“In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an intention to dedicate—there must be an *animus dedicandi*, of which the user by the public is evidence, and no more; and a single act of interruption by the owner is of much more weight upon a question of intention than many acts of enjoyment.”

But it has also been held that where there has been evidence of a user by the public so long and in such a manner that the owner of the fee, whoever he was, must have been aware that the public were acting under the belief that the way had been dedicated, and has taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence on which those who have to find the fact may find that there was a dedication by the owner whoever he was. It is therefore, I may say, in England never practically necessary to rely on prescription to establish a public way.

Now, it is here to be observed that though the length of time during which a road is used as a public highway is an element in determining whether a dedication should be inferred, it is not any definite time, and a very short period of usurpation will often satisfy a jury. But I am far from thinking that the law of England is here at all the perfection of reason, or such as ought to be introduced into the law of Scotland if not so already.

No case is made here as to a right of way created by the owner, either on the titles or by such acts (if any there be) as without any writing might, according to the law of Scotland, preclude the owner and those who claim under him from denying that a right of way had been created. The sole claim is by prescription, and I think there is no dispute that, by the law of Scotland, the period of prescription is forty years. If the public had used the road to such an extent and in such a manner that they may properly be said to be possessed of it, and they have had such possession for forty years, they have acquired the right, and that although it was shewn that the owner in fee was, during that time, not dedicating it; but if less than forty years' possession is proved there is not, as I understand, any principle or authority for saying that a dedication is to be presumed. And again, when the public are excluded for forty years, their right, however clear it may be that they once had one, is gone, by negative prescription. The question, in short, is as to possession by the public or against

¹ 6 App. Cas. 740, at p. 750.

² 11 M. & W. 827.

the public for a period of forty years, and not, as in England, as to user by the public for such an undefined time, and in such a manner and under such circumstances as to justify the inference that an owner in fee had dedicated. No. 6.
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I think that evidence of possession by the public, such as is proved in this case, between 1820 and 1846, would, in England, justify a jury in finding a dedication before 1846 ; but it does not justify a finding of prescriptive right, unless it is proved that it continued so long, either at the beginning or end of the period, as to amount to forty years.

I do not propose to enter into the evidence in detail. I agree with the Judges below that the fair result of the proof is that, in 1842, when Captain Stirling, already the owner of Glentyan, purchased the adjoining farm of Wardhouse and began to take steps to throw it into his policies, he did exclude the public from a road which they had possessed for some time. I agree also in thinking that this exclusion was not complete till the gate was set up across the road.

The appellant's counsel shewed that there was some conflict of testimony as to whether the exclusion was complete from the time the gate was set up, and also as to the time when the gate was put up, some putting it in 1846, some in 1851 ; but I think the preponderance of proof was that the gate was set up in 1846, and that the exclusion of the public was complete from that time, and not before. That puts the defender in possession, as against the public, for thirty-seven years, but not for forty.

The Wardhouse farm lies between two public roads, the northern being called Lawmarnock Road and the southern one the Bruntshields Road. A small stream of water flows across the Wardhouse farm to Glentyan mill, and a dam was made for the mill close by the Bruntshields Road. The farm steading of Wardhouse farm is erected about halfway between the two public roads on the northern or Lawmarnock side of the stream. When all this was done does not appear, but it certainly was some time before the beginning of this century.

The earliest evidence given for the pursuers is that of an old man, Matthew Houston, who was born in 1793, and continued at school till he was eleven years old, that is, till 1804, when he went away to learn weaving. As I understand his evidence, it is not so strong in favour of the respondents as Lord Mure thinks it, but is some evidence in favour of the existence of and the user by the public of the road at this early time. He says he used to go "ginneling" trout in the burn whilst he was a schoolboy, but after he became a weaver was kept closer to his work, and did not go again till he was grown up, and he also used to go to curl in winter and to bathe in summer in the dam. In all those ways he would see the place ; how far he would observe, or how accurately recollect what he observed, is a question. I see no reason to doubt that the boy who was ginneling trout would observe, and probably remember, as long as he remembered anything, that on the spot where there is now a bridge over the little stream there was then no bridge but a deep pool, now silted up ; and as the farmer who occupied the steading must have crossed the stream to get to his fields on the south side, I suppose there probably was at that time some kind of ford across the stream. Whether the boy would so accurately observe or remember that ford there may be a doubt. He says, when he next came after he was grown up (I suppose he would hardly call himself so till he was sixteen or seventeen, that is in 1809 or 1810) the bridge was built, but he does not know by

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whom or when. He says that he saw carts and horses using the road ; it is by no means clear whether he means in his school days or in his grown-up days. But he does say, and I think it very likely, that in the early morning when he and the other boys were waiting to get their breakfasts, and the milk carts were late in coming, the hungry boys would walk along the Bruntshields Road to meet them, and he says, " I have seen them on the road in question going past Wardhouse." This is some evidence that light carts, such as milk carts, did come that way before the bridge was built. There is a good deal of evidence that after the bridge was built a number of carts, not very large, but as many as could be reasonably supposed to have an object in going from Lawmarnock Road to Bruntshields Road, did use the road ; but this is, I think, the only direct evidence of such a user before the bridge was built.

Mr Stevenson, who was tenant of the Wardhouse farm from 1805 to 1823, when he removed to Auchinames in the neighbourhood, built the bridge. He is dead, but his son, who was born in 1812, and cannot of course speak of his own knowledge as to anything happening before 1817 or 1818, is called. He was born at Wardhouse, and continued there till they flitted to Auchinames, and there continued to live with his father till his death in 1849, when he succeeded his father in that farm. He tells us, what is very probable, that his father talked to him about what he had done ; and as his father is dead that is evidence. It is, of course, subject to the observation that the deceased cannot be cross-examined, and the witness does not say (and probably would not be believed if he did say) that he cross-examined the deceased as to what he told him ; but his account of what his father told him is, to my mind, worthy of credit ; and without reading the details of that evidence, I think it strong to shew that before the bridge was built the public could hardly use this road at all, certainly not conveniently, with any except empty or very light carts.

Lord Mure seems to think that because the witness says what, on reflection, is self-evident, that he cannot tell from his own recollection what was the state of the place before the bridge was built,—that is, before the witness was born,—and cannot tell more from recollection of what his father told him than that he said that until it was made a loaded cart could not cross the ford, this evidence is not so favourable to the appellant's case as I consider it. I do not at all think it conclusive ; but when I weigh it against that of Matthew Houston I think it is the more reliable of the two.

I agree with Lord Adam that when you find a number of old persons speaking to a certain state of matters, there is a fair presumption that we should have had others, if they had survived, speaking in the same way. But old Mr Stevenson, if he had survived, would, if his son's recollections are accurate, have spoken very differently from Matthew Houston, who is the only witness who speaks to the state of things before the bridge was built. And Lord Adam lays down very strongly that submission by the public to exclusion for thirty-seven years, though not a bar, throws a heavy onus on those who seek to establish the public use for forty years ; yet when the point is brought to be as to what was the state of things in 1807, about the beginning of the forty years (and the evidence is, I think, rather in favour of the defender), Lord Adam seems to give no effect to the onus at all.

I think the Lord Ordinary was right ; and as I believe your Lordships are of the same opinion, I move that the appeal be allowed and the interlocutor of the Lord Ordinary restored, the appellant having the expenses in the Court below

from the date of the Lord Ordinary's interlocutor, the respondents paying also the costs of this appeal. No. 6.

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LORD WATSON.—This action was instituted by the respondents in August 1883 for the purpose of establishing a public right of way for foot-passengers, carts, and carriages, along a road or track leading northwards from a public road known as the Bruntshields Road, through the appellant's lands of Wardhouse, to another public road known as the Lawmarnock Road. The road in dispute, and its termini, are situated in an agricultural district of Renfrewshire, and at no great distance from the village of Kilbarchan.

The respondents sue as members of the public, and the right of road which they ask the Court to declare is based not upon grant or dedication but upon prescriptive user by the public. In the able arguments addressed to us from both sides of the Bar, there was really no serious controversy raised in regard to the legal principles applicable to the constitution of a public right of that kind, and, in my opinion, there is little room for controversy on that point. According to the law of Scotland, the constitution of such a right does not depend upon any legal fiction, but upon the fact of user by the public, as matter of right, continuously and without interruption, for the full period of the long prescription. Lord Stair¹ states prescription to be a rule of "positive law, founded upon utility rather than equity," and he adds,² that, in Scotland, the common rule is by the course of forty years, "but there must be continued possession free from interruption." According to Erskine,³ "positive prescription is generally defined by our lawyers as the Romans did usucapion, the acquisition of property by the continued possession of the acquirer for such a time as is described by the law to be sufficient for that purpose." These learned writers agree that the definition must be qualified in cases where the law requires an antecedent feudal title as the basis of prescription, as in cases falling under the Act 1617, chap. 12. The effect of prescription, in these cases, is not to constitute the right of the possessor, but to fortify it against all future challenge. But, with the exception of one ingenious author, who says that the possession of the public ought to be ascribed to the *jus corone*,⁴ no one has suggested that any title is required as the foundation of a prescriptive right of public way. I am aware that there are *dicta* to be found, in which the prescriptive acquisition of a right of way by the public is attributed to implied grant, acquiescence by the owner of the soil, and so forth; but these appear to me to be mere speculations as to the origin of the rule, and their tendency is to obscure rather than to elucidate its due application to a case like the present.

Although the principles of law which govern the acquisition of a prescriptive right of way are in themselves simple, yet, in their application to facts, questions of nicety frequently arise. It then becomes necessary to consider whether the user has been that of the public, whether it has been continuous and uninterrupted, and whether it has existed for the full period required by law. These are all questions of fact, and it would not be expedient to lay down any specific rules for their solution. As regards the first of these questions, which has occasioned much more controversy than the others, I think it is safe to say generally, that in order to constitute a public user of the kind of road claimed

¹ Stair's Inst. ii. 12, 9.

² *Ibid.* ii. 12, 11.

³ Ersk. Inst. iii. 7, 2.

⁴ Napier on Prescriptions, p. 370.

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in the present action, the user must be of the whole road, as a means of passage from the one terminus to the other, and must not be such user as can be reasonably ascribed either to private servitude rights or to the license of the proprietor. Then, as regards the amount of user, that must just be such as might have been reasonably expected if the road in dispute had been an undoubted public highway.

Upon the evidence adduced, the Lord Ordinary and the learned Judges of the First Division have come to the unanimous conclusion that from the year 1846 down to the time when this action was raised, the appellant and his predecessors in title have excluded the public from the road in question, and that there is no proof of the assertion of a right on the part of the public during the whole of that period. With that conclusion I entirely agree; and, after the observations which have been made upon this part of the case by the Lord Ordinary, it would be a waste of time to refer to the evidence in detail. There was, no doubt, some use of the road, prior to the year 1874, by persons unconnected with the lands of Wardhouse; but that use did not amount to the assertion of a public right. Counsel for the respondents endeavoured to press upon your Lordships the consideration that the late Captain Stirling, who was proprietor of Wardhouse from 1844 till his death in December 1872, was a very popular person, and that, in deference to his feelings, the inhabitants of the district did not assert their right so vigorously as they would otherwise have done. Such considerations are, in my opinion, utterly irrelevant. Public user is a fact which must be inferred from overt acts of possession, and defective evidence of user cannot be strengthened by proof of the motives which induced individuals to abstain from acts of that kind.

The legal consequence of the exclusion of the public from and after the year 1846, is, that the respondents must establish possession on the part of the public for forty years before that date. The Lord Ordinary was of opinion that the respondents have failed to instruct public user before 1846, extending *retro* for forty years; but the three learned Judges who decided the case in the Inner-House took a different view of the evidence. They were of opinion that the evidence is sufficient to sustain the inference that before their exclusion in 1846 the public had used the road as matter of right for the full prescriptive period.

The evidence of the respondents does, in my opinion, establish that from 1820 to 1846 the public did use the road continuously and as matter of right. That was the view taken by the Lord Ordinary, as well as by the Judges of the First Division, and it was not very seriously disputed by the appellant's counsel. It is certainly not proved that the road was used daily, either by foot-passengers or by carts, but it is in evidence that it was used in both ways by inhabitants of Kilbarchan, and also by a considerable number of farmers in the neighbourhood whenever they had occasion. In arriving at that conclusion, I lay aside altogether the evidence as to the road having been used as an access to the mill dam by bathers and curlers, and I attach little weight to the evidence that people used to stroll along part of the road, although such evidence is not altogether devoid of significance when it is coupled with proof of public use of the road throughout its entire length.

The main controversy between the parties related to the condition and use of the road in question during the period antecedent to the year 1820. The respondents have adduced oral testimony of living witnesses, which reaches back

as far as the year 1803. The appellant has also led proof which goes back to the year 1805, but that proof consists of the hearsay testimony of a single witness, Stevenson, whose information was derived from his deceased father, who was tenant of the lands of Wardhouse from 1805 until 1823. It seems to be fairly deducible from the evidence on both sides that about the year 1806 a bridge was built by the late Mr Stevenson, at that time the new tenant of Wardhouse, in order to carry the road in question over a burn which it crosses, between the steadings of Wardhouse and the Bruntshields Road. I think it is also proved that a road existed before the bridge was built, and that it previously crossed the burn by means of a ford, a little way further down the burn than the site of the bridge. The condition of that part of the road before 1806 is a matter of some importance, and upon that point I can see no reason for rejecting the testimony of the witness Stevenson, who says that it could not be used by loaded carts. To my mind, it is extremely improbable that an agricultural tenant would have incurred the expense of erecting a bridge if the ford and its accesses had not been very unsuitable for ordinary farm traffic. It is also, in my opinion, matter for observation that it is neither proved nor suggested that, at the time when the bridge was built, the road at that point had fallen into temporary disrepair, or that its bad condition was due to other than permanent causes.

I shall now refer to the evidence of possession anterior to 1820. There are six aged witnesses for the respondents, whose combined testimony covers the period from 1803 to 1820, and I begin with those whose recollections are the most recent. William Orr, who was born in 1805, speaks to the use of the road from 1815 by carts from his father's farms of Law and Lawmarnock, and also from two other farms in the vicinity, Pannell and Monkland. He also speaks to the use of the road by persons on foot, but it is by no means clear that his evidence on that point applies to the earlier years between 1815 and 1820. John Gilmour, born in 1802, first saw the road in 1814. When he was a boy he used the road almost daily in the summer time, when he went to bathe in the dam; and he likewise states that he has seen horses and carts using the road, but cannot say whose horses and carts they were. He does not speak to the use of the road by foot-passengers at that early period. James Clark, born in 1802, who recollects the road since 1811 or 1812, says that "in these early days the road in question was very much used by the Kilbarchan people for walking. I went from end to end of the road." He seems to have used the road at that time as an access to the dam, when he went with other boys to bathe, and he says that he has seen carts upon the road, but cannot say whose they were. Archibald Hunter, born in 1803, was first taken to the road about 1808 or 1809, when he was a mere child, by his father, who, on that occasion, went from the Bruntshields Road, a little way up the road in dispute, and then "turned and came away back again." I think it is the import of his evidence that he did not renew his acquaintance with the road until he was a "young lad," whatever that may signify; probably not before 1814 or 1815. He too went at that time for the purpose of bathing in the dam, but he says that the road was a great resort of the Kilbarchan people, and that he has seen horses and carts going along the road, but cannot say whose they were, as he "did not pay any attention."

The two remaining witnesses for the respondents who had the earliest acquaintance with the road, and upon whose evidence great reliance was placed by Lords Mure and Adam, are Matthew Houston and John Houston. Matthew

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Houston was born in 1793; and his first knowledge of the road was acquired in 1803 and 1804, when he went to "ginnel" trout in the burn over which the bridge was subsequently built. He left school and began to weave when he was eleven years old, and it plainly appears from his evidence that from that time until he was a "young man" his knowledge of the road was very limited, if indeed he was ever upon it, which is by no means clear. Accordingly he knows nothing about the building of the bridge, save that he saw it after it was built, and he was not even aware that Mr Stevenson was the tenant of Ward-house. It is very difficult to ascertain the date at which he first saw the bridge, but, in all probability, it cannot have been before 1809 or 1810. The only occasion of his using the road in his younger days was in going to catch trout, with his hands at first, and afterwards with rod and line, and going to see the curlers on the dam. He does give evidence to the effect that the Kilbarchan people were in the habit of walking along the road; but I do not think that evidence, when closely examined, can be held to refer to the years 1803 and 1804. Then he speaks to the existence of the road and ford in these years, and he adds that the road was "always passable for carts." I believe that statement to be true, subject to the qualification (which it does not exclude) that the ford and its accesses did not afford a convenient passage for carts, and were not passable by a loaded cart. But I doubt very much whether his evidence as to the use of the road by carts is in reality applicable to the years 1803 and 1804. One thing is plain, that even if it be held to apply to these two years, his evidence at that time is limited to milk carts, which supplied a dealer in Kilbarchan.

Then John Houston, who was born in 1799, first went on the road in 1807, and frequently used it afterwards, on his way to the dam for the purpose of bathing or sliding. He says nothing whatever about the use of the road by other persons on foot, except for these purposes, and he says expressly, "I don't remember seeing carts on the road." This witness, on cross-examination, made a volunteer statement to the effect that "the carts went through the burn until the bridge was built." The statement is not evidence at all. The witness never saw the road before the bridge was built, and he cannot recollect his having seen a single cart upon it after the bridge was built. He does not say at what time, or from whom, he obtained his information, and in the absence of any evidence on these points his hearsay statement is inadmissible.

In my opinion the evidence of these old men, taken by itself, and apart from any presumption which might be derived from other facts proved in the case, would be quite insufficient to establish that the road in question was used as matter of right by the public from 1806 down to 1820. I agree with the Lord Ordinary that the oral evidence applicable to that period "falls very far short of what would be necessary to establish a public right of way," and that it does not prove any use of the road, by members of the public, "except such as may be predicated of any of the ordinary farm roads made and maintained by proprietors throughout the country." If I understand his judgment aright, Lord Mure, though he does refer at some length to the case of *Harvie v. Rodgers*¹ was of opinion that the direct oral evidence was sufficient, without the aid of any presumption, to establish public user during that earlier period. Lord Adam does not appear to me to have taken the same view, because he says, "I

¹ 3 Wil. & S. 251.

ask myself what is the presumption which we must draw when all the survivors speak in one direction. I think there is this presumption, that if we had had more survivors they would all have spoken in the same direction." His Lordship then refers to a direction of the Lord Justice-Clerk (Hope), which was upheld by this House in *Cuthbertson v. Young*,¹ and goes on to say, "That charge of the Lord Justice-Clerk (Hope) is an authority in the direction I have already indicated, and if there is evidence, uncontradicted and undisputed, going back to an early period, I think we are entitled to have recourse to the presumption that there was an antecedent grant."

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In *Harvie v. Rodgers*² and *Cuthbertson v. Young*,¹ both of which came to this House upon a bill of exceptions to the charge of the presiding Judge, there is no reference made by the noble Lords who decided these cases to any presumption of an antecedent grant. In *Harvie v. Rodgers*² there was evidence before the jury to the effect that, for at least thirty-four years prior to 1789, the public had enjoyed the free and uninterrupted use of the footpath in question; and that from 1789 to 1822, when the action was brought, the public continued to use it, notwithstanding repeated but unsuccessful attempts to bar their passage. Lord Lyndhurst thus states the import of the direction excepted to. "The learned Judge in substance told the jury, there is evidence from which you may assume that for a particular period, namely, forty years, this way had been exercised without interruption. If you are of that opinion, then that is, according to the law of Scotland, sufficient to establish a prescriptive right of way; and if that right of way be once established in the manner I have stated, then I tell you that in point of law subsequent interruptions not acquiesced in cannot defeat the right so acquired." In expressing his approval of that direction, the noble and learned Lord said that, if thirty-four years of uninterrupted exercise of the right of way were established, "it was then competent for the jury to presume, and they ought in point of law to be directed to presume, a previous enjoyment of the same kind."

In *Cuthbertson v. Young*³ there was evidence to shew that between 1827 and the raising of the action in 1849, a period of twenty-two years, the public had been excluded from the footpath claimed. The Lord Justice-Clerk (Hope) refused to tell the jury that such evidence of interruption was "sufficient in law to exclude such right of way on the part of the public," and he directed the jury that, "if evidence was given satisfactory to their minds of the existence of a public footpath as far back as the memory of living witnesses could be expected to extend, although such testimony did not either in any instance, or only in a few cases, go distinctly as far back as forty years prior to 1827, still it was competent for the jury to presume, and (the evidence being consistent and uncontradicted) the jury ought in point of law to presume, a previous enjoyment corresponding with the manner in which it had been enjoyed during the period embraced by the evidence." In affirming that direction the Lord Chancellor (Cranworth) added,—“I understand the learned Judge, when he used the expression ‘the jury ought to presume,’ not to be stating a proposition in law on which the jury were bound to act, but merely to be pointing out what was an almost irresistible inference in point of fact.” The expression was borrowed verbatim by the Lord Justice-Clerk from the judgment of Lord Lyndhurst in

¹ 1 Macq. 455, 26 Scot. Jur. 310, Pat. App. 309.

² 3 Wil. & S. 251, at p. 260.

³ 14 D. 306, 307, 24 Scot. Jur. 145.

No. 6. *Harvie v. Rodgers*,¹ yet it elicited from Lord Cranworth the observation that Scotch Judges are "sometimes perhaps a little loose in their mode of directing juries."

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There can, I apprehend, be little doubt that Lord Cranworth was right in pointing out that any presumption which the jury were entitled or ought to draw was matter not of law but of fact. The decisions of the House in these two cases go no further than this, that when there is no evidence, or it may be scant evidence, applicable to the commencement of the forty years requisite, the Court or a jury may nevertheless infer, if the evidence is sufficient to sustain the inference, that the public user which is proved to have existed during the later portion of that period must have existed throughout. But these decisions afford no indication whatever of the quantum of evidence which will be sufficient to support such an inference. The House assumed, and was bound to assume, that there was ample evidence to support the inferences drawn by the jury, for in *Harvie v. Rodgers*¹ the Court had refused a motion made for a new trial on the ground that the verdict was against the weight of evidence, and in *Cuthbertson v. Young*² the verdict had never been impeached on that ground.

In the present case there is evidence applicable to the first fourteen years of the prescriptive period during which the respondents must establish public user. To my mind the evidence which applies to these earlier years is deficient not only in amount but in quality. If twenty witnesses had merely repeated the statements made by the six old men who gave evidence for the respondents, that would not, in my opinion, have strengthened the respondents' case. On the other hand, the testimony of a smaller number of witnesses, each speaking to persons using and occasions of user other than those observed by these six witnesses, might have been a very material addition to the evidence for the respondents. It is, however, a just observation that it would not be reasonable to expect that many witnesses could be found capable of speaking to the condition of the road in question and its use during the period of fourteen years ending in 1820, a period ranging from sixty-three to seventy-seven years before proof was taken in this case. The evidence suggests, and it is doubtless the fact, that before this case went to proof the vast majority of those who were qualified to speak to that period of fourteen years had paid the last debt of nature. And I freely concede that in ordinary circumstances that fact might afford reasonable grounds for presuming that the testimony of those witnesses whom death has silenced would have amply supplemented the evidence of the survivors.

But the circumstances of the present case appear to me to be exceptional. For thirty-seven years before the respondents brought their action the public were excluded from the road, and never asserted their right to use it. Whatever might have been the case before that date, the proprietors of Wardhouse, by the lapse of seven years from 1846, became entitled in 1853 to a possessory judgment, and thereafter they had no occasion to establish their exclusive right to the road by declarator. It lay with the public to establish their right by judicial decree before they could legally use the road. But that is not the only effect which must be attributed to the exclusion of the public for so long a period as thirty-seven years. The fact of exclusion will not, *per se*, destroy a pre-existent right of public way unless it is maintained for the prescriptive

¹ 3 Wil. & S. 251.

² *Supra*.

period of forty years ; but it is, as stated by Lord Cranworth in *Cuthbertson v. Young*,¹ evidence that no public right ever existed, which may, of course, be met and overcome by counter evidence. Lord Adam was of opinion that the exclusive possession of the proprietor for thirty-seven years threw a very heavy onus on the respondents ; and he adds that “if, in spite of that onus, the pursuers have been able to make out, by proof of use over the whole period of forty years, or upon a presumption arising from proof of use over a lengthened part of that period, that the road was used or enjoyed as a public road for that period, that will be sufficient.” So far as it goes, I see no reason to differ from that statement ; but it appears to me to omit all notice of the most important question which arises in the circumstances of this case, namely, to what extent the presumption to which his Lordship refers is ousted by the fact that there was no assertion of any right by the public for a period only three years short of what was necessary to place the appellant’s right to the road beyond question. And I do not find that, in dealing with the evidence, his Lordship entertains that question, or considers the weight which that fact of exclusion ought to have against the presumption which he draws in favour of the respondents.

The Lord Ordinary, in his opinion,² speaks of “the origin of the road” ; and it appears to me that the meaning which his Lordship intended to convey by that phrase has been misapprehended in the Inner-House. The Lord Ordinary did not, in my opinion, mean to suggest that there was no road or track along the line now claimed before 1806, but that before the erection of the bridge in that year there was merely a bad farm road, quite unsuitable for the purposes for which the public used the road with carts between 1820 and 1846. And it is a significant fact that those members of the public who used the road with carts between 1820 and 1846 did so mainly because its gradients were more suitable for a loaded cart than those of the neighbouring highways, whereas, prior to the erection of the bridge in 1806, the road was unavailable for such traffic. I also venture to think that Lord Mure has misapprehended the evidence of Mr Stevenson as to his father’s complaints that the public used the road. His Lordship seems to infer from that evidence that, throughout the term of his father’s tenancy, the public used the road as matter of right. What the witness Stevenson does say is,—“My father complained of people who took advantage of the road that he had made. It was done in some cases, but very rarely.” The statements of the witness obviously refer to a use which did not begin until after the bridge was erected, and moreover, on any fair construction of them, they relate to actual complaints made at the time in the hearing of a witness who was born in 1812.

The impression made upon my mind by the evidence applicable to the period between 1806 and 1820 is that it is quite possible, if not probable, that the appellant has, by the lapse of time, been deprived of as much evidence as the respondents. It is nowhere suggested that a single person who lived upon the farm of Wardhouse between 1805 and 1820, and who must have known, better than any of the aged worthies who have been examined for the respondents, the condition of the road and its uses before and after the erection of the bridge, was alive at the time the proof was taken in this case. That loss of testimony is plainly not imputable to the appellant, and I know of no principle, and can see no good reason for holding, that the public ought, any more

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than a private litigant, to be exempted from the consequences of their own laches in delaying the judicial assertion of their rights.

In these circumstances, I am very clearly of opinion that the exclusive and undisturbed possession, enjoyed for thirty-seven years by the appellant and his predecessors in title, is absolutely fatal to any presumption of public user prior to the year 1820; and, seeing that the evidence of possession before that date is insufficient of itself, and without the aid of presumption, to instruct user by the public, I have come to the conclusion that the interlocutor appealed from ought to be reversed, and the judgment of the Lord Ordinary restored.

LORD FITZGERALD.—The statement of the law made by my noble and learned friends has been so very clear and satisfactory that I shall not attempt to add one word to it. By “the law” I mean the law of Scotland as applicable to the particular case now before us. It differs very much from the English law upon the same subject, but still more from the law of Ireland, which is so clear and simple that a question such as is now before your Lordships could not possibly have arisen.

Having disposed of the legal question, the remaining question is, what is the correct view to take of the evidence in this case, or what legitimate inference is to be drawn from the facts unquestioned and in proof in the case? When, from reading the judgment of the Lord Ordinary and the judgments of the Appellate Court in Scotland, I had learned that there was no real controversy upon the fact that for thirty-seven years before the bringing of this action the public had been excluded from this road, and excluded in a clear and unequivocal manner, and that such exclusion had been continuous, it did appear to me that there was an inference to be drawn so overwhelming against the claim of the pursuers that it would be difficult indeed to rebut that inference.

Now, let us go back to the year 1846, when Captain Stirling, the owner of Glentyan, had acquired the Wardhouse estate. He himself, we may take it, knowing a great deal of the local circumstances connected with the enjoyment of this road before that time, whatever enjoyment there was, proceeds to deal with this road for the purpose of enlarging and completing his policies, and he does it in a most expressive and decided manner, namely, by closing up this road, putting across it a gate which is constantly kept locked or secured, and absolutely excluding the public. He was dealing with the community of Kilbarchan. The act which he was doing was one which was against the interest of every member of that community; it was one to which they would all be adverse; and he was dealing with a community that was quite capable of asserting and defending its own rights. I should come to the conclusion that they would then have asserted the right if a public right of way had existed.

There is another view also to be taken. That was in 1846. At that time a large portion of the community could have spoken to the enjoyment for forty years previously, if enjoyment there had been. If there had been continuous and exclusive possession by the public, there were then a number of people who could have spoken to it in positive terms and in the most satisfactory manner; and it seems to me incredible that a community who saw its right, if the right existed, violently invaded, would have long submitted to that invasion and have acquiesced in it for thirty-seven years. The inference to be drawn from that is very strong that a public right did not exist, and that the people then living knew that it did not exist, and that it was because of that know-

ledge that the community acquiesced in the forcible act of Captain Stirling in excluding them. Well, if that is the true view to take of it, it only remains to consider whether in this case there is sufficient evidence of facts in proof to rebut that legitimate and, as I have called it, overwhelming inference.

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I do not intend to advert to any of the details. They have been so well criticised by my noble and learned friends who have preceded me that I should only be wasting time by entering upon them. I will only state what occurs to my own mind regarding them, and that is that at an early period, from 1805 to 1820, the evidence is of that character that it cannot be said to be such full, complete, and satisfactory evidence as would rebut the inference deducible from a thirty-seven years' acquiescence, which can only be rebutted by proving that for forty years anterior to 1846 the public had a clear and continuous possession as of right and with no interruption.

My Lords, I entirely agree with the judgment of the Lord Ordinary, and I think that the interlocutor under appeal should be reversed, and that the interlocutor of the Lord Ordinary should be restored.

INTERLOCUTOR under appeal reversed: Interlocutor of the Lord Ordinary restored: The appellant to receive the expenses in the Court below from the date of the Lord Ordinary's interlocutor, and the respondents to pay the costs of this appeal.

GRAHAMES, CURREY, & SPENS—WEBSTER, WILL, & RITCHIE, S.S.C.—J. B. ALLAN—
JOHN MACPHERSON, W.S.

DUKE OF HAMILTON, Defender (Appellant).—*Davey, Q.C.—Murray.*
JAMES DUNLOP AND ANOTHER.—*Lord-Adv. Balfour—*
Sol.-Gen. Herschell.

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Hamilton v.
Dunlop, &c.

Property—Minerals—Reserved right.—A conveyance of lands reserving to the disponent right to work the minerals will be construed as a conveyance of the lands reserving the right of property in the minerals.

Where a proprietor conveyed the lands of A in exchange for the lands of B, reserving "the liberty of working" coal and other minerals in the lands of A to himself and his heirs and successors in the lands of B, "if conveyed with that privilege," *held* (aff. judgment of the Second Division) that the reserved right was a right of property in the minerals, which was not lost when the lands of B were disposed by him without the privilege.

(In the Court of Session, June 20, 1884, 11 R. 963.)

The defender, the Duke of Hamilton, appealed.

Ld. Chancellor
(Selborne).
Lord Black-
burn.
Lord Watson.
Ld. Fitzgerald.

LORD CHANCELLOR.—It appears to me that the unanimous decision of the Second Division of the Court of Session agreeing with that of the Lord Ordinary in this case is right.

I will first make some observations which occur to me, which shall be but few, upon what I regard as the good sense and reasonable view of such a deed as the present, even if there were not authority apparent on the matter. You have words of reservation, and you have a prior title to the whole property in the coals and minerals in the person who is making this reservation in his favour. What is the thing reserved? If there be no limit of time—if it be to Dunlop and his heirs for ever—then it is a perpetual reservation. What is the subject of the reservation? The right to take away the whole of those coals and minerals. A perpetual right to the whole possible profits and the benefit of property is *prima facie* very much like the whole beneficial interest in that

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Feb. 4, 5, 6;
April 7, 8;
May 22.

Highway—Dedication—"Way . . . deemed to have been dedicated as highway"—Actual enjoyment by public as of right and without interruption for twenty years—Rights of Way Act, 1932 (22 & 23 Geo. 5, c. 45), s. 1, sub-s. 1.

By the Rights of Way Act, 1932, s. 1, sub-s. 1: "Where a way, not being of such a character that user thereof by the public could not give rise at common law to any presumption of dedication, upon or over any land has been actually enjoyed by the public as of right and without interruption for a full period of twenty years, such way shall be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate such way, or unless during such period of twenty years there was not at any time any person in possession of such land capable of dedicating such way."

To bring a case within this sub-section, the person asserting the right of the public to use the way must establish, on the one hand, that the public have actually had the amenity or advantage of using the way openly and not secretly or by force or with permission given from time to time and without interruption, in the sense of actual and physical stopping, of their enjoyment of the way, and, on the other hand, the actual suffering of the exercise of that right by the landowner for a full period of twenty years.

Dicta of Stirling J. in *Smith v. Baxter* [1900] 2 Ch. 138, 144 (quoting the words of Kay J. in *Cooper v. Straker* (1888) 40 Ch. D. 21, 27); of Cotton L.J. in *De La Warr (Earl) v. Miles* (1881) 17 Ch. D. 535, 596; of Parke B. in *Flight v. Thomas* (1840) 11 Ad. & El. 688, 699; and of Lindley L.J. in *Hollins v. Verney* (1884) 13 Q. B. D. 304, 308, applied.

ACTION tried by Hilbery J. without a jury.

The plaintiffs were the owners of an estate within the district of which the defendants were highway authority. A roadway which joined two highways ran across the plaintiffs' estate. In 1934 the plaintiffs, claiming that the roadway was their private property, erected a fence at one end of it and a gateway at the other. The defendants removed both the fence and the gateway.

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The plaintiffs thereupon brought this action against the defendants claiming damages for the wrongful entering by the defendants of the plaintiffs' land and for the defendants using the private roadway of the plaintiffs and removing the gate, gate-posts and fence of the plaintiffs. By their defence, the defendants said that the roadway in question was not a private way but a public highway, that the gateway and the fence erected by the plaintiffs obstructed that highway, and that the defendants, in removing the gateway and fence, were acting in performance of the duties imposed on them by the Local Government Act, 1894.

W. Marshall Freeman and *A. W. Nicholls* for the plaintiffs.
Turner K.C. and *Erschine Simes* for the defendants.

Cur. adv. vult.

May 22. HILBERY J. read a judgment in which he stated the facts and continued: The plaintiffs say that the defendants, who are the highway authority for the district in which this roadway is situated, wrongfully claim to use the road in question as a public highway and threaten, and intend to repeat, acts which the plaintiffs say are acts of trespass. The defendants justify those acts, asserting that they are, as they are conceded to be, the highway authority for the district, charged by the Local Government Act, 1894, with the duty of protecting all public rights of way within their district and preventing so far as possible the stopping-up or obstruction of any such right of way, and that the roadway in question is a public highway.

The acts of trespass of which the plaintiffs complain are the removal by the defendants of a gate and gate-post at the northern end of the roadway in question, and a fence at the southern end of the roadway. It is conceded that, if the roadway in question is properly to be considered to be a public highway, the removal of the gate and fence in question by the defendants was an act done by them in pursuance of their duties as the highway authority and was an act which

they were required to do by law. The only issue, therefore, which has to be decided by me is whether the roadway in question is a public highway. In the circumstances it was agreed that the burden of proof was on the defendants.

The defendants put their case in two ways. First, they contend that the evidence in the case should be held to establish at common law that this roadway is a public highway. Secondly, they say that their evidence establishes that this should be deemed to be a roadway dedicated as a public highway under the Rights of Way Act, 1932. There is not, I think, any dispute between the parties as to what the common law requires in order that the defendants may be said to have established that this roadway has become a public highway, nor do I think there is any serious dispute between the parties (except, perhaps, with regard to one matter) about what the law requires if I am to find that this should be deemed to be a public highway under the Rights of Way Act, 1932.

The defendants accept that at common law the burden is on them to show a long-continued user in such circumstances that an inference should be drawn from it that the owner of the land has intended to dedicate the roadway to the public for their use. From one of the several cases cited to me I take a passage which, I think, as succinctly as possible expresses what the law is. I quote from Lord Kinneer's speech in *Folkestone Corporation v. Brockman* (1): "The nature of user, and consequently the weight to be given to it, varies indefinitely in different cases, and whether it will import a presumption of grant or dedication must depend upon the circumstances of the particular case. The law is stated more exactly by Lord Blackburn in *Mann v. Brodie*. (2) He begins by citing the doctrine laid down by Parke B. in *Poole v. Huskinson* (3): 'In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an intention to dedicate—there must be an animus dedicandi, of which the user by the

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(1) [1914] A. C. 338, 352.

(3) (1843) 11 M. & W. 827, 830.

(2) (1885) 10 App. Cas. 378, 380.

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public is evidence and no more.' And then he adds more particularly with reference to the effect of user, that 'where there has been evidence of a user by the public so long and in such a manner that the owner of the fee, whoever he was, must have been aware that the public were acting under the belief that the way had been dedicated, and has taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence on which those who have to find that fact may find that there was a dedication by the owner, whoever he was.' " As was observed by Lord Kinnear in his speech in the case I have already cited in dealing with this question from the common law point of view (1): "The points to be noted are, first, that the thing to be proved is intention to dedicate, and secondly, that while public user may be evidence tending to instruct dedication, it will be good for that purpose only when it is exercised under such conditions as to imply the assertion of a right, within the knowledge and with the acquiescence of the owner of the fee." And he goes on to quote with approval this passage from the speech of Lord Halsbury L.C. in *Macpherson v. Scottish Rights of Way and Recreation Society, Ltd.* (2): "The question in the mind of an English lawyer is not only whether he can, on proper judicial evidence, determine that there has been an exercise of such a right of way as is here in question, but whether he can reasonably infer from that that the owner had a real intention of dedicating that way to the use of the public."

In considering the evidence in this case I have applied those principles and borne in mind the further observation to which Lord Kinnear directs attention—namely, that the question is whether such user as has been proved is to be ascribed to tolerance or right. (3)

In the second place the defendants, as I have said, base their case on the Rights of Way Act, 1932. They contend that both under s. 1 and s. 2 they have satisfied the requirements of the Act. Sect. 1 provides as follows: "(1.) Where

(1) [1914] A. C. 352.

(3) [1914] A. C. 353.

(2) (1888) 13 App. Cas. 744, 746.

a way, not being of such a character that user thereof by the public could not give rise at common law to any presumption of dedication, upon or over any land has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, such way shall be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate such way, or unless during such period of 20 years there was not at any time any person in possession of such land capable of dedicating such way. (2.) Where any such way has been enjoyed as aforesaid for a full period of 40 years, such way shall be deemed conclusively to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate such way."

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A consideration of the evidence from the point of view of whether or not it establishes a case for the defendants under the Rights of Way Act, 1932, requires, I think, that I should first decide what it is that that Act requires should be established by evidence before the way shall be deemed to have been dedicated as a highway. Sect. 1, sub-s. 1, as I have pointed out, enacts that where a way such as is therein referred to, and such as is the one in dispute in this action, has been "actually enjoyed by the public as of right and without interruption for a full period of 20 years, such way shall be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate such way."

In the first place, it is necessary to decide how the words "actually enjoyed by the public as of right" are to be construed. These words, it was pointed out to me, are reproductions of the language used in the Prescription Act, 1832. As used in that Act they have been the subject of judicial interpretation, though I cannot find that they have been the subject of judicial interpretation in their context in the Rights of Way Act, 1932. When considering these words as used in the Prescription Act, 1832, Lindley L.J., delivering the judgment of the Court of Appeal in *Hollins v. Verney*,

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said (1): "Further light is thrown on what is meant by actual enjoyment for the full period of twenty years by looking at the matter from the point of view of the owner of the servient tenement. A right of way cannot be actually enjoyed by one person without being permitted or suffered by the owner of the land, over which the way is enjoyed; and if the one must actually enjoy it for the full period of twenty years, the other must actually suffer it for the same period. Moreover, as the enjoyment must be as of right and without interruption for the full period of twenty years, it follows that for the same period there must have been an opportunity of resistance and interruption." A little later on the learned Lord Justice said: "The truth is that the question whether in any particular case a right of way has, or has not, been actually enjoyed for the full period of twenty years, appears to be left by the Act to be treated as a question of fact to be decided by a jury." That language seems none the less applicable where, as here, the actual user which has to be considered is by members of the public generally and not by some one individual in particular. Moreover, in the Prescription Act the expression is used in connection with a topic very similar to that with which the Rights of Way Act, 1932, is dealing in s. 1. I think it is right, therefore, to interpret those words as involving that he who asserts the right must establish as a matter of fact, on the one hand, the actual enjoyment of the right by the public as of right and, on the other hand, the actual suffering of the exercise of that right by the landowner for the full period of twenty years. I take the word "enjoyed" to mean, as Stirling J. said in *Smith v. Baxter* (2), "having had the amenity or advantage of using."

In the second place, what is the meaning of the qualification on the actual enjoyment by the public expressed in the Act by the words "as of right"? Speaking of the same qualification in the Prescription Act, 1832, in *Earl De La Warr v. Miles* (3) Brett L.J. said: "The true interpretation of those words 'as of right' seems to me to be that he has done so

(1) (1884) 13 Q. B. D. 304, 308.

(3) (1881) 17 Ch. D. 535, 591.

(2) [1900] 2 Ch. 138, 144.

upon a claim to do it, as having a right to do it without the lord's permission, and that he has so done it without that permission. If he shows that he has claimed to do it, not as a thing permitted to him year by year by the lord, but as a thing that he had a right to do, whether the lord said 'You may do it' or not; he has proved all that it is necessary for him to prove."

It is the requisite quality of the act, not merely the act itself, which is here defined. It is easier for me to appreciate the presence of those words in the Prescription Act, 1832, dealing as it does with whether rights have been acquired in respect of one tenement and against another because of acts done over a period by owners of the one tenement, than their presence in the Rights of Way Act, 1932, dealing with the acts of members of the public, no matter how or whence they come, or why they go along the way, and who may individually use the way but once, and that by chance. However, I think it is plain that the words "as of right" require that the quality of the acts, as well as the acts, must be established.

The essential quality of the acts—that is, as acts done as of right—has from early days in our law been established by showing that the acts were done openly, not secretly, not by force and not by permission from time to time given. In Coke on Littleton (19th ed., p. 114 (a)) Lord Coke expresses the requirements thus: "Longus usus nec per vim, nec clam, nec precario." There is a long line of cases which supports this view, and I take from one of them a passage which occurs in the judgment of Cotton L.J. in *Earl De La Warr v. Miles* (1), where he says: "You must see whether the acts have been done as of right, that is to say, not secretly, not as acts of violence, not under permission from time to time given by the person on whose soil the acts were done."

I think it right, therefore, to hold that, where the words "as of right" are used in the Rights of Way Act, 1932, in connection with the actual enjoyment, they are satisfied if the evidence shows that the actual enjoyment has been

(1) 17 Ch. D. 596.

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open, not by force and not by permission from time to time given.

Finally, there are the words "without interruption" to be interpreted. In the first place, do they refer to the enjoyment of the right or to the period of that enjoyment? Is it sufficient to amount to interruption if acts have from time to time been done which, while not stopping the user from going on, have yet challenged the right? Or must the interruption, to come within the meaning of the Act, be actual and physical stoppage of the user for a time, or from time to time?

These words, again, occur in the Prescription Act, 1832. When used in that Act they are qualified by s. 4 of the Act, which enacts that no act or other matter shall be deemed to be an interruption, within the meaning of the statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof and of the person making or authorizing the same to be made.

Of the words when used in the Prescription Act, 1832, Parke B. said: "Section 4 speaks of the *party* interrupted. The statute seems to contemplate interruption of the right, not of the period": *Flight v. Thomas*. (1) But under the Rights of Way Act, 1932, there is no section equivalent to s. 4 of the Prescription Act, 1832. The words in s. 1 are "has been actually enjoyed by the public as of right and without interruption for a full period of twenty years." In their context they occur, however, as qualifications of the actual enjoyment of the way by the public, rather than as qualifications of the period. The scheme of the section appears to be that the actual enjoyment of the way must in character be two things—that is, of right and without interruption, and, when an enjoyment of a nature satisfying those two requirements has been proved, the duration of that enjoyment must be shown to have been for a full period of twenty years. Moreover, public user is essentially to some extent intermittent, occurring, as it does, only when individual members of the

(1) (1840) 11 Ad. & E. 688, 699.

public make use of the way. It is, therefore, in my view, as it was in the view of Parke B., of the words when used in the Prescription Act, 1832, to the interruption of the enjoyment of the way and not to the period of time that the words are attached by way of qualification.

But what must be the nature of the interruption which the enjoyment of the way must be without? Is it sufficient, as I have said, to amount to an interruption if acts have from time to time been done which, while suffering the actual user to go on, yet challenged the right. Or must the interruption be some physical and actual interruption which prevents the enjoyment of the way?

With regard to this, I can find no help in the rest of the Act, but the words themselves are used in connection with what the Act calls "actual enjoyment" for a period of years. As it is actual enjoyment which must be without interruption, one would suppose that the interruption contemplated must be actual. One can scarcely interrupt acts except by some physical act which stops them. I therefore think that the word "interruption" in the expression in the Act "without interruption" is properly to be construed as meaning actual and physical stopping of the enjoyment, and not that the enjoyment has been free of any acts which merely challenged the public right to that enjoyment. In practice this construction of the words will lead to no difficulty and cause no surprise. Many bodies, such as the four Inns of Court, over and through whose property run roads used by the public, take the precaution to close and actually to stop the public enjoyment of those roads for one day at least in every year.

[His Lordship then passed to the consideration of the evidence and said that he was satisfied that there had been actual enjoyment of the way by the public for twenty, and, indeed, for forty years; that that enjoyment had been open and not by force or with permission; that for forty years it had been free from physical or actual interruption; that the evidence was consistent only with an intention by the plaintiffs to dedicate; and that the defendants, therefore, had

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established their case under s. 1 of the Rights of Way Act, 1932. He, accordingly, directed judgment to be entered for the defendants, with costs.]

Judgment for defendants.

Solicitors for the plaintiffs: *Westbury Preston & Stavridi, for Grece & Pringle, Redhill.*

Solicitors for the defendants: *Lees & Co., for E. C. King, Clerk to the Coulsdon and Purley U. D. C.*

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Dec. 16, 20.

Evershed M.R.,
Cohen and
Asquith L.JJ.

Rights of way—Use for upwards of 20 years—Gate across way locked from time to time by tenant—Enjoyment of way “without interruption”—Meaning—Relevance of interruptor's intention—Rights of Way Act, 1932 (22 & 23 Geo. 5, c. 45), s. 1, sub-s. 1.

Although such an act as locking a gate across a way which is used as of right by the public *prima facie* constitutes an interruption of the enjoyment of the way within the meaning of s. 1 of the Rights of Way Act, 1932, and none the less so because during the time while the gate is kept locked no one had happened to try to use the way, the absence of any intention to challenge the right of the public to use the way is material to the question whether there has in fact been any interruption within the meaning of the section.

A track over agricultural land had been used for upwards of forty years by the public as of right as a way for agricultural vehicles and cattle. A tenant of two fields through which the track ran had during that period from time to time locked a gate across it. According to the evidence he had locked the gate at night only and for the purpose of preventing cattle from damaging his corn when it was stacked in one of the fields. He had unlocked the gate each morning. In an action by the owner of land crossed by the track against the defendants for damages for trespass in driving a tractor over the track, the defendants claimed that they were exercising a public right of way. The county court judge found that when the previous tenant had locked the gate it had only been for the purpose of protecting his corn from damage by cattle, and not for the purpose of showing the public at large that there was no right of way over the track. Accordingly, he held that the locking of the gate was not an “interruption” of the exercise of the right of way which would prevent time from running under s. 1 of the Rights of Way Act, 1932.

Held, that, on the evidence as a whole, it was open to the county court judge to find that there had been no interruption in fact of the user of the way by the public, since the locking by the tenant of the gate had been done at such times and in such circumstances as not to be likely to interrupt, and not in fact to have interrupted, the use of the way.

APPEAL from Cardigan county court.

The plaintiff, Eira Marguerite Lewis, was the owner and occupier of the Old Rectory and the adjoining land and buildings at Dinas, Pembroke. The first defendant, William Joseph Thomas, was the owner of land adjoining the plaintiff's land, and George Thomas and Vincent Davies, the second and third defendants, were the tenants of the first defendant.

The plaintiff alleged that the defendants had wrongfully trespassed upon the drive of the Old Rectory with tractors and other vehicles, and had wrongfully driven cattle over it. Further, it was alleged, after the plaintiff had erected a gate at the west entrance to the drive and locked it, the defendants in March, 1949, broke the padlock on the gate and again drove a tractor along the drive. The plaintiff claimed damages and an injunction to restrain the defendants from continuing the acts of which she complained. The defendants in their defence claimed that there was a public right of way for farm vehicles and cattle over the drive and that they were entitled to use it for the purposes complained of.

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It appeared from the evidence that the way in question was part of a track which started from a main road. It first passed along two fields, Nos. 142 and 148 on the ordnance survey of the parish, followed the drive of the Old Rectory, subsequently crossing further agricultural land, and ultimately joined the main road again. The track formed a short cut from Soar Hill to Brynheullan. If the track were not used, it would be necessary to make a considerable détour by the main road. It was admitted that there was a right of way for pedestrians over the track.

Originally fields Nos. 142 and 148 had been glebe land and had, with the Old Rectory and other adjoining land, vested in 1914 in the Commissioners of Church Temporalities in Wales, subsequently vesting in the Representative Body for the Church in Wales. During the material period the Old Rectory had been occupied by the rector of the parish, and the two fields had been let to one Reynolds, whose tenancy ended in 1941. In 1942 the Representative Body sold the two fields, and in 1947 the purchaser conveyed them to the first defendant. In 1945 the Old Rectory was sold by the Representative Body to the plaintiff. It appeared from the evidence that while Reynolds was tenant of the two fields he had from time to time locked a gate across the track between them at night in order to prevent cattle from damaging his corn. He had unlocked the gate in the morning. He gave the rector a key to the padlock.

The county court judge dismissed the action, holding that there had been continuous user of the way for over forty years, and that Reynolds had only locked the gate across the track to protect his corn and not to show the public that there was no right of way.

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E. V. Falk for the plaintiff. Before a public right of way can be acquired under s. 1 of the Rights of Way Act, 1932 (1) two things are required: first, there must be user of the way as of right; secondly, that user must be without interruption: *Merstham Manor Ltd. v. Coulsdon and Purley Urban District Council* (2). The plaintiff does not dispute that there was for over fifty years user of this way as of right by agricultural vehicles and for the driving of cattle. The second requirement, however, has not been fulfilled: there has been interruption. In s. 1, "without interruption" must be construed in its ordinary meaning as without any actual physical interruption. The intention of the person who interrupts the user of a way is immaterial: *Jones v. Bates* (3). Once the objective test of continuous user for the period laid down in the section is satisfied, the state of mind of the person blocking the way becomes of importance. The tenant, Reynolds, who locked the gate across the way, did it with the knowledge of the rector who was the agent of the freeholders. A right of way cannot be established by showing that, when the freeholder interrupted the way, he had no intention of defeating the public claim: *Moser v. Ambleside Urban District Council* (4). That case shows that intention is important in considering the effect of the proviso to the section. Here there is evidence that the rector knew that Reynolds had locked a gate across the way. The intention of Reynolds in locking the gate is

(1) Rights of Way Act, 1932, s. 1, sub-s. 1: "Where a way, not being of such a character that user thereof by the public could not give rise at common law to any presumption of dedication, upon or over any land has been actually enjoyed by the public as of right and without interruption for a full period of twenty years, such way shall be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate such way, or unless during such period	"of twenty years there was not at any time any person in possession of such land capable of dedicating such way." Sub-section 2: "Where any such way has been enjoyed as aforesaid for a full period of forty years, such way shall be deemed conclusively to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate such way." (2) [1937] 2 K. B. 77. (3) (1938) 158 L. T. 507. (4) (1925) 89 J. P. 59, 118.

immaterial. That intention cannot be attributed to the rector.

D. E. Evans for the defendants. It is clear from the judgment of Hilbery J. in *Merstham Manor Ld. v. Coulsdon and Purley Urban District Council* (1) that an intention to challenge the right of way is an essential ingredient of an interruption of a way. The interruption must have been with the intention of disputing the public right of user. Here the tenant locked the gate for his own convenience. A key was available for anyone who wanted to pass along the way when the gate was locked. This track was used very infrequently. It was only used by a few people, and not by night. There is no evidence that the locking of the gate caused any one in fact to be interrupted. There was evidence here on which the county court judge could hold that the defendants had discharged the onus which was on them. [He referred to *Attorney-General v. Dyer* (2), and *Attorney-General v. Hemingway* (3).

Falk in reply. It is put against the plaintiff that, whereas there was interruption, there is no evidence that any person was in fact interrupted. If it is not necessary to prove continuous user of the way, it is equally not necessary to prove a continuous interruption.

Cur. adv. vult.

Dec. 20. EVERSHERD M.R. This appeal raises a question under s. 1 of the Rights of Way Act, 1932. The plaintiff, who is the owner-occupier of a property known as The Old Rectory, near to the village or town of Brynheullan, has sued three persons for alleged trespass, consisting of the user by them of a way over her property and certain other acts which they did in purported exercise of that right of way.

The answer of the defendants to the claim of trespass was that they were exercising a public right of way for agricultural vehicles and cattle. It is to be noted that, so far as foot passengers are concerned, it is conceded by the plaintiff that there is a public right of way ; but the issue has been whether that public right of way extends also to its user for agricultural vehicles and cattle. I understand that other defences were raised ; but, so far as this court is concerned, the sole question is whether the finding of the county court judge that there was such a public right of way can stand. The question is

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(1) [1937] 2 K. B. 77.

(3) (1916) 81 J. P. 112.

(2) [1947] Ch. 67.

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“So far as the former of those two conditions is concerned, “as of right,” there is, I think, no question but that the witnesses as to user gave evidence that they used the way—and I borrow the well-known formula of Tomlin J., in *Hue v. Whiteley* (1)—each “believing himself to be using a public “road” to pass from one highway to another.

The real question is whether, having regard to the facts, there has been user without interruption for the requisite period. The requisite period may be forty years or twenty years, according to whether the case is founded on sub-s. 2 or sub-s. 1. For present purposes, I understand, that does not matter: either there has been interruption sufficient to defeat the claim under either sub-section or there has been no interruption at all.

Prima facie a question of that kind is one of fact for the judge. He saw all the numerous witnesses who came before him. As it is prima facie a matter of fact, therefore, the plaintiff would be out of court were it not for one matter—one sentence in the judgment of the county court judge—around which the whole argument has ranged. The note of the judgment is in two parts: first, there is a note in which the judge says that he delivered an oral *ex tempore* judgment from the notes which he made during the hearing. The notes, which are then set out, include, among others, the following: “Evidence of witnesses (a) plaintiff’s witnesses. Reynolds’ evidence as to locking gate is not conclusive. Not locked “as a right. Opened in morning.” Then the judge made an additional note, of which the material parts are these. He said: “In this case I was satisfied from the evidence of the “witnesses, especially that given by the defendants’ witnesses, “that there had been continuous use of the roadway in question “for over forty years without any attempt to question the “right to use it. . . . I came to the conclusion (and so stated “in my judgment) that, on the few occasions when Reynolds “locked the gate across the road, he did so only when his corn “was stacked near the gate of the field near the roadway in “question and when he had found that people had left his “gate open and consequently cattle wandered into the corn- “field. It was on these occasions and for this purpose only

(1) [1929] 1 Ch. 440, 445.

“ that he locked the gate across the road, and not because he
 “ was endeavouring to show to the public at large that there
 “ was no right of way through the roadway in question.”

It is on that particular part of the judge's finding and judgment that the plaintiff founds her argument ; for she says that the judge in that passage misdirected himself by holding, in effect, that interruption in fact does not matter if there was no intention by the interrupter to challenge the right. The plaintiff says, first, that that direction is wrong in law and is inconsistent with Hilbery J.'s view in *Merstham Manor Ltd. v. Coulsdon and Purley Urban District Council* (1), approved by this court in *Jones v. Bates* (2), and particularly with Scott L.J.'s judgment in the latter case.

Secondly, the plaintiff argues that in any case Reynolds was only a tenant of these two fields east of the Old Rectory property. What he did was in fact done with the full knowledge of the rector who was living at the Old Rectory and was at that time the agent of the owners of the property. It cannot, the plaintiff argues, be assumed that whatever was in the mind of Reynolds the same thoughts were also in the mind of the rector ; and the court could not on any view, it is said, assume that there was no intention on the rector's part to challenge the right of way. [His Lordship recited the facts, and continued :] During the period while Reynolds was a tenant, however, it is clear that on occasions—the judge finds at night only—he did lock a gate which was across the way, not on the Old Rectory property, but on his own property between the two fields. It is that locking, that alleged interruption, which forms the main burden of the argument before us.

As to the second point, namely, that, whatever was in Reynolds' mind, the rector cannot be assumed to have intended no challenge, there is in point of fact no evidence at all that the rector did intend any challenge. In so far as there is any evidence, I should have thought that it was the other way. But, in any case, the gate in question was not on the rector's property. It was not the rector's gate, and therefore this alleged interruption cannot, in my judgment, be laid at the door of the rector at all. He was, in fact, given a key. His interest in the matter was really as a member of the public if he desired himself to pass eastward along this lane from his property to the main road. I do not therefore think that

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(2) 158 L. T. 507.

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The real question is the first indicated above. If his judgment means what the plaintiff says, it may well be doubted whether the statement of the judge could be regarded as correct. *Prima facie*, to my mind "interruption" in these two sub-sections means interruption in fact.

I have already mentioned Scott L.J.'s judgment in *Jones v. Bates* (1). I quote this short passage: "The next requirement of the statute, 'without interruption,' means that the enjoyment of the right must not have been interrupted. If for the statutory period members of the public have used the way as of right, and their exercise of that right has in fact been interrupted, then the statutory consequences follow." I take that as meaning that, in the mind of the Lord Justice, "interruption" means what it says: it means interruption in fact.

On the other hand, in my judgment the presence or absence of a challenge may well be a relevant circumstance in determining whether in truth there has been interruption in fact. The illustration was given during the course of the argument of a road which was interrupted and entirely blocked by some broken-down vehicle so that nobody could pass along it at all. It is obvious that in such a case no court would hold that there was such an interruption as was intended by the section. In the forming of that conclusion, the circumstances in which the barring of the way took place and the complete absence of any intention to stop anybody from going along it would, I think, be a relevant circumstance.

Reading the evidence and the judge's judgment, I come to the conclusion that he really did no more, in the passage read, than to refer to Reynolds' state of mind as one of the relevant circumstances to be considered, like the occasions and the times when the gate was locked, in arriving at his decision whether there had in fact been interruption.

I agree that a barring, and particularly a deliberate barring, of a way for an appreciable period would not necessarily lose its effect merely because no one happened to try to use the way during that period. But here the only user in controversy is use by farm vehicles and cattle (the use by foot being conceded); and such use is very improbable at night. The

(1) 158 L. T. 507, 511.

evidence seems to be that Reynolds, in fact, only locked the gate at certain periods of the year when his corn was stacked, and always saw to it that it was unlocked in the morning.

In all the circumstances, including the considerable evidence of use which the judge heard, I think that it was open to him to find, as he did, "no interruption," and that the locking was done at such times only as would not be likely to interrupt and did not in fact interrupt (as it was not intended to interrupt) the user of the track for farm vehicles and cattle.

I would therefore dismiss the appeal. I would also follow the judge in not attempting to define more precisely the nature and extent of the right and in not making any declaration. It is sufficient that the plaintiff's action fails. The matter would, as between the plaintiff and these defendants and persons deriving title through them, of course, be *res judicata*; but the plaintiff might hereafter, if she wished, litigate the matter afresh with other persons, or the Attorney-General; and raise more precisely the exact nature of the public right. That does not call for any decision in this case. I think that the proper course is to affirm the decision of the county court judge in dismissing the plaintiff's action.

COHEN L.J. : I am of the same opinion, and only desire to add a few words on the main issue. To succeed in the defence that there is a public highway, the defendants have to establish, first, enjoyment as of right for the prescribed period and, secondly, no interruption. So far as the first point is concerned, the judge found in their favour. There was ample evidence on which he could so find, and I do not think that his finding as to enjoyment as of right was challenged by Mr. Falk for the plaintiff. The dispute is whether that enjoyment was or was not interrupted. On this point Mr. Falk relied on the evidence of Reynolds, which has already been summarized by the Master of the Rolls. There was no other evidence of interruption, but I should mention that given for the plaintiff by one Harries, who farmed some of the fields in question. He said that he obtained the rector's permission before he drove his cattle along the track. The county court judge held that that evidence did not constitute an interruption. It is with this finding that Mr. Falk quarrels. He says, first, that the evidence of Reynolds, who was not the owner of the land subject to the alleged right of way, cannot be relevant.

There is no direct authority on the point of interruption so

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far as the Act of 1932 is concerned ; but in *Moser v. Ambleside Urban District Council* (1), MacKinnon J. had to consider the question of intention under the law as it was before that Act. The question then was whether the evidence justified an inference of dedication. MacKinnon J. said (2) : " The other principle that I think it is as well to bear in mind is this : it was said, very truly, in the passage of Parke B. in *Poole v. Huskinson* (3), that a single act of interruption by the owner was of much more weight upon the question of intention than many acts of enjoyment. If you bear quite clearly in mind what is meant by an act of interruption by the owner, if it is an effective act of interruption by the owner—I mean by the owner himself—and is effective in the sense that it is acquiesced in, then I agree that a single act is of very much greater weight than a quantity of evidence of user by one or other members of the public who may use the path when the owner is not there and without his knowledge. The fact that the owner, as is so constantly done, locks the gates once a year, and that sort of thing, is, or may be, a periodical intimation by the owner that he is not intending to dedicate a highway, but it must be an effective act of interruption ; it must be by the owner himself, because if you have evidence of an attempted interruption which is not effective in the sense that members of the public resent the interruption and break down the gate, or whatever it is, and that defiance of his supposed rights is then acquiesced in by the owner, or, again, if it is an attempted interruption by a tenant without the assent or authority of the owner and is also an interruption that is ineffective and a failure because the public refuse to acquiesce in it, then, as it seems to me, such an ineffective interruption, either by the owner or by the tenant, so far from being proof that there is no dedication, rather works the other way as showing that there has been an effective dedication." The dedication in that case was affirmed by the Court of Appeal (4). There is no further reference to the matter of intention in the judgment of this court.

It is plain that, where the question is whether or not there was evidence of dedication, first, intention must be relevant and, secondly, the relevant intention must be that of the person presumed to dedicate. But Mr. Falk says that the Act of

(1) 89 J. P. 59.

(2) Ibid. 61.

(3) (1843) 11 M. & W. 827.

(4) 89 J. P. 118.

1932 has made the fact of interruption, if proved, conclusive, unless, to quote the relevant words from sub-ss. 1 and 2 of s. 1 of the Act, "there is sufficient evidence that there was no intention during that period to dedicate such way." To some extent I agree with Mr. Falk. It seems to me that the reference to interruption in the sub-section is to the fact of an interruption, and that the question of intention is primarily relevant if, and only if, the owner, against whom the right of way is asserted, seeks to prove no intention to dedicate. None the less, intention may be involved in the question whether a particular act is or is not interruption. Thus, padlocking a gate is prima facie an act of interruption; but I doubt whether it could be held to be so if the interrupter fixed on the gate a notice that the key would be found hanging on the gatepost. The question is whether, having regard to the circumstances, the locking of the gate by Reynolds to the extent indicated by his evidence constitutes interruption. The fact that the gate was locked is clearly proved; and it is not proved that any one person while it was locked would find on the gate any information where the key could be obtained. On the other hand, although the rector must be taken to have approved of the affixing of the lock of which he had a key, Reynolds states that the driver of a coal lorry would get a key, presumably from the rectory, and that the gate was normally unlocked. Moreover, there was no evidence of any actual case in which any person seeking to use the way had been interfered with by the erection and locking of the gate. The alleged right of way was in a place where user of it was only likely by farmers and the like in the vicinity, who would know where the key would be. I agree with the Master of the Rolls in reading the evidence as meaning that the gate was only locked at night. In those circumstances, I am not prepared to differ from the view of the county court judge that there was, in the circumstances of this case, no actual interruption of the right of way. That being so, it seems to me to follow that the appeal fails.

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ASQUITH L.J. I agree.

Appeal dismissed.

Solicitors: *Rhys Roberts & Co. for Walter L. Williams & Sons, Fishguard.*

Holt, Beevor & Kinsey for W. J. Williams & Davies, Cardigan.

B. A. B.

[HOUSE OF LORDS.]

H. L. (E.)*	BRITISH TRANSPORT COMMISSION . . .	APPELLANTS;
	AND	
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	SAME	APPELLANTS;
	AND	
	WORCESTERSHIRE COUNTY COUNCIL . . .	RESPONDENTS.

CONSOLIDATED APPEALS.

Railway—Powers—Bridges—Right of way—Dedication—Footpath over private accommodation bridge—Presumption of dedication—Long user by public—Power of railway authority to dedicate—Test—Consistency with purposes of railway—Question of fact—Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 16, 68—National Parks and Access to the Countryside Act, 1949 (12, 13 & 14 Geo. 6, c. 97), s. 31.

Corporation—Powers—Alienation of land—Land held under statutory powers for public benefit—Compatibility with statutory objects—Easement—Dedication of highway—Footpath over private accommodation bridge over railway.

Highway. Fact or Law.

A footpath across a bridge spanning a railway line constructed in 1845 under powers conferred by a private Act of Parliament was marked on a provisional map prepared by a county council pursuant to the National Parks and Access to the Countryside Act, 1949, as a public right of way as at November 1, 1952. The railway owners applied to quarter sessions under section 31 of the Act for a declaration that no right of way existed over the bridge. Quarter sessions found that the bridge had been built solely as a private accommodation bridge for the benefit of the owners and occupiers of the lands on either side of the railway line, which had severed them, and that it had never been expressly dedicated to the public but its use by the public over a period of more than 20 years had been such as to raise a presumption that it had been dedicated. They found that the continued existence of the bridge would not endanger the running of the trains nor the operation of the railway, and held that the footpath had been dedicated:—

Held, that the footpath had been dedicated, notwithstanding that the railway authority held the land under statutory powers conferred on it for the public benefit and it was empowered by section 16 of the Railways Clauses Consolidation Act, 1845, to discontinue the

* *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD RADCLIFFE, LORD COHEN and LORD KEITH OF AVONHOLM.

accommodation bridge, for the sole test to be applied of its power to dedicate the footpath was whether the public use of the footpath as a highway was incompatible with the statutory objects of the authority.

The question whether a dedication was or was not incompatible with those statutory objects was one of fact. Compatibility could be established without showing that in no conceivable circumstances could the dedication at any future time or in any way possibly interfere with those objects. Regard must be had to what could reasonably be foreseen and guarded against and not to that which, though possible, could fairly be said to be improbable.

Rex v. Inhabitants of Leake (1833) 5 B. & Ad. 469; *Birkdale District Electric Supply Co. Ltd. v. Southport Corporation* [1926] A.C. 355; 42 T.L.R. 303; *South Eastern Railway Co. v. Cooper* [1924] 1 Ch. 211; and *South Eastern Railway Co. v. Warr* (1923) 21 L.G.R. 669 applied.

Ayr Harbour Trustees v. Oswald (1883) 8 App.Cas. 623 and *Paterson v. Provost, etc., of St. Andrews* (1881) 6 App.Cas. 833 distinguished.

Dicta in Mulliner v. Midland Railway Co. (1879) 11 Ch.D. 611 disapproved.

Decision of the Court of Appeal [1956] 2 Q.B. 214; [1956] 2 All E.R. 129 affirmed.

APPEALS from the Court of Appeal (Singleton, Jenkins and Hodson L.JJ.).

These were appeals from orders of the Court of Appeal dated March 22, 1956, affirming orders dated January 23, 1956, of the Queen's Bench Division (Lord Goddard C.J., Stable and Ashworth JJ.), whereby it ordered:

(1) That the order made by the appeals committee of the quarter sessions of the peace for the County of Westmorland "on April 5, 1955, dismissing an application made by the "appellants" (the British Transport Commission) "pursuant to "section 31 of the National Parks and Access to the Countryside Act, 1949, for a declaration that on August 1, 1952, no "public right of way existed over a bridge spanning certain lines "of railway owned and occupied by the appellants in the Borough "of Kendal in the County of Westmorland delineated upon a "provisional map prepared by the respondents" (the Westmorland County Council) "pursuant to the said Act and thereupon "shown to be crossed by a footpath numbered 29 be affirmed."

(2) That the order made by the appeals committee of the quarter sessions of the peace for the County of Worcester "on "March 23, 1955, dismissing an application made by the appellants pursuant to section 31 of the National Parks and Access "to the Countryside Act, 1949, for a declaration that on

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" November 1, 1952, no public right of way existed upon certain lines of railway owned and occupied by the appellants in the urban district of Malvern in the said county delineated upon a provisional map prepared by the respondents " (the Worcestershire County Council) " pursuant to the said Act and thereupon shown to be crossed by a footpath numbered 158 be affirmed."

It is sufficient to set out the facts and contentions relating to the first appeal. These were stated by Viscount Simonds as follows: The appeal in the Westmorland case was brought from an order of the Court of Appeal whereby that court unanimously dismissed an appeal from a decision of the Divisional Court of the Queen's Bench Division which had been given upon a case stated by quarter sessions of the peace for the County of Westmorland. The case stated was consequent on an order of sessions dismissing an application by the appellants for a declaration that no public right of way existed over a bridge spanning certain lines of railway owned and occupied by the appellants in the borough of Kendal in the same county.

The jurisdiction of quarter sessions arose in this way. By section 27 of the National Parks and Access to the Countryside Act, 1949, the council of every county in England and Wales were required to carry out a survey of all lands in their area over which a public path was alleged to subsist and to prepare a draft map of their area showing such footpath whenever in their opinion such a right of way subsisted or was reasonably alleged to have subsisted at the relevant date as therein defined. The council were then required to publish in the prescribed manner a notice of the preparation of the draft map and of the places where it might be seen and to hear objections as to anything contained in or omitted from it. Having made a determination on any such objection, the council were next required to make a provisional map incorporating its determination and to advertise the preparation thereof and the places at which it might be inspected. At any time within 28 days of the publication of such notice the owner, lessee or occupier of any land on which the map showed a public path or a road used as a public path might apply to quarter sessions for a declaration that at the relevant date there was no public right of way over the land, and unless quarter sessions were satisfied that at that date such a right of way did exist they must make a declaration accordingly. By section 31 (7) of the Act provision was made for an appeal to the High Court by way of case stated on a point of law.

Pursuant to their obligations under that Act the respondents, the Westmorland County Council, prepared a provisional map of the borough of Kendal and showed on it a footpath numbered 29 which crossed certain lines of railway owned and occupied by the appellants by means of an overbridge, to be presently described. The relevant date for the purpose of the Act was August 1, 1952.

On November 12, 1954, the appellants applied to the justices of the county of Westmorland sitting as an appeals committee of quarter sessions for the county for a declaration that on November 1 no public right of way existed over the overbridge. That application was heard on April 5, 1955, and was refused, and in due course a case was, pursuant to the Act, stated for the opinion of the High Court.

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After reference to the application the case proceeded as follows :

“(A) The said lines of railway were constructed in or about the year 1847 by the appellants’ predecessors in title under powers contained in the Kendal and Windermere Railway Act, 1845.

“(B) At the date of the construction of the said railway no public right of way existed on or near to the line of the said way numbered 29.

“(C) The said bridge was constructed by the appellants’ predecessors in title at or about the time of the construction of the said railway in order to facilitate access between the land on either side of the said railway which was severed by the construction of the same.

“(D) The said bridge was constructed solely as a private accommodation crossing for the benefit of the owners and occupiers of the lands so severed as aforesaid and no express dedication to the public of the way thereover has at any time been made.

“(E) Since the construction of the said railway members of the public have used the said way numbered 29 and the said bridge in such manner and for such period as to give rise to a presumption that the same had been dedicated as a highway if the owner of the soil were capable of such dedication.

“(F) The owners from time to time of the soil of the said way, other than the appellants and their predecessors in title as owners of the said railway, have at no time been under such a disability as would render them incapable of dedicating the said way as a highway and have made no application to quarter sessions for such a declaration as was sought by the appellants in these proceedings nor has such an application been made by

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“(G) If and when the appellants cease to be bound to maintain the said bridge for the benefit and convenience of the owners or occupiers of the lands severed by the said railway for whose benefit and convenience the same was originally constructed by reason of the rights of the said owners and occupiers having been released by agreement or abandoned or having otherwise ceased to be exercisable, the appellants would demolish and discontinue the said bridge, it being their practice so to deal with accommodation works as opportunity arises.

“(H) There is no likelihood of the appellants wishing to construct additional lines of rails under the said bridge or its approaches unless substantial new industrial development takes place in the area served by the said railway. There is no prospect of any such development.

“(I) The continued existence of the bridge will not cause any danger to the running of the appellants’ trains and the operation of the railway.

“(J) The bridge is a strong and durable edifice likely to last indefinitely with comparatively small repairs. The cost of demolishing it would be at the very least £700. It has not been repaired for at least eight years and if it is to remain it will require repairs within the next two or three years which we estimate will cost £250 and thereafter maintenance at a cost which we estimate at £150 in every period of ten years. Accordingly we find that the annual cost of maintenance capitalised would be appreciably less than the cost of demolition. In every case the costs referred to are calculated at present day prices.

“(K) In so far as it is a matter of fact, the expenditure involved in the maintenance of the bridge is quite compatible with the present and future execution of the purposes for which the land is vested in the appellants.”

The Kendal and Windermere Railway Act, 1845, incorporated (inter alia) the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845. Section 68 of the latter Act required the railway company to make and at all times thereafter maintain for the accommodation of the owners and occupiers of lands adjoining the railway (inter alia) so many bridges over the railway as might be necessary for the purpose of making good any interruptions caused by the railway to the

lands through which it was made. The bridge over which the footpath numbered 29 ran (which has been called "the over-bridge") was constructed pursuant to this section.

Section 16 of the same Act provided that, subject as therein mentioned, it should be lawful for the company for the purpose of constructing the railway or the accommodation works connected therewith as thereafter mentioned to execute any of the works therein mentioned, that was to say, they might construct upon, across, under, or over any lands described in the plans such embankments, bridges and fences as they should think proper and (this was the relevant power) they might "from time to time alter, repair, or discontinue the beforementioned works or any of them, and substitute others in their stead" and further they might "do all other acts necessary for making, maintaining, altering, or repairing, and using the railway."

Those being the facts, the contentions of the parties were as follows:

"It was contended by the appellants that the dedication of a public right of way over the said bridge would be incompatible with the purposes of the appellants' railway undertaking in that:

"(A) It would commit the appellants in perpetuity to all such expense in the maintenance of the said bridge as might from time to time be necessary which expense could be avoided if the same were demolished.

"(B) It would fetter the appellants' powers to expand their said railway undertaking by the construction of additional lines of rails if and when they might require to do so.

"(C) It would deprive the appellants of their statutory powers to discontinue the said bridge and crossing pursuant to section 16 of the Railways Clauses Consolidation Act, 1845.

"It was contended by the respondents that:

"(A) There having been user of the said way numbered 29 and the said bridge in such manner and for such period as to give rise to a presumption that the same had been dedicated as a highway if the owner of the soil were capable of dedication, dedication ought to be presumed to have taken place;

"(B) the user of the bridge by the public as a public footpath was not inconsistent with the operation of the railway and the execution of the purposes for which the bridge and adjoining railway land is and was vested in the appellants and their predecessors;

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“(C) the dedication of a public right of way over the bridge
 “ would only be incompatible with the execution of the functions
 “ of the appellants and their predecessors if it were to involve
 “ the appellants in a material increase in expenditure and on the
 “ facts the appellants would not be involved in any increase in
 “ expenditure whatever;

“(D) section 16 of the Railways Clauses Consolidation Act,
 “ 1845, does not have the effect contended for it by the appel-
 “ lants; otherwise its effect would be that railway undertakers
 “ as a matter of law could in no circumstances dedicate a right
 “ of way across any part of the railway; this proposition is not
 “ supported in any decided case.”

Upon those facts and contentions the justices were of opinion that there had been dedication and accordingly refused to make the declaration sought by the appellants. The question they submitted for the opinion of the High Court was “whether, “on the facts aforesaid, a dedication of the alleged public right “of way was incompatible with the statutory objects of the “appellants.” The Divisional Court and Court of Appeal in turn dismissed the appellants’ appeal. In effect both courts answered the question submitted to them in the negative.

Sir Andrew Clark Q.C., Sir Frank Soskice Q.C. and John Widgery for the appellants. Five initial points are important: (1) The bridge is on land acquired for constructing the railway. The railway passes under the bridge and so this is not surplus land. (2) Before the construction of the bridge no public right of way existed at or near the place where it was constructed. (3) The bridge was constructed purely as a private accommodation bridge. (4) It cannot be found that at no time will conditions arise which will require the widening of the railway. (5) In the future the bridge might interfere with the running of the trains; one cannot tell what scientific developments may occur at a later stage.

The bridge was constructed under the powers of section 16 of the Railways Clauses Consolidation Act, 1845, incorporated in the Kendal and Windermere Railway Act, 1845, by section 1 of that Act. There is a difference between statutory powers and the mere powers of a landowner. If there is no right of way, the appellants can pull down the bridge simply as landowners. If there is a right of way, they can only do so by virtue of statutory powers.

The following submissions are made:

(1) The appellants and their predecessors always had express statutory power to discontinue works and to remove the bridge (see section 16 of the Railways Clauses Act). It cannot be assumed that it will never be necessary for them to exercise that power for the purpose of using the railway.

(2) Such a statutory power is a fiduciary power entrusted to the appellants for the benefit of the public and cannot be abandoned by any voluntary act on their part (a) because of the fiduciary nature of the benefit to the public, and (b) because to abandon it would amount to the amendment of an Act of Parliament, which can only be effected by the legislature.

(3) Such a statutory power as the power to remove a bridge is not necessary, in normal circumstances, to enable a statutory company to remove a bridge or any other erection on its own land. It can do that in its own right as landowner. But statutory powers are necessary to enable the company to remove the bridge if removal would infringe the rights of third parties or of the public. The power in the Act must therefore be deemed to have been inserted for the express purpose of enabling the company to remove a bridge which it could not otherwise have removed because the public or some third person had acquired rights over it.

(4) Alternatively, if a statutory corporation can abandon a statutory power, it can only do so where the power is itself subsidiary and where its abandonment could never interfere with the carrying out of its statutory purposes to the best advantage.

(5) The mere fact that, as circumstances indicated at the time when the abandonment of the power came into question, there was no evidence to show that its abandonment would in fact interfere with the corporation's statutory purposes, is not enough to justify the abandonment of the power. It must be shown that it is inconceivable that at any future date, however remote, any such interference could arise.

(6) It follows, therefore, that in the present case the railway company had no power to dedicate to the public a right of way over the bridge in question greater than a right limited to last only till such time as the railway company should find it necessary to remove the bridge in exercise of its statutory powers.

(7) But it is the essence of a public right of way that it must be dedicated in perpetuity, and in English law there can be no dedication of a way to the public for a limited time, certain or uncertain.

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The obligation on a railway company to provide an accommodation way when its lines sever a landowner's property remains in force only while the property on each side of the railway remains in common ownership, and there is no obligation to keep open the accommodation bridges when the obligation to the landowner comes to an end: *Midland Railway Co. v. Gribble*.¹ The effect of dedicating a right of way over an accommodation bridge would be to prevent the exercise of the power to discontinue the bridge, and that would amount to the abandonment or modification of the statutory power. It is conceded that the mere convenience of two adjoining landowners in visiting each other would be sufficient ground for the maintenance of an accommodation bridge.

It is of the essence of a public right of way that it is perpetual. The dedication can be limited as to the type of user, its quality, but it cannot be subject to a limitation totally extinguishing its user at a subsequent time: see *Dawes v. Hawkins*,² approved in *Corsellis v. London County Council*³; see also Carson's Real Property Statutes, 3rd ed., p. 65, citing *Fitzpatrick v. Robinson*.⁴ The powers conferred on statutory corporations are conferred for the benefit of the public. As to such powers as these, see *Duke of Bedford v. Dawson*⁵ and *Emsley v. North Eastern Railway Co.*⁶

*Rex v. Inhabitants of Leake*⁷ is not inconsistent with the appellants' case. The facts are different here. Further, the conclusions of fact of the majority in that case were not justified. It has no application to a case like the present where dedication would involve the voluntary release or abandonment or modification of a power conferred by a special Act on a statutory undertaker, or by an Act relating to the way in which land acquired for the purposes of the Act may be dealt with: see section 16 of the Act of 1845. It did not lay down as the test of incompatibility whether or not there was any likelihood of the dedication of a right of way materially hindering the statutory undertaker in the efficient and adequate discharge of his duty. The test which it did lay down was whether or not the grant of such an easement might in any possible circumstances in the future hamper the undertaker in carrying out the purposes of his

¹ [1895] 2 Ch. 827, 829 et seq.² (1860) 8 C.B.N.S. 848.³ [1907] 1 Ch. 704; 23 T.L.R. 366.⁴ (1828) 1 H. & B. 585.⁵ (1875) L.R. 20 Eq. 353.⁶ [1896] 1 Ch. 418, 428-429, 432, 434; 12 T.L.R. 219.⁷ (1833) 5 B. & Ad. 469, 477-481, 483.

special Act to the best advantage: see *per* Parke J.⁸ in his use of the word "never."

*Grand Surrey Canal Co. v. Hall*⁹ is against the appellants. The passage based on it and on *North London Railway Co. v. Vestry of St. Mary, Islington*,¹⁰ a case of the same sort, in Pratt and Mackenzie's *Law of Highways*, 19th ed., p. 21, is inaccurate. *Mulliner v. Midland Railway Co.*¹¹ supports the appellants' propositions. There the arch was in fact required by the railway for the purpose of storage.

The test is not the position at the time of the alleged dedication. One must ask whether it is remotely possible that in the future the dedication might interfere with the purposes of the railway, and, if it is even remotely possible, there can be no dedication. *Paterson v. Provost, etc., of St. Andrews*¹² supports the appellants on this point and applies directly to this case. See also *Ayr Harbour Trustees v. Oswald*,¹³ which is decisive in the appellants' favour. *Grand Junction Canal Co. v. Petty*¹⁴ tends the other way, but has no bearing on the point under section 16 of the Act of 1845. In *In re an Arbitration between Gonty and Manchester, Sheffield and Lincolnshire Railway Co.*¹⁵ no question of dedication in fact arose. *Caledonian Railway Co. v. Turcan & Co.*¹⁶ carries the matter no further. See also *Great Western Railway Co. v. Solihull Rural District Council*.¹⁷

From the cases it appears that the right questions to put to a jury in such a case as this would be: (1) Does the user of the right of way interfere with the proper running of the railway? (2) If no, so far as you can foresee, is there any possibility of the continued user of the right of way interfering with the proper running of the railway? (3) Would the inability to remove the bridge be likely to interfere with the proper running of the railway? (4) If no, do the facts show that the inability to remove the bridge could never at any time interfere with the running of the railway? Where there is such a provision as that of section 16 of the Act of 1845 it could never be found that the inability to remove the bridge could never interfere with the proper running of the railway.

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⁸ 5 B. & Ad. 469, 481.⁹ (1840) 1 Man. & G. 392.¹⁰ (1872) 27 L.T. 672.¹¹ (1879) 11 Ch.D. 611, 619, 623.¹² (1881) 6 App.Cas. 833, 843, 846-847, 851.¹³ (1883) 8 App.Cas. 623, 634, 635, 636, 637, 640.¹⁴ (1888) 21 Q.B.D. 273; 4 T.L.R. 502.¹⁵ [1896] 2 Q.B. 439; 12 T.L.R. 617.¹⁶ (1898) 25 R.(H.L.) 7, 16.¹⁷ (1902) 86 L.T. 852; 18 T.L.R. 707.

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*Attorney-General ex rel. Barnes Urban District Council v. London and South Western Railway Co.*¹⁸ was not a question of dedication. *Taff Vale Railway Co. v. Pontypridd Urban District Council*¹⁹ is directly in point when read with the *Ayr Harbour* case.²⁰ One cannot divest oneself of a statutory power.

*Lancashire and Yorkshire Railway v. Davenport*²¹ is not relied on, because it has no bearing on the point under section 16. *In re South Eastern Railway Co. and Whiffin's Contract*²² is a case the other way. But that case was criticized in *Stourcliffe Estates Co. Ltd. v. Bournemouth Corporation*.²³ *South Eastern Railway Co. v. Warr*²⁴ does not help the decision of the present problem, nor does *South Eastern Railway Co. v. Cooper*.²⁵ *Birkdale Electric Supply Co. Ltd. v. Southport Corporation*²⁶ is useful for the speech of Lord Sumner reviewing the authorities. See also *In re Heywood's Conveyance*.²⁷

The cases support the following propositions: (1) A statutory undertaker cannot voluntarily release or abandon any statutory power conferred on it by its special Act of Parliament relating to the manner in which that statutory undertaker may deal with the land acquired for the purposes of the Act. (2) A statutory undertaker cannot, in the absence of express statutory power, grant any easement over land acquired for the purposes of its special Act if its existence might in any possible circumstances at any future time hamper the undertaker in carrying out to the best advantage the purposes of the special Act: the *Ayr Harbour* case,²⁸ *Paterson's case*²⁹; the *Birkdale* case,³⁰ *per* Lord Sumner; the *Taff Vale* case³¹; *In re South Eastern Railway Co. and Whiffin's Contract*,³² and *In re Heywood's Conveyance*.³³ Not one actual decision directly conflicts with either proposition, though some dicta have cast doubt on the second proposition. The Court of Appeal were wrong in holding themselves bound by *South Eastern Railway Co. v. Warr*.³⁴

As to what Singleton L.J. said in the Court of Appeal³⁵ about the Rights of Way Act, 1932, that Act has not so altered the law as to bind the House to find against the appellants: see *Jones v.*

¹⁸ (1905) 69 J.P. 110; 21 T.L.R. 220.

¹⁹ (1905) 93 L.T. 126.

²⁰ 8 App.Cas. 623.

²¹ (1906) 4 L.G.R. 425.

²² [1907] 2 Ch. 366.

²³ [1910] 2 Ch. 12; 26 T.L.R. 450.

²⁴ (1923) 21 L.G.R. 669.

²⁵ [1924] 1 Ch. 211.

²⁶ [1926] A.C. 355; 42 T.L.R. 303.

²⁷ [1938] 2 All E.R. 230.

²⁸ 8 App.Cas. 623.

²⁹ 6 App.Cas. 833.

³⁰ [1926] A.C. 355.

³¹ 93 L.T. 126.

³² [1907] 2 Ch. 366.

³³ [1938] 2 All E.R. 230.

³⁴ 21 L.G.R. 669.

³⁵ [1956] 2 Q.B. 214, 247-248; [1956] 2 All E.R. 129.

Bates.³⁶ Nothing in the Act is inconsistent with the appellants' submissions. H. L. (E.)

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Michael Rowe Q.C., Harold Williams Q.C. and E. S. Temple for the respondents. The appellants and their predecessors in title were at all material times capable of dedicating such foot-paths as these as rights of way. To say that a statutory body is incapable of granting a right of way or an easement, expressly or impliedly, would reverse the law accepted for over a century. Thus, canal towing-paths have been accepted as rights of way. See also *Hunwick v. Essex Rivers Catchment Board*.³⁷

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The general rule as to the limits of the powers of statutory corporations is properly expressed in *Rex v. Inhabitants of Leake*.³⁸ It is not inconsistent with either *Paterson's case*³⁹ or the *Ayr Harbour case*.⁴⁰ Apart from their primary purpose, statutory provisions are not obligatory. Thus, unless a railway company's power to run railway trains is in fact carried out, its fundamental purpose is not being carried out, for the company is bound to run them. The principle in *Leake's case*⁴¹ has been applied in at least 10 cases since the *Ayr Harbour case*.⁴² If the appellants are right, *Leake's case*⁴³ must have been wrongly decided. When Parke J. used the word "never" in that case,⁴⁴ he meant "never, so far as anyone can foresee." The 10 cases referred to are: *Grand Junction Canal Co. v. Petty*⁴⁵; *Foster v. London, Chatham and Dover Railway Co.*⁴⁶; *Dundee Harbour Trustees v. Nicol*⁴⁷ (a postscript to the previous case, not reckoned in the 10); *In re an Arbitration between Gonty and Manchester, Sheffield and Lincolnshire Railway Co.*⁴⁸; *Great Western Railway Co. v. Solihull Rural District Council*⁴⁹; *Attorney-General ex rel. Barnes Urban District Council v. London and South Western Railway Co.*⁵⁰; *Taff Vale Railway Co. v. Pontypridd Urban District Council*⁵¹; *Lancashire and Yorkshire Railway v. Davenport*⁵²; *Great Central Railway Co. v. Balby-with-Hexthorpe Urban District Council*⁵³; *South Eastern Railway Co. v. Warr*⁵⁴ and *South Eastern Railway Co. v. Cooper*.⁵⁵ See also *Magistrates*

³⁶ (1938) 158 L.T. 507, 510-511; 54 T.L.R. 649; [1938] 2 All E.R. 237.

³⁷ [1952] 1 All E.R. 765; 116 J.P. 217.

³⁸ 5 B. & Ad. 469.

³⁹ 6 App.Cas. 833.

⁴⁰ 8 App.Cas. 623.

⁴¹ 5 B. & Ad. 469.

⁴² 8 App.Cas. 623.

⁴³ 5 B. & Ad. 469.

⁴⁴ Ibid. 481.

⁴⁵ 21 Q.B.D. 273.

⁴⁶ [1895] 1 Q.B. 711; 11 T.L.R. 89.

⁴⁷ [1915] A.C. 550; 31 T.L.R. 118.

⁴⁸ [1896] 2 Q.B. 439.

⁴⁹ 86 L.T. 852.

⁵⁰ 69 J.P. 110.

⁵¹ 93 L.T. 126.

⁵² 4 L.G.R. 425.

⁵³ [1912] 2 Ch. 110; 28 T.L.R. 268.

⁵⁴ 21 L.G.R. 669.

⁵⁵ [1924] 1 Ch. 211.

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As to the question of expense raised in the appellants' contention (A) in the case stated, admittedly according to *Great Western Railway Co. v. Solihull Rural District Council*⁵⁸ and *Lancashire and Yorkshire Railway v. Davenport*⁵⁹ if the maintenance of a work like this bridge is likely to cast an extra burden of finance on the undertaker, that is relevant to the question of the compatibility or incompatibility of the dedication with the undertaker's statutory purposes. But compatibility is a question of fact: see *Great Central Railway Co. v. Balby-with-Hexthorpe Urban District Council*⁶⁰ and *South Eastern Railway Co. v. Warr*.⁶¹ Here expense would not produce incompatibility.

From the *Ayr Harbour* case⁶² to the *Birkdale* case⁶³ the principle in *Leake's* case⁶⁴ was consistently applied. In the *Birkdale* case⁶⁵ the Earl of Birkenhead clearly stated the rule as being that of compatibility or incompatibility.

In certain cases incompatibility is so obvious that it speaks for itself. As to the test of incompatibility, the correct approach is to consider what duties the public statutory corporation was established to perform and then consider whether the action in question would materially hinder the corporation from an adequate and efficient discharge of those duties. The duty of a railway to the public is to run its trains safely and efficiently. The test here is whether, at the date when the question is considered by the tribunal of fact, there was any likelihood that the existence of the alleged right of way would interfere with the adequate and efficient discharge of the undertaker's statutory duties. Here the right of way is not inconsistent with the appellants doing their duty as railway undertakers, nor is it likely to be so in the future. In considering the future, one must take into account the likelihood of the land being wanted for railway works and the likelihood of expense being incurred.

As to the question of the grant of a right of way over the bridge being inconsistent with the express statutory powers conferred by section 16 of the Act of 1845, it does not confer on the railway undertakers a mere right of discontinuance; the express power is to discontinue and substitute another work. In the

⁵⁶ (1904) 6 F. 620.

⁵⁷ [1928] Ch. 359; 44 T.L.R. 308.

⁵⁸ 86 L.T. 852.

⁵⁹ 4 L.G.R. 425.

⁶⁰ [1912] 2 Ch. 110.

⁶¹ 21 L.G.R. 669.

⁶² 8 App.Cas. 623.

⁶³ [1926] A.C. 355.

⁶⁴ 5 B. & Ad. 469.

⁶⁵ [1926] A.C. 355, 364.

exercise of the power of any other landowner the appellants could discontinue the bridge without substituting another provided that they disturbed no legal rights. But section 16 gives the railway undertakers a power which qua landlords they would not have, a power to discontinue the bridge against the will of the persons entitled to the accommodation way, paying, if necessary, compensation under the relevant provisions of the Act. Since the appellants now claim a power of discontinuance without substitution, section 16 is not in point.

Further, the power in section 16 is ancillary to the power to make, alter, repair or use the railway: *Emsley v. North Eastern Railway Co.*⁶⁶ and *Pugh v. Golden Valley Railway Co.*⁶⁷ It would be incredible that the existence of such a power should prevent dedication of a right of way where, as here, the dedication was not incompatible with the main purposes of the railway. The test of compatibility or incompatibility applied to the main power governs a subsidiary power.

As to the effect of a long series of cases on the interpretation of a statute, see Maxwell on the Interpretation of Statutes, 10th ed., pp. 308-309, and *Morgan v. Crawshay*.⁶⁸ Section 1 of the Rights of Way Act, 1932, has recognized the validity of the doctrine in *Leake's* case.⁶⁹ To annul the long line of cases following it would have serious effects.

When this bridge ceased to be an accommodation bridge, the obligation to maintain it would fall on the local authority.

Harold Williams Q.C. following. In the matter of dedication, there is a relationship between the right of passage and the powers of the undertaker. If a public right of way is established on the bank of a river or canal or over a railway, the way is considered to be dedicated to the public, subject to the statutory rights of the undertakers: see *Grand Junction Canal Co. v. Petty*⁷⁰ and *Attorney-General ex rel. Barnes Urban District Council v. London and South Western Railway Co.*⁷¹ If the railway undertakers wanted to remove this bridge by virtue of their statutory rights, that would override the common law right of passage. That might result in a right of way over the line instead of over the bridge. This argument is not concerned with the question of the liability to maintain the bridge but with the existence of the right of way. Paths are known to go over a

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The law of Scotland as regards the creation of rights of way is different from that of England: see *Mann v. Brodie*.⁷² The fiction of dedication does not exist in Scotland. Scottish cases are not a safe guide on the creation of a highway.

Sir Andrew Clark Q.C. in reply. The matter really comes back to *Leake's case*.⁷³ No other case cited by the respondents is a direct authority. That case establishes that statutory undertakers cannot dedicate a public right of way if in any way it may interfere with the performance of their statutory purposes. The question to be asked is whether the existence of the alleged right of way might, in any possible circumstances, at any future time, hamper the undertakers in carrying out to the best advantage the purposes of their special Act. The whole matter turns on the ratio decidendi of *Leake's case*,⁷³ what it decided, whether it was rightly decided and whether it has been overruled. It is a difficult case to understand, but what it laid down was not the principle for which the respondents contend. Parke J. held that the court was entitled to infer from the facts that the existence of the right of way could never interfere with the statutory purposes of the drainage Act, that the bank in question was not required for the works, i.e., that it was surplus land, that the road would be of advantage to the drainage works and that the benefit resulting from it might be as great as any pecuniary consideration which might be obtained from a sale. Lord Denman C.J. held that he could not infer that the right of way would necessarily interfere with the statutory purposes, that the existence of good roads was desirable from the point of view of the maintenance of the drains and so that the making of the road was within the express powers of the Act, since the cheapest way of getting good roads was to dedicate them to the public. His judgment does not touch the present problem. The only principle to be deduced from *Leake's case* ⁷³ is that it is not within the powers of statutory undertakers to dedicate a public right of way unless it can be established that the right will never interfere with the carrying out of their statutory powers and that the dedication is not wholly gratuitous. If that is right, then it is in complete accord with the *Ayr Harbour case*.⁷⁴ If *Leake's case* ⁷⁵ purported to lay down a wider principle, then that is wrong and it cannot stand, because it is contrary to *Paterson's*

⁷² (1885) 10 App.Cas. 378, 385-386.

⁷⁴ 8 App.Cas. 623.

⁷³ 5 B. & Ad. 469.

⁷⁵ 5 B. & Ad. 469.

case,⁷⁶ the *Ayr Harbour* case⁷⁷ and the *Birkdale* case,⁷⁸ decisions of the House of Lords, and it is not too late to overrule it: see *Caledonian Railway Co. v. Turcan*.⁷⁹ See also section 23 of the Highway Act, 1935, and *Robinson v. Richmond (Surrey) Borough Council*.⁸⁰

The Rights of Way Act, 1932, was not intended to alter the substantive law, only the law of evidence. The point as to the meaning of incompatible remains open.

The appellants' contention (A) in the case stated is not now advanced as a separate contention.

Their Lordships took time for consideration.

May 14. VISCOUNT SIMONDS. My Lords, these consolidated appeals, in which the British Transport Commission are appellants and the Westmorland County Council and the Worcester-shire County Council respectively are respondents, raise a question of general importance. It will be sufficient to state the facts and contentions in regard to the appeal in which the Westmorland County Council are respondents. The same conclusion must be reached in both cases.

[His Lordship stated the facts and continued:] I must for a moment recur to the appellants' contentions as they appear in the case stated. Contention (A) is no longer advanced as a separate contention. Contentions (B) and (C) may fairly be said to be directed to the general question submitted by the justices, but learned counsel for the appellants found it convenient to argue the case upon the alternative pleas: (a) that the dedication of public rights of way in the circumstances of the case would amount to a repeal of the appellants' statutory power to discontinue the bridge in certain events and would thus be ultra vires; and (b) that such dedication would have been incompatible with the public or statutory purposes for which the appellants and their predecessors held their lands. It is, however, clear that the two pleas interlock: for one aspect of incompatibility might consist in such a surrender of power as to debar the performance of the statutory purpose. I propose, therefore, to examine the case upon the footing that the real question is that which was submitted by the justices, not, however, closing my mind to the aspect of the question to which I have just referred.

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⁷⁶ 6 App.Cas. 833.

⁷⁷ 8 App.Cas. 623.

⁷⁸ [1926] A.C. 355.

⁷⁹ [1898] A.C. 256, 266-267.

⁸⁰ [1955] 1 Q.B. 401; [1955] 1 All E.R. 321.

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Before I refer to the authorities, which are numerous, it is perhaps desirable to state that, in my opinion, they are by no means irreconcilable, as has been suggested, but that the single difficulty is to ascertain from them what is the test of incompatibility which is to guide the court in determining whether an act proposed to be done by a railway or other statutory company is incompatible with the statutory purpose for which it was authorized to acquire and acquired its land.

Any examination of this question must begin with the case of *Rex v. Inhabitants of Leake*,¹ which has been cited in many cases, some of them in this House, and never disapproved. The decision goes to the root of the matter, and, often as they have been cited, I think I should remind your Lordships of the words of Parke J. in that case. "If," he said, "the land were vested by the Act of Parliament in commissioners, so that they were thereby bound to use it for a special purpose, incompatible with its public use as a highway, I should have thought that such trustees would have been incapable in point of law to make a dedication of it; but if such use by the public be not incompatible with the objects prescribed by the Act, then I think it clear that the commissioners have that power."

Here a principle is laid down which is supported not only by a great weight of succeeding authority but by its inherent reasonableness. For, though, on the one hand, it would be improper that commissioners or other persons having acquired land for a particular statutory purpose should preclude themselves from using it for that purpose, on the other hand, if consistently with its user for that purpose, it can be used for some other purpose also, I see no impropriety in such secondary user. If the usefulness of a parcel of land is not exhausted by its user for its statutory purpose, why should it not be used for some other purpose not incompatible with that purpose?

This, at least, is the view which has been consistently taken for over 100 years, and I do not doubt that any departure from it would be fraught with most serious consequences to assumedly well-established public rights. Amongst the cases to which reference might be made some have a particular value because they were later in date than the case of *Ayr Harbour Trustees v. Oswald*,² upon which the appellants strongly relied, and were decided in the light of that binding decision. I may mention such cases as *Grand Junction Canal Co. v. Petty*³; *Foster v.*

¹ (1833) 5 B. & Ad. 469, 478.² (1883) 8 App.Cas. 623.³ (1888) 21 Q.B.D. 273; 4 T.L.R.

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*London, Chatham and Dover Railway Co.*⁴; *In re an Arbitration between Gonty and Manchester, Sheffield and Lincolnshire Railway Co.*⁵; *Taff Vale Railway Co. v. Pontypridd Urban District Council*⁶; *South Eastern Railway Co. v. Cooper*⁷; *Birkdale District Electric Supply Co. Ltd. v. Southport Corporation*.⁸ If in the case of *Mulliner v. Midland Railway Co.*⁹ there are to be found observations by Sir George Jessel which do not conform with this long line of authority, they cannot be given the weight which is usually accorded to the decisions of that very learned judge. They have in fact been the subject of judicial criticism and explanation: see, e.g., *Gonty's case*¹⁰ and *Petty's case*.¹¹

It was, however, upon the *Ayr Harbour case*¹² that counsel for the appellants mainly relied, suggesting, if I understood the argument, that a proper understanding of that case must lead to a decision in his favour. I think, on the contrary, that this contention is based on a radical misunderstanding of it. For it appears to me that in the *Ayr Harbour case*¹² it was plain that the proposed agreement by the statutory body, which had acquired land for a particular purpose, that they would not use it so as to interfere with the access from other property of the vendor to the sea, was regarded as incompatible with the statutory purpose. It was in fact an example of incompatibility, not a decision to the effect that incompatibility does not supply a test. This was clearly the view of Lord Sumner in the *Birkdale case*.¹³ Similar observations may be made on the case of *Paterson v. Provost, etc., of St. Andrews*,¹⁴ which gives equally little support to the appellants.

If I am right in saying that the principle of *Leake's case*¹⁵ must be applied here, I must next consider what is the test of incompatibility, which, as I have already said, appears to me to be the real difficulty in the case. This is a question of fact. It can be nothing else and it has been so treated, and expressly so treated, in many of the cases to which I have referred. But to say this does not completely solve the problem. For the jury or tribunal of fact must still be properly directed what is the test, and it is to this point that counsel for the appellants directed his attack. He urged that there could only be incompatibility, or, perhaps I should here say, compatibility, if it could be proved

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that in no conceivable circumstances could the proposed user at any future time and in any way possibly interfere with the statutory purpose for which the land was acquired. If he is right, it is clear that the justices in the present case did not ask themselves the right question or ascertain the relevant facts.

My Lords, I am satisfied that this argument is misconceived. In the first place, in none of the relevant cases, neither in those that I have already mentioned nor in those, far more numerous, that I have examined, has anything of the kind been suggested. Parke J.'s use of the word "never" in *Leake's* case¹⁶ was clearly not intended to have so dramatic an effect. But in the second place, to give to incompatibility such an extended meaning is in effect to reduce the principle to a nullity. For a jury, invited to say that in no conceivable circumstances and at no distance of time could an event possibly happen, could only fold their hands and reply that it was not for them to prophesy what an inscrutable Providence might in all the years to come disclose. I do not disguise from myself that it is difficult to formulate with precision what direction should be given to a jury. But, after all, we live in a world in which our actions are constantly guided by a consideration of reasonable probabilities of risks that can reasonably be foreseen and guarded against, and by a disregard of events of which, even if we think of them as possible, we can fairly say that they are not at all likely to happen. And it is, in my opinion, by such considerations as these, imprecise though they may be, that a tribunal of fact must be guided in determining whether a proposed user of land will interfere with the statutory purpose for which it was acquired. At an earlier stage of this opinion I set out at length the facts found by the justices in order that it might be seen how far they had correctly directed themselves in reaching their conclusion that there had been a dedication of the way in question. In paragraph 2 (H), (I), (J) and (K) of the stated case they find the facts as they are now and as they are, in their view, likely to be. I do not think that there is any sin of commission or omission to be found in them or that it can be said that upon the basis that I have attempted to lay down they were not well entitled to reach their conclusion.

I should upon this part of the case add that there was some discussion whether a tribunal of fact must look at the facts as they are at the date when the matter arises for determination

¹⁶ 5 B. & Ad. 469, 481.

or, disregarding the present, try to look at them as they existed when the dedication was presumed to be made. It is possible, my Lords, that a case may arise in which it becomes relevant to decide this question, but inasmuch as a presumption of dedication arises after user for a number of years but there is no presumption of the date of dedication and in the present case the justices adopted the course most favourable to the appellants by looking at the facts as they are today and can today reasonably be foreseen, I do not think it necessary to say any more on this question.

My Lords, I come now to that part of the argument for the appellants, which, though it is comprehended in the broad question of incompatibility, was treated as an independent plea. It was to the effect that in the circumstances of the present case the dedication of a right of way over the overbridge in question would amount to a repeal of the appellants' statutory power to discontinue the bridge and would thus be ultra vires. This plea looks back to section 16 of the Railways Clauses Consolidation Act to which I have already referred, and it is stated in a way which gives it a superficial attraction. But it is not accurate to say that, if a statutory body puts it out of its power to act in an authorized manner in a particular case, that amounts to a repeal pro tanto of the Act of Parliament. This appears to me to be involved in the larger conclusion that I have already reached that land acquired for a particular statutory purpose may yet be used for another purpose which is not incompatible with it. The argument here, too, could be that user for another purpose precludes user for the statutory purpose and therefore pro tanto amounts to a repeal of the Act. But such an argument is rejected because the statutory purpose is not defeated so long as the secondary user is compatible with it. A fortiori, where the question is not of the main purpose of the undertaking but of the exercise of a power under section 16, the question is whether its non-exercise, or such an act as will preclude its exercise, is consistent with the statutory purpose for which the land was acquired. The answer must be precisely that which has already been given. It is consistent: it is not incompatible. The single new fact which might in some other case be of importance is that the continued existence of a bridge, which the appellants would in other circumstances demolish, might involve them in certain costs of maintenance. But in the present case it was disclaimed as a separate ground of incompatibility and I have been unable to discern its relevance in any other

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way. Nor do I think it necessary to consider what may be the respective obligations of the appellants and the local authority in the event of the bridge being no longer required as an accommodation work but being still necessary to support the public way. This is a question which has not arisen and may never arise.

Reference was made in the course of the argument before the House to section 1 of the Rights of Way Act, 1932, subsection (7) of which provides: "Nothing in this section contained shall affect any incapacity of a corporation or other body or person in possession of land for public or statutory purposes to dedicate any such way where such way would be incompatible with such public or statutory purposes." I agree with Singleton and Hodson L.J.J. that the subsection does not help the appellants but on the contrary, by preserving the existing law and recognizing that incompatibility of a public way with statutory purposes is the test, confirms the view that the principle of *Leake's* case¹⁷ prevails.

For these reasons, which shortly adopt the judgments of the Divisional Court and the Court of Appeal, I am of opinion that both appeals should be dismissed. I cannot conclude without saying how much I have owed in preparing this opinion to the careful and exhaustive judgment of the late Singleton L.J.

LORD MORTON OF HENRYTON. My Lords, I shall deal only with the Westmorland case as that was the only case argued before your Lordships and it is agreed that the same question arises in each of the two consolidated appeals.

The bridge over which the alleged public right of footway runs was constructed by the predecessor in title of the appellant commission solely as a private accommodation crossing for the benefit of the owners or occupiers of lands severed by the construction of the Kendal and Windermere railway. Since the construction of that railway members of the public have used the bridge in such manner and for such period as to give rise to a presumption that the same had been dedicated as a public footpath if the owner of the bridge were capable of such dedication. See finding (E) in paragraph 2 of the case stated.

Sir Andrew Clark, for the appellant commission, submitted that neither the commission nor the railway company which was its predecessor in title was capable of such dedication. His reasons were (1) that a dedication of a public right of way over

¹⁷ 5 B. & Ad. 469.

the bridge would prevent the undertakers from exercising at any time a statutory power, namely, the power to discontinue the bridge, which is conferred by section 16 of the Railways Clauses Consolidation Act, 1845. That Act is incorporated with the special Act, the Kendal and Windermere Railway Act, 1845; (2) that such a dedication might, at some future time, hamper the undertakers in carrying out to the best advantage the purposes of the special Act.

My Lords, in my opinion, the only rule applicable to the present case is that a statutory company has no power to grant a public right of way the enjoyment whereof by the public is incompatible with the statutory objects of the company. This rule was established as a rule of law by a long series of cases, starting with *Rex v. Inhabitants of Leake*¹⁷ and has been recognized by this House in *Birkdale District Electric Supply Co. Ltd. v. Southport Corporation*.¹⁸

It is common ground between the parties that the question of incompatibility is a question of fact, but there is a vital difference in the views put forward on behalf of each party as to the proper question to be put to the tribunal of fact. Sir Andrew Clark submitted that the question should be "whether the existence of the alleged right of way might, in any possible circumstances, at any future time, hamper the undertaker in carrying out to the best advantage the purposes of its special Act." Mr. Rowe, for the respondent council, submitted that the question should be "whether at the date when the question is considered by the tribunal of fact, there is any likelihood that the existence of the alleged right of way would interfere with the adequate and efficient discharge of the undertaker's statutory duties."

My Lords, I can find no decision, in the long line of authority cited in argument, which is clearly in favour of Sir Andrew Clark's version, and I find several cases in which the court appears to have acted upon the view that Mr. Rowe's version is the right one. As examples I would mention *Grand Junction Canal Co. v. Petty*¹⁹ and *In re an Arbitration between Gonty and Manchester, Sheffield and Lincolnshire Railway Co.*²⁰

I do not find this result surprising, for if Sir Andrew Clark's version is correct, it would, I think, be impossible ever to presume dedication of a public right of way by a statutory railway company over any part of the land which it had acquired for the

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purposes of its Act. A right of way is a burden upon the land. I cannot think that it would be possible for a tribunal of fact honestly to find that the existence of such a right could never at any time, and in any possible circumstances, hamper the undertaker; yet there are many cases in which a dedication of a public right of way has been presumed against a statutory railway company.

I therefore accept Mr. Rowe's submission, and turn to consider whether, upon the facts found in the case stated, there is any likelihood that the existence of a public right of way over the bridge would interfere with the adequate and efficient discharge of the commission's statutory duties.

It is first to be borne in mind that the bridge is an accommodation crossing and there is no evidence that it has ceased to be required for the purpose for which it was erected. Indeed, it cannot be said with certainty that a time will ever come when it is no longer required for that purpose, for the land on each side of the line may remain indefinitely in one ownership and there may never be any agreement with the owner that the bridge may be discontinued.

Next, there is, of course, no obligation upon the commission to exercise the power to discontinue the bridge, even if the time comes when it is no longer required for accommodation purposes.

Finally, the findings of fact (H), (I), (J) and (K) in paragraph 2 of the case stated make it clear that it is extremely unlikely that the commission will ever find it necessary to discontinue the bridge for the purposes of its undertaking. I use the word "necessary" because it has been held that each one of the powers conferred by section 16 of the Railways Clauses Consolidation Act, 1845, can be exercised only when it is necessary for making, maintaining, altering or repairing and using the railway: see *Reg. v. Wycombe Railway Co.*,²¹ approved in *Pugh v. Golden Valley Railway Co.*,²² and *Emsley v. North Eastern Railway Co.*²³

I add that I am by no means satisfied that it would be impossible to discontinue the bridge, either under the statutory power or at common law, if it were no longer required as an accommodation way and if a public right of way existed over it. I find it unnecessary, however, to deal with this question, in view of the findings of fact to which I have just referred.

²¹ (1867) L.R. 2 Q.B. 310.

²² (1880) 15 Ch.D. 390.

²³ [1896] 1 Ch. 418; 12 T.L.R. 219.

For these reasons, my Lords, I am of opinion that the question which I have posed should be answered in the negative. It follows that I would dismiss the appeals.

LORD RADCLIFFE. My Lords, I agree that these appeals ought to be dismissed. I should not say more but for the fact that the principles of law which bear upon their subject appear to me to stand so curiously related that I do not want to part with the appeals without saying something as to what I conceive to be involved in the decision now proposed. It means, I think, that we must cut down two very far-reaching general propositions of law, valuable in themselves, to proportions that are manageable in relation to the particular set of circumstances with which we are now confronted.

Both these general propositions support the appellants' argument. One proposition is that laid down by Jessel M.R. in *Mulliner v. Midland Railway Co.*²⁴ It is to the effect that a railway company, which operates under statutory powers of managing its railway conferred upon it for the furtherance of the public interest, is devoid of legal capacity to grant any easement or right of way over land acquired by it unless expressly authorized by statute so to do. It has not, generally speaking, the full capacity of disposition enjoyed by a private owner of land. The other proposition, which is distinct from the first, is that no body corporate or unincorporate, which holds property or rights under powers conferred upon it for the public benefit can make a disposition or agreement effective in law by which it abdicates its freedom to exercise those powers at any time in the future. The second proposition rests principally upon two decisions of this House in Scottish cases, *Paterson v. Provost, etc., of St. Andrews*,²⁵ *Ayr Harbour Trustees v. Oswald*.²⁶

Mulliner's case²⁷ was decided in 1879. It has been referred to again and again in other cases, both in argument and in judgments of the court. It has certainly never been overruled: on the contrary Sir George Jessel's statement of the law has twice been made the very foundation of unanimous decisions in the Court of Appeal: see *Great Western Railway Co. v. Solihull Rural District Council*²⁸ and *Great Western Railway Co. v. Talbot*.²⁹ More than that, part of his reasoning (though

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²⁴ 11 Ch.D. 611.²⁵ 6 App.Cas. 833.²⁶ 8 App.Cas. 623.²⁷ 11 Ch.D. 611.²⁸ (1902) 86 L.T. 852; 18 T.L.R. 707.²⁹ [1902] 2 Ch. 759; 18 T.L.R. 775.

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not directly his reasoning on this point) was quoted with approval by Lord Blackburn when making the first speech in this House in the *Ayr Harbour* case.³⁰ In any ordinary combination of circumstances one would say that the legal principle laid down in *Mulliner's* case³¹ was firmly established.

On the other hand, it is equally certain that for many years there has been a tendency to treat *Mulliner*³¹ as having stated the law in terms different from those actually employed. It has been subjected to a process of judicial explanation. Few authorities can have been explained so often with such little fidelity to the original source. In 1888, in *Grand Junction Canal Co. v. Petty*,³² the court treated *Mulliner*³³ as being a decision in which "the facts of the case . . . pointed to a different conclusion of fact from that on which the decision in *Rex v. Inhabitants of Leake*³⁴ was founded." In *South Eastern Railway Co. v. Cooper*³⁵ Pollock M.R. referred to *Mulliner*³⁶ as "a case . . . of very special character," and Warrington L.J., in the same case, similarly discounts the significance of Sir George Jessel's intended proposition of law by describing it³⁷ as made "in reference to the facts of that case." That, I suppose, could be said with as much or as little force about all judgments. Yet two things at least are plain from a reading of *Mulliner*³⁸: first, that there was nothing special about the facts—they related to a purported grant of a right of way through arches forming the substructure of a station—and, secondly, that Sir George Jessel rested his decision upon what he himself called the "general law." The question that he put and answered in the negative was: "Has a railway company any power by law to alienate, either for value or without value, any portion of the land actually used for the railway or works," except so far as express provision to that effect is made in its regulating Act? From that he deduced, as was pointed out and approved by Rigby L.J. in *In re an Arbitration between Gonty and Manchester, Sheffield and Lincolnshire Railway Co.*,³⁹ that the grant of any easement was similarly forbidden.

Gonty's case³⁹ is yet another Court of Appeal case in which *Mulliner*⁴⁰ was commented on. The case itself amounted to a decision that, in considering whether part of a building could

³⁰ 8 App.Cas. 623, 634-635.

³¹ 11 Ch.D. 611.

³² 21 Q.B.D. 273, 275.

³³ 11 Ch.D. 611.

³⁴ 5 B. & Ad. 269.

³⁵ [1924] 1 Ch. 211, 223.

³⁶ 11 Ch.D. 611.

³⁷ [1924] 1 Ch. 211, 232.

³⁸ 11 Ch.D. 611, 617, 619.

³⁹ [1896] 2 Q.B. 439.

⁴⁰ 11 Ch.D. 611.

be severed from the rest "without material detriment thereto," that being the only condition upon which a railway company could effect the severance under a special statutory power, it was legitimate to treat the railway company as having legal power to grant a right of access over the portion proposed to be taken, and to assess compensation accordingly. I have not sufficient ingenuity at my command to be able to say how this decision can be good law in the face of *Ayr Harbour Trustees v. Oswald*,⁴¹ in which it was decided by this House that in assessing compensation for injurious affection of land retained arising from compulsory acquisition of other land previously part of the same holding it was not legitimate to treat the undertakers as having legal power to grant a right of access over the land acquired. However that may be, in *Gonty's* case⁴² Lord Esher M.R. appeared to regard *Mulliner*⁴³ as being inconsistent with the view that the undertaker could grant the right of access but as being an authority which he was not prepared to follow. A. L. Smith L.J. said⁴⁴ that he was not going to controvert *Mulliner*,⁴⁵ but thought that if it were to be "cited as a case which says that "the railway company cannot give an easement through its own "embankment from one side to the other" he could not agree with it. Unfortunately, the learned Lord Justice did not say what, in his view, *Mulliner*⁴⁵ could be cited for if not for that, and his illustration of the power or duty of a railway company to create an accommodation access through its embankment, when it severs land, does nothing to clear up the matter since, of course, in such a case there is a statutory obligation to provide just such accommodation. Rigby L.J., as I have said, thought that *Mulliner*⁴⁵ did decide that no perpetual right of way could lawfully be created by a railway company over land taken and required for its purposes. "That . . . is all that case was "intended to decide, and the case has no bearing on that "before us."⁴⁶

For completeness, I ought to add that there have been further comments on or proffered explanations of *Mulliner*⁴⁷ in *Taff Vale Railway Co. v. Pontypridd Urban District Council*⁴⁸ and in *South Eastern Railway Co. v. Warr*.⁴⁹ Neither, I think, enables one to say with any confidence just how far it stands as an authority today or for what proposition.

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How flickering is the illumination which these authorities throw upon the main principle of law can be seen if one compares the decision of Joyce J. in 1912 in *Great Central Railway Co. v. Balby-with-Hexthorpe Urban District Council*⁵⁰ with the decision of Swinfen Eady J. in 1909 in *South Eastern Railway Co. v. Associated Portland Cement Manufacturers (1900) Ltd.*⁵¹ In the former the learned judge, after referring to *Mulliner*⁵² and *Gonty*,⁵³ held⁵⁴ it to be clear law that a railway company could not grant or dedicate a right of way over its lines of rails. In the latter the learned judge, after referring to the same two cases, thought⁵⁵ that there was "nothing whatever in that point" that a railway company "could not grant . . . the easement of "tunnelling under" its line.

In my opinion, the root of the trouble lies in the fact that the courts have not truly accepted the validity of Sir George Jessel's proposition⁵⁶ that a railway company lacks legal capacity to grant an easement over railway land "except . . . with a view to "the traffic of their railway." Side by side with this proposition and without explicitly rejecting it they have in fact been accepting and working on a different rule for statutory undertakers, viz., that they can grant easements over their land so long as the exercise of such easements is not inconsistent or incompatible with the fulfilment of the statutory purpose. This rule is regarded as being derived from *Rex v. Inhabitants of Leake*.⁵⁷ I do not think it profitable to inquire at this date whether that case, fairly considered, did amount to a decision of the court embodying any such rule. If we were reviewing it for the first time today I should feel much doubt about that. But I think that we are bound to recognize that for very many years and on many occasions courts have taken as their test the words of Parke J.⁵⁸: ". . . if such use by the public be not incompatible "with the objects prescribed by the Act, then I think it clear that "the commissioners have that power," and have treated this test as a pragmatic one, to be answered according to the facts ascertainable at the time when the question arises. Some of the cases which recognize this test as the governing rule have been referred to in the speech of the noble and learned Viscount on the Woolsack. As he says, there are others.

⁵⁰ [1912] 2 Ch. 110; 28 T.L.R. 268.

⁵¹ [1910] 1 Ch. 12; 26 T.L.R. 61.

⁵² 11 Ch.D. 611.

⁵³ [1896] 2 Q.B. 439.

⁵⁴ [1912] 2 Ch. 110, 122.

⁵⁵ [1910] 1 Ch. 12, 25.

⁵⁶ 11 Ch.D. 611, 623.

⁵⁷ 5 B. & Ad. 469, 478.

⁵⁸ Ibid.

Such a rule has many drawbacks. It means that the validity of any easement must depend on the state of facts ascertained or reasonably foreseeable at the time when it is challenged in legal proceedings; and no one can tell in advance upon what occasion a challenge will arise. It is very hard to know what measure of foresight or what extremity of prudence to allow to the judge of fact. It leads to what may well be, I think, misleading comparisons between different statutory undertakers and their works—railway lines, reservoirs, canals, towpaths, drains and bridges. It has led to much confusion between the voluntary grant or dedication of a right *de novo*, the provision of accommodation ways or works under statutory obligation, and the voluntary enlargement of rights of way existing before the creation of the works and therefore necessarily preserved. Each of these classes may involve different considerations. When the distinctions have all been allowed for, I think that it is accurate to say that, although the test derived from *Rex v. Inhabitants of Leake*⁵⁹ has often been accepted and propounded, it has never yet resulted in a finding that the voluntary grant by a railway company of a right of way over its lines on the level of the lines is an effective grant. A possible exception is the case of *South Eastern Railway Co. v. Cooper*⁶⁰: but the judgments delivered by the Court of Appeal in that case are not so expressed as to enable me to say with any certainty what was the ratio decidendi that formed the ground of their decision.

Nevertheless, I think that the accepted rule, with all its defects, is better than no rule at all. The construction of railways, at any rate, drove steel barriers over many hundred miles of the English countryside. To hold that at no time, at no point, and in no circumstances could a railway company grant *de novo* even a footway over, across, or under its lines would be a grave impediment to public amenity. In my opinion, therefore, we ought to say that *Mulliner*⁶¹ cannot stand today as a binding decision in so far as it laid down the proposition that a railway company lacks legal capacity to grant a right of way over or under its railway lands, including the site of the permanent way. I think myself that the error in the reasoning of that case lay in treating any grant of an easement as equivalent to an alienation for this purpose. Technically, as a matter of conveyancing, such a grant is no doubt a form of alienation. But in the context of the powers of a railway company over the whole extent of the

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⁵⁹ 5 B. & Ad. 469.⁶⁰ [1924] 1 Ch. 211.⁶¹ 11 Ch.D. 611.

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railway lands a grant of an easement and an outright sale may amount to very different things. It seems to me better to say baldly that on this occasion a great judge laid down a proposition of law in terms that are too comprehensive to be maintainable than to continue to explain his decision in language that he did not use to justify conclusions which contradict his expressed opinion.

Now, the other proposition which fortifies the appellants' arguments is that laid down in the two cases, *Paterson v. Provost, etc., of St. Andrews*⁶² and *Ayr Harbour Trustees v. Oswald*.⁶³ *Paterson's* case⁶⁴ is the earlier in date, though *Oswald's* case⁶⁵ is, I think, the one more often referred to.

Both cases related to the question whether bodies holding land for purposes beneficial to the public interest could abdicate the potential exercise of certain powers over part of the land by ceding rights in it to other persons or to the public. In *Paterson's* case⁶⁶ the land concerned was the links at St. Andrews which were held by the magistrates of the burgh for behoof of the inhabitants, subject to the obligation of preserving them for the purposes of the game of golf and for the recreation and amusement of the inhabitants. What the magistrates were proposing to do was to construct a macadamized road along the boundary of the links. The learned Lords who heard the appeal, assisted by a volume of evidence from those skilled at golf, were evidently satisfied that there was no reason to fear that the addition of this feature would "interfere with the due prosecution of the "game"⁶⁷; "such variation in the state of the ground as it would "introduce," said Lord Selborne L.C., "would, in the event of "balls finding their way there, rather add to than detract from "the interest of the game . . .": while Lord Watson, speaking with something like levity, observed⁶⁸ that "really the speculation as to whether it is better to have a road with ruts in it, or a "metalled road, or a piece of grass with hollows and heaps, is "after all rather a matter of fancy than a question having any "substance in it." It followed that there was nothing in law to prevent the magistrates from making up their road and allowing people the use of it.

On the other hand, it was the clear view of all the members of the House who took part in that decision that it was not

⁶² 6 App.Cas. 833.

⁶³ 8 App.Cas. 623.

⁶⁴ 6 App.Cas. 833.

⁶⁵ 8 App.Cas. 623.

⁶⁶ 6 App.Cas. 833.

⁶⁷ Ibid. 843.

⁶⁸ Ibid. 853.

within the power of the magistrates to abdicate any part of their control of the site of the road or, consequently, to dedicate it as a public highway; and the judgment approved by the House was worded accordingly. The whole point of the decision was to establish the distinction between the competence of the magistrates to make a road and allow passage over it, and their incompetence to grant to the public or to individuals or to allow them to acquire any title to a right of way over it. Their opinion on this point is, I think, contained in the following words of Lord Watson⁶⁸: “. . . such a change may come over St. Andrews “ that it may become necessary in the due exercise of their “ administrative powers for the town council to take away this “ right of road. One cannot anticipate that such a thing will “ immediately occur, but it may, and those who have the right “ to take recreation, and to play golf upon the links, are quite “ entitled to have a judgment which will prevent the magistrates “ from making such an alienation at the present moment as may “ come at any future period into collision with their rights over “ this piece of land . . . ” That imposes a very stern test. It does not depend on evidence. It looks to possibility, not to any standard of reasonable probability.

The facts of *Oswald's* case⁶⁹ are so familiar that I do not need to set them out. The harbour board had acquired part of his land, and the question arose what amount of compensation they ought to pay him for injurious affection of the remainder. To reduce the damage and so his compensation they were ready to secure him a right of permanent access to that remainder over the part they had taken. There was no evident reason why they should not so lay out the projected wharves and roads as to leave space for access by this means. They did not have to fill up the land taken with buildings. Nevertheless, this House decided that they had no power to grant Oswald any permanent right over that land, because to do so would amount to depriving the present trustees and their successors of the discretion which their Act had vested in them, the power of using that land as the site of buildings if at any time the needs of their undertaking should require it. That would be to renounce “ a part of their statutory “ birthright,” as Lord Sumner said in the *Birkdale* case.⁷⁰ Striking as the phrase is, it does not seem to me to offer much help in deciding which are the cases in which the principle of

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Paterson's case⁷¹ and *Oswald's* case⁷² is to be applied, where, as he says, "the very nature of the grants or the contract itself" provides the answer, and which are those many other cases in which the test to be applied is the humbler one of incompatibility proved by evidence. The birthright of a statutory corporation includes all those powers and rights with which it is thought proper to invest it at its creation: and I do not think it easy for a court of law to decide merely by the nature of the thing which of those powers are inalienably entailed and which can be disentailed and disposed of by ordinary grant.

In my opinion, we are bound to recognize that the principle of these two cases cannot be applied in all circumstances and on all occasions to all statutory corporations and public bodies. That, indeed, has already been recognized by the decision of this House in the *Birkdale* case,⁷³ in which the electric supply company had certainly made a contract which deprived themselves and their successors of power at any future time to raise the charges for their supply beyond a fixed limit, however much the needs of their undertaking might require it. It is of some importance to remember, when searching for a dividing line, that the two cases which "spoke for themselves" were both concerned with defined areas of land of no great extent, and the possible consequence of renouncing powers over such areas could be stated as a matter of practical observation. But nothing like the same observation can be brought to bear when the factors of the problem are, on the one hand, all the general powers derived by a railway company from the Railway Clauses Consolidation Act, 1845, and, on the other hand, many miles of railway lines covering great varieties of setting. In such cases what I have called the pragmatic test is, I think, to be preferred.

That consideration derives some support from the fact that we are dealing here with under- and over-bridges constructed as accommodation ways provided on severance. Such structures are not imposed upon the railway line ab extra by voluntary initiative of the railway undertakers themselves. On the contrary, their creation and maintenance for an indefinite period are conditions subject to which the undertakers are required to operate their line. Moreover, section 68, which imposes this condition, itself adds the proviso "the company shall not be required to make" "such accommodation works in such a manner as would prevent

⁷¹ 6 App.Cas. 833.⁷³ [1926] A.C. 355.⁷² 8 App.Cas. 623.

"or obstruct the working or using of the railway." But, if so, I cannot feel that there is much substance in the argument that the company had no power to grant a public right of way over such works because their existence is a natural defect to the best working of the line which ought to be removed as soon as the accommodation purpose is itself exhausted.

LORD COHEN. My Lords, I need not restate the facts. It is sufficient to say that it is common ground that (1) the facts found by quarter sessions in the Westmorland case would raise a presumption of dedication of the footpath in question as a public right of way provided that it was not ultra vires for the appellants or their predecessors in title so to dedicate it, and (2) there is no material distinction between the Westmorland case and the Worcestershire case. Quarter sessions, the Divisional Court and the Court of Appeal have all held that dedication was not ultra vires.

The Lord Chief Justice, delivering the judgment of the Divisional Court, adopted the test laid down by Lord Wensleydale, then Parke J., in *Rex v. Inhabitants of Leake*,⁷⁴ as follows: "If the land were vested by the Act of Parliament in commissioners, so that they were thereby bound to use it for some special purpose, incompatible with its public use as a highway, I should have thought that such trustees would have been incapable in point of law, to make a dedication of it; but if such use by the public be not incompatible with the objects prescribed by the Act, then I think it clear that the commissioners have that power." The Lord Chief Justice pointed out⁷⁵ that that case had been followed again and again, and went on to say that the question of incompatibility must be a question of fact to be decided by jury or judge, whichever in the particular case be the tribunal of fact. After distinguishing the case of *Ayr Harbour Trustees v. Oswald*,⁷⁶ he held that on their findings of fact quarter sessions came to a correct decision.

In the Court of Appeal each of their Lordships delivered a judgment. They adopted the same test as that which I have already cited from the judgment of the Lord Chief Justice, and held that on the facts found by quarter sessions they were bound by authority to uphold the decision of the courts below.

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[1956] 2 Q.B. 226; [1956] 1 All E.R.

⁷⁵ [1956] 2 Q.B. 214, 227-228; 321.

[1956] 2 All E.R. 129; affirming

⁷⁶ 8 App.Cas. 623.

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Before your Lordships Sir Andrew Clark, for the appellants, did not dispute that *Rex v. Inhabitants of Leake*⁷⁷ was rightly decided on its facts, but after a careful and helpful review of the authorities, he submitted that: (1) It had no application to a case where, as here, dedication would involve the voluntary release or abandonment or modification of a power conferred on a statutory undertaker by a special Act, or by any Act incorporated therewith relating to the manner in which the statutory undertaker may deal with land acquired for the purposes of the Act; (2) *Rex v. Inhabitants of Leake*⁷⁷ did not lay down as the test of incompatibility whether there was any likelihood of the dedication of a right of way materially hindering the statutory undertaker from an adequate and efficient discharge of his duties. The test laid down, said Sir Andrew, was whether the grant of an easement over the land might in any possible circumstances at any future time hamper the undertaker in carrying out to the best advantage the purposes of its special Act.

The first of these submissions is founded on section 16 of the Railways Clauses Consolidation Act, 1845, which Act was, by section 1 of the Kendal and Windermere Railway Act, 1845, incorporated in the last-mentioned Act. Section 16 sets out the various works which a railway company may execute, and the section applies both to works for the construction of the railway and to accommodation works. The provision relied on by Sir Andrew was a provision that the company might from time to time alter, repair or discontinue the works and substitute others. This provision is followed by a provision conferring power to do all other acts necessary for making, maintaining, altering or repairing and using the railway.

I pause here to observe that it has been held that this last limb of section 16 is in reality a proviso upon the whole section, and that the works authorized by the section must be works necessary for making, altering, repairing or using the railway: see *Emsley v. North Eastern Railway Co.*,⁷⁸ per A. L. Smith L.J.

Sir Andrew argued that since it has been held that the obligation on a railway company to provide an accommodation way when its line severs a landowner's property remains in force only so long as the property on the two sides of the railway is in common ownership (see *Midland Railway Co. v. Gribble*⁷⁹), the effect of dedicating a right of way over the accommodation bridge might be to prevent the exercise of this power of discontinuing

⁷⁷ 5 B. & Ad. 469.⁷⁹ [1895] 2 Ch. 827.⁷⁸ [1896] 1 Ch. 418, 434.

the bridge. This, he said, amounted to the abandonment or modification of the statutory power. H. L. (E.)

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Dealing with this argument, the Lord Chief Justice said ⁸⁰:
 “ If this contention be right, it is indeed strange that it has never
 “ before been the subject of a decision or even mentioned in any
 “ of the judgments on the subject. There does seem to be a trace
 “ of an argument on this point in *Attorney-General ex rel. Barnes*
 “ *Urban District Council v. London and South Western Railway*
 “ *Co.*,⁸¹ but it can hardly have been pressed as the judgment of
 “ Farwell J. does not refer to it. In *Taff Vale Railway Co.*
 “ *v. Pontypridd Urban District Council*,⁸² had the point been
 “ taken it would have afforded a short and complete answer.”
 With these observations I respectfully agree.

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Mr. Rowe, for the respondents, countered Sir Andrew's argument based on section 16 by two propositions.

I. First, he said that section 16 does not confer a bare power to discontinue but only a power to discontinue and substitute another work. He admits that the company could discontinue without substituting another bridge, but he says that it would do so not under the section but in exercise of the power which any landowner would have if by discontinuance he disturbs no existing right. Section 16, the argument ran, is directed to conferring on a railway company a power which merely qua landowner it would not have, i.e., a power against the will of the person entitled to the accommodation way to discontinue it and replace it by another accommodation way, paying, if necessary, compensation under the relevant provisions of the Act. Mr. Rowe submitted that since Sir Andrew's argument connoted discontinuance without substitution, section 16 had no relevance.

II. Mr. Rowe submitted that since the power to discontinue conferred by section 16 is ancillary to the power to make, alter, repair or use the railway (see *Emsley's case* ⁸³), it would be incredible that the existence of this ancillary power can prevent dedication in a case where, as here, on the facts it is held that the dedication of the right of way is not incompatible with the main purpose of the railway.

I agree with the second submission and do not, therefore, find it necessary to express a concluded opinion on the first. For the reasons I have given, I would reject the first of Sir Andrew's

⁸⁰ [1956] 2 Q.B. 214, 228.

⁸² 93 L.T. 126.

⁸¹ (1905) 69 J.P. 110; 21 T.L.R.

⁸³ [1896] 1 Ch. 418.

H. L. (E.) reasons for distinguishing this case from *Rex v. Inhabitants of Leake*.⁸⁴

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If his second reason were well founded, it is difficult to conceive of a case in which a tribunal of fact could arrive at the conclusion that the dedication of the right of way was compatible with the objects prescribed by the Act. I doubt whether it could ever be said that in no possible circumstances at any future time could a railway company desire, for example, to widen its track. Sir Andrew, however, says that his proposition is supported by the language of Parke J. in *Rex v. Inhabitants of Leake*,⁸⁵ where he says: "I think, that if it is quite clear that such works would " never be required, the commissioners, whether special or " general, might give the right to the public." Sir Andrew stresses the word "never." The sentence, divorced from its context, lends some support to his argument, but reading the judgment as a whole, and having regard in particular to the next following paragraph thereof, I think it is clear that Parke J. regards the question as one of fact, to be determined, no doubt, not merely in the light of the position on the date of trial but in the light also of the probable future requirements of the company in the fulfilment of its railway purposes.

Sir Andrew also relied on the language of Jessel M.R. in *Mulliner v. Midland Railway Co.*,⁸⁶ where he said: "It appears " to me quite impossible that the railway company can have a " right either to sell, grant, or dispose of this land, or of any ease- " ment or right of way over it, except for the purposes of their " Act, that is to say, with a view to the traffic of their railway." The dispute in that case was as to a right of way granted by the railway company under one of the arches on which one of the company's railway stations was built. The evidence clearly established that the existence of the right of way would interfere with the company's railway undertaking and the grant was held to be ultra vires. The correctness of the decision has never been challenged, but the dictum to which I have referred, if divorced from the facts of the case, in my opinion goes too far. This view is supported by the observations of the members of the Court of Appeal in *Grand Junction Canal Co. v. Petty*,⁸⁷ and in *In re an Arbitration between Gonty and Manchester, Sheffield and Lincolnshire Railway Co.*⁸⁸ In the former case it was held

⁸⁴ 5 B. & Ad. 469.

⁸⁷ 21 Q.B.D. 273.

⁸⁵ Ibid. 481.

⁸⁸ [1896] 2 Q.B. 439.

⁸⁶ 11 Ch.D. 611, 623.

that the dedication of land as a public footpath was not inconsistent with its use by the canal company as a tow-path, and in the latter it was held that the giving of a private right of way over certain lands of the railway company was not inconsistent with the purposes of the railway company. In the former case Lord Esher said that he did not think that in *Mulliner's* case⁸⁹ the late Master of the Rolls meant to decide anything in contravention of what was decided in *Rex v. Inhabitants of Leake*.⁹⁰

Sir Andrew also relied on the decision of this House in *Ayr Harbour Trustees v. Oswald*.⁹¹ This case had been relied on by Sir Frank Soskice before the Divisional Court. Lord Goddard C.J. dealing with his argument said⁹²: "In our opinion that case "has no application to the present. The harbour trustees were "empowered by statute to acquire compulsorily an area of land "for the purpose of their undertaking on payment of compensation to the owner of the land acquired. They sought to reduce "the amount of compensation by offering to enter into a covenant "with the dispossessed owner restricting themselves from building on or using a considerable portion of the land which the "Act permitted them to take. To this the owner objected and "claimed that he was entitled to be compensated for what he "had lost and that the company had no power to sterilize the "land, to use a convenient expression, and to covenant not to use "that which the statute authorized them to acquire. It was "held, to use Lord Sumner's expression in the *Birkdale* case,⁹³ "that the company could not thus dispose of their statutory "birthright. Here the dedication does not prevent the use of the "land by the railway though it burdens it, as must always be "the case where there is dedication."

With these observations I respectfully agree, and would only add that the very fact that the land the user of which it was proposed to restrict was included in the schedule connoted that its acquisition was then in the eyes of the legislature required for the purpose of the undertaking.

It is also to be observed that Lord Herschell did not regard the decision in *Ayr Harbour Trustees v. Oswald*⁹⁴ as inconsistent with the line of authorities following *Rex v. Inhabitants of Leake*,⁹⁵ for in *Caledonian Railway Co. v. Turcan & Co.*⁹⁶ he said: "In my view, without expressing any opinion upon the

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⁸⁹ 11 Ch.D. 611.⁹⁰ 5 B. & Ad. 469.⁹¹ 8 App.Cas. 623.⁹² [1956] 2 Q.B. 214, 229.⁹³ [1926] A.C. 355, 372.⁹⁴ 8 App.Cas. 623.⁹⁵ 5 B. & Ad. 469.⁹⁶ (1898) 25 R.(H.L.) 7, 18.

H. L. (E.) "decision in that case" (*Gonty's case*⁹⁷) "it does not conflict,
1957 "as has been supposed, with the case of *Oswald v. Ayr Harbour*
"Trustees."⁹⁸

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The last case to which I need refer is *Paterson v. Provost, etc., of St. Andrews*.⁹⁹ It was not cited in either of the courts below but Sir Andrew submitted that it was really conclusive in his favour. The question at issue was as to the powers of the corporation in relation to the links, the property in which was vested in the corporation, subject to the obligation admitted to have subsisted from time immemorial of preserving the links for the purposes of the game of golf and for the recreation and amusement of the inhabitants.

The case is somewhat remote from the present case, but properly understood it seems to me to support the respondents' case. I would refer to a passage from the speech of Lord Watson where he says¹⁰⁰: "Now, my Lords, although they hold it "subject to these rights on the part of the inhabitants, the magistrates and council remain undivested to any further extent of "their proprietary rights, and are therefore entitled either to "make or to sanction any other uses to which the property is "convertible so long as those uses are not inconsistent with the "due enjoyment by the burgesses of the rights vested in them by "law. What uses they may so sanction will depend to a very "great extent upon the amount of population and the amount of "the golf played or recreation taken. Uses which would be "perfectly legitimate and proper in a thinly populated burgh may "become very illegitimate and very improper, and may constitute "invasions of the burgesses' rights, when practised where there "is a large population.

"My Lords, what the magistrates and town council were proposing to do at the time when this action was raised appears "to me to have been this, they were acting upon the assumption "that it was within their competency to confer upon the public "at large a right of way over a portion of the ground which it "was their duty to preserve for purposes consistent with the "rights of the inhabitants; and they justified their position upon "the ground that as matters stood at that date, no right of the "inhabitants would be invaded thereby. I think that was a mistaken view of the law and of the extent of their power, because "they would thereby have vested in others a right which might

⁹⁷ [1896] 2 Q.B. 439.

⁹⁸ 8 App.Cas. 626.

⁹⁹ 6 App.Cas. 833.

¹⁰⁰ Ibid. 851-852.

" become inconsistent with the rights of the inhabitants at some future time. H. L. (E.)

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" The appellants brought this action no doubt with a view to stop the threatened proceedings, but they did not limit the conclusions of their summons to the actual proceedings which the council were threatening to take, but made them so wide that, if given effect to, they would establish this proposition, that wherever a right of golfing or of recreation exists the magistrates cannot give a comfortable or convenient right of passage over the ground reserved for that purpose, although the so giving it may not interfere to the smallest extent with the rights of the burgesses."

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I read that passage as laying down that it was a question of fact whether what the corporation proposed to do would interfere with the rights of the burgesses. Lord Watson no doubt stressed that in reaching a conclusion on that issue of fact the court must have regard not only to the position as it was at the moment of trial but also to what was likely to happen in the future, but I find nothing in *Paterson's case*¹⁰¹ disapproving of the statement of the law by Parke J. in *Rex v. Inhabitants of Leake*,¹⁰² or of the application of that statement of the law in the many cases to which reference was made in the course of the argument.

*Paterson's case*¹⁰³ was referred to by Lord Birkenhead in *Birkdale District Electric Supply Co. Ltd. v. Southport Corporation*¹⁰⁴ and he did not suggest that it conflicted with *Rex v. Inhabitants of Leake*.¹⁰⁵ In the same case Lord Sumner referred with approval to *Rex v. Inhabitants of Leake*¹⁰⁶ and¹⁰⁷ explained the *Ayr Harbour case*¹⁰⁸ as being a case where the *res ipsa loquitur maxim* applied and the question of competence did not depend on a proved incompatibility between statutory purposes and the proposed user. It was in this case that Lord Sumner used the picturesque phrase "statutory birthright"¹⁰⁹ and explained the *Ayr Harbour case*¹⁰⁹ as being one in which the trustees were proposing to renounce a part of their statutory birthright. It is, however, plain from his speech that he considered that the question whether a company was renouncing or seeking to renounce its statutory birthright would normally be a question of fact to be decided on the evidence.

¹⁰¹ 6 App.Cas. 833.

¹⁰² 5 B. & Ad. 469.

¹⁰³ 6 App.Cas. 833.

¹⁰⁴ [1926] A.C. 355.

¹⁰⁵ 5 B. & Ad. 469.

¹⁰⁶ [1926] A.C. 355, 372.

¹⁰⁷ 8 App.Cas. 623.

¹⁰⁸ [1926] A.C. 355, 372.

¹⁰⁹ 8 App.Cas. 623.

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Reading his judgment as a whole, I think he was approving the decision in *Rex v. Inhabitants of Leake*¹¹⁰ and stating in other language the principle there laid down by Parke J. that the question whether there is power to dedicate a right of way depends on whether the user by the public of that right of way would be compatible with the object prescribed by the statute appointing commissioners or creating the statutory company as the case might be. The question remains as to the test of compatibility. On that I cannot usefully add anything to what has been said by my noble and learned friend on the Woolsack and by Lord Morton of Henryton. I agree with the test they propose. As I read the case stated, that was the test applied by quarter sessions in the present case.

For these reasons I agree that the appeal should be dismissed.

LORD KEITH OF AVONHOLM. My Lords, I agree and, but for the fact that certain Scottish authorities were referred to and stressed in the argument for the appellants, I would have had nothing to add. No differences that exist between the laws of the two countries in the matter of constitution of public rights of way affect, in my opinion, the principles upon which these cases fall to be decided. The law of Scotland is certainly no less favourable to the constitution of a right of way in circumstances such as the present than the law of England.

The Scottish case nearest in its facts is *Magistrates of Edinburgh v. North British Railway Co.*¹¹¹ Lord Kinnear in that case held that the necessary user to establish a public right of way over a railway within the confines of Edinburgh had not been established. He expressed, however, an alternative ground of judgment which is stated in the headnote to the case as: "*Opinion* "that a public right of way cannot be acquired by user over lands "held by a railway company for the purposes of the railway, "and that it makes no difference that the lands have been "acquired by private agreement, and not by the exercise of compulsory powers." If Lord Kinnear was intending to lay down as a matter of law that in no circumstances could the public acquire a right of way over railway property, I think, with all respect to the great authority of that eminent judge, that such an opinion is not consistent with the train of authority to which your Lordship on the Woolsack has referred. There are, however, in Lord Kinnear's opinion passages that suggest he was perhaps influenced by the fact that in the circumstances of that

¹¹⁰ 5 B. & Ad. 469.

¹¹¹ (1904) 6 F. 620.

case a public right of passage was incompatible with the conduct of the traffic on the railway, and if that was the ground of his opinion it was entirely consistent with English authority.

The case of *Ayr Harbour Trustees v. Oswald*¹¹² creates no difficulty. That was a very plain case of ultra vires. It did not turn upon any question of conflict of rights, but upon whether harbour trustees had any power to sterilize land which they proposed to acquire compulsorily by binding themselves and their successors not to use it for the statutory purposes for which alone it could be acquired. Lord Sumner in *Birkdale District Electric Supply Co. Ltd. v. Southport Corporation*¹¹³ covers such a case where he says “. . . in default of proof of incompatibility in the ‘present case, some other consideration of a cogent kind must ‘be found.’” Another consideration of a cogent kind existed in the *Ayr Harbour Trustees* case,¹¹⁴ as Lord Sumner himself recognized. I would only add that the observations of Lord Watson and Lord Herschell in *Caledonian Railway Co. v. Turcan & Co.*¹¹⁵ do not suggest that they thought the creation of a right of way over land acquired under statutory powers was so obviously impossible that it could be condemned out of hand. They leave the decision in *In re an Arbitration between Gonty and Manchester, Sheffield and Lincolnshire Railway Co.*¹¹⁶ not, it is true, approved, but at least undisturbed.

The case of *Paterson v. Provost, etc., of St. Andrews*¹¹⁷ was much relied on by appellants’ counsel, but I doubt whether it is apt as an authority in the territory with which the present appeal is concerned. The magistrates of St. Andrews held certain land for the enjoyment by the inhabitants of St. Andrews of golfing and recreation thereon. They were in effect trustees of the land for these purposes. The point at issue was focused by Lord Watson in the following passage¹¹⁸: “. . . they [the magistrates ‘and town council] were acting upon the assumption that it ‘was within their competency to confer upon the public at large ‘a right of way over a portion of the ground which it was their ‘duty to preserve for purposes consistent with the rights of the ‘inhabitants; and they justified their position upon the ground ‘that as matters stood at that date, no right of the inhabitants ‘would be invaded thereby. I think that was a mistaken view ‘of the law and of the extent of their power, because they would

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of Avonholm.¹¹² 8 App.Cas. 623.¹¹³ [1926] A.C. 355, 370.¹¹⁴ 8 App.Cas. 623.¹¹⁵ 25 R.(H.L.) 7.¹¹⁶ [1896] 2 Q.B. 439.¹¹⁷ 6 App.Cas. 833.¹¹⁸ 6 App.Cas. 833, 851-852.

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“ thereby have vested in others a right which might become inconsistent with the rights of the inhabitants at some future time.”

That the magistrates could do no positive act that was in breach of their duty to the inhabitants is clear. But it does not follow that by tacit acquiescence, indifference, or neglect they might not have allowed a public right of way to be established over the golf links. I know of no authority or principle which would have prevented the public, by appropriate use of a path over the golf links from one public place to another for an uninterrupted period of 40 years, from establishing the existence of a public right of way. The principle of presumed dedication has no place in the law of Scotland and accordingly it is not possible, in my opinion, to build up on the case of *Paterson*¹¹⁹ any argument favourable to the appellants.

On the facts proved here the assumed inconsistency of the existence of a right of way with the subsidiary powers conferred on the appellants by section 16 of the Railways Clauses Consolidation Act, 1845, seems to me unreal. Whether the appellants could at some future time remove the bridge does not at the moment call for consideration. Even if they could and did, it does not follow that the right of way would disappear, nor has it been shown that the exercise of the right of way would then become incompatible with the running of the railway. Incompatibility is a question of fact, not a question of law, and where the facts are such as would be sufficient to presume dedication to the public of a right of way in all other respects it is, in my opinion, for the statutory undertaker to prove incompatibility, and not for those asserting the right to prove compatibility. The speech of Lord Sumner in *Birkdale District Electric Supply Co. Ltd. v. Southport Corporation*,¹²⁰ though given in a somewhat different kind of case, contains passages to the same effect and in this matter I think no distinction can be taken between the two cases.

I would dismiss these appeals.

Appeals dismissed.

Solicitors: *M. H. B. Gilmour; Sharpe, Pritchard & Co. for Clerks to Worcester and Westmorland County Councils.*

F. C.

¹¹⁹ 6 App.Cas. 833.

¹²⁰ [1926] A.C. 355.

Cotham SoC Appendix 8

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Commentary. The trial judge appears to have been misled by the dicta in *Gibson and Gibson* (1984) 80 Cr.App.R. 24 at 30. The commentary at [1984] Crim.L.R. 616 warned that these remarks should be treated with caution and, it is thought, stated the true position (as applied by the court in the present case) which need not, therefore be repeated here. Unfortunately, the commentary probably did not appear in time for any effect it might possibly have had on the present case.

The prosecution is clearly in great difficulty where there is evidence that injuries have been inflicted on a child by one or other of the parents but there is no evidence that the injuries were inflicted by one rather than the other or by both, or by one with the encouragement of the other.

When the Police and Criminal Evidence Act 1984 comes into force the spouse of a person charged with an assault or sexual offence against a person under the age of sixteen will be compellable to give evidence for the prosecution: section 80(3). This does not apply, of course, where the spouses are jointly charged, when neither is competent or compellable for the prosecution: section 80(4). It will assist the prosecution, therefore, only where they have evidence that one rather than the other is to blame and they prosecute only the party they believe to be guilty. [J. C. S.]

NUISANCE

Glue-sniffing—causing a nuisance and disturbance—Local Government (Miscellaneous Provisions) Act 1982, s.40.

Sykes v. Holmes and Maw

High Court of Justice: Queen's Bench Divisional Court: Stephen Brown L.J. and Mann J.: July 11, 1985.⁴

The respondents were charged with an offence contrary to section 40 of the Local Government (Miscellaneous Provisions) Act 1982—being unlawfully on premises, causing a nuisance and disturbance to the annoyance of persons who lawfully used the premises. They were found in a school playground, after school hours, sniffing glue. The playground had been used for such purposes before and had required clearing up to avoid danger to the children using the school. The justices found that the mere act of inhaling solvents unobserved, outside school hours when the staff and pupils were not present could not of itself be said to cause a nuisance etc. to persons who lawfully used the premises. They dismissed the informations. The prosecutor appealed by way of case stated.

Held, allowing the appeal and remitting the case to the justices to continue the hearing, section 40 provided that the lawful users of the premises concerned need not be present at the time of the accused's act(s). The activities of the respondents could constitute a nuisance—see *Thompson-Schwab v. Costaki* [1956] 1 All E.R. 652—as unduly interfering with the comfortable and convenient enjoyment of land. Having regard to the annoyance and distress caused, as indicated by the evidence of the School's headmistress, there was a case to answer.

[Reported by Lynne Knapman, Barrister.]

⁴ For the appellant: *P. Robertshaw* (instructed by Messrs. Warren Murton, London, W.1, agents for Mr. A. R. Sykes, City Solicitor, Bradford Metropolitan Council). For the respondent: *G. E. Shelton* (instructed by Messrs. Irvine & Co., Bradford).

Commentary. In *Thompson-Schwab v. Costaki* the Court of Appeal decided that there was sufficient prima facie evidence for an interlocutory injunction restraining the defendants from using premises for prostitution because the perambulations of the prostitutes and their customers constituted a sensible interference with the comfortable and convenient enjoyment by the plaintiffs of neighbouring residences, having regard to the usages of civilised society and to the character of the neighbourhood. That was a civil proceeding for private nuisance and certainly did not decide that the offence of public nuisance was committed. It is, however, relevant to the question whether there was "nuisance . . . to the annoyance of persons who lawfully use those premises . . ." within the meaning of the section. "Disturbance" is an alternative to nuisance.

"Nuisance" is a vague concept and so wide-ranging as, arguably, to be unsuited to the definition of an offence in modern criminal law; but the effect of the present decision is limited, as the section applies only to playgrounds, playing fields and other premises for outdoor recreation, and schools or further education establishments provided or maintained by a local education authority. [J. C. S.]

PRECEDENT

Overruling previous decision of Divisional Court.

Hornigold v. Chief Constable of Lancashire

High Court of Justice: Queen's Bench Divisional Court: Robert Goff L.J. and Beldam J.: June 27, 1985.⁵

The appellant appealed unsuccessfully to the Crown Court against a conviction for driving with excess alcohol contrary to section 6 of the Road Traffic Act 1972 (as substituted by the Transport Act 1981). The Crown Court set aside a witness summons to Dr. Jones of Lion Laboratories and ruled that cross-examination and evidence directed to the alleged unreliability of the Lion Intoximeter generally was inadmissible. The appellant challenged those decisions. Counsel for the appellant sought to re-argue the matters despite the decision of the Divisional Court in *ex p. Cardy* [1985] R.T.R. 49 which was given after the decision of the Crown Court in the present case.

Held, dismissing the appeal, although it was right that, having regard to the principles stated in *R. v. Greater Manchester Coroner, ex p. Tal* [1984] 3 W.L.R. 643, the Divisional Court was not absolutely bound by a previous decision of another Divisional Court, it is perfectly plain from what was said therein that there will be departure from a previous decision only where the Court is convinced that that decision was wrong. *Ex p. Tal* was not intended to provide freedom to parties to re-argue points simply on the ground that they might persuade the Court to reach a different conclusion. Before a point may be re-argued, the party must be able to indicate, at the outset of the argument, specific material on the basis of which it may properly be submitted that the Court may be convinced that the previous decision was plainly wrong.

[Reported by Lynne Knapman, Barrister.]

⁵ For the appellant: *C. Nicholls Q.C.* and *C. Limb* (instructed by Messrs. J. S. Seizant & Co., Chorley, Lancs). For the respondent: *J. Hugill Q.C.* and *P. Openshaw* (instructed by Messrs. Sharpe Pritchard & Co., London W.C.2, agents for Mr. J. V. Bates, Chief Prosecuting Solicitor, Preston, Lancs.). For Dr. Williams of Lion Laboratories: *H. M. Boggis-Rolfe* (instructed by Messrs. Walters Fladgate & Co., London W.1, agents for Messrs. Phillips & Buck, Cardiff).

2 A.C.

A [HOUSE OF LORDS]

THRASYVOULOU RESPONDENT

AND

SECRETARY OF STATE FOR THE ENVIRONMENT APPELLANT

B OLIVER AND OTHERS RESPONDENTS

AND

HAVERING LONDON BOROUGH COUNCIL . . . APPELLANTS

[CONJOINED APPEALS]

C 1989 Oct. 24, 25, 26, 30; Lord Bridge of Harwich,
Dec. 14 Lord Brandon of Oakbrook, Lord Griffiths,
Lord Jauncey of Tullichettle and Lord Lowry

*Estoppel—Per rem judicatam—Issue estoppel—Planning appeal—
Inspector's decision that properties used as hotels—Enforcement
D notices alleging use of properties as hostels—No change of use
since inspector's decision—Whether inspector's decision giving
rise to issue estoppel per rem judicatam—Allegation in enforcement
notice differing from findings as to established use in earlier
enforcement appeal—Whether issue estoppel—Town and Country
Planning Act 1971 (c. 78), ss. 36, 88 (as amended by Local
Government and Planning (Amendment) Act 1981 (c. 41), s. 1,
Sch., para. 1)*

E In the first appeal, there was an established use certificate
for hotel use in respect of one of a number of properties
which were predominantly used for providing temporary
accommodation for homeless families. In 1982 the owner
appealed under section 36 of the Town and Country Planning
Act 1971 against the wording of planning permission for an
extension to that property. The owner also appealed under
F section 88 of the Act of 1971 against enforcement notices issued
by the council alleging a material change of use of three other
properties and requiring that use to be terminated. The
inspector found that all four properties were used as hotels.
The council did not appeal. In February 1985 the council issued
further enforcement notices in relation, inter alia, to the four
properties, alleging a material change of use of the properties to
use as hostels. It was common ground that there had been no
G change of use since 1982. The owner appealed under section 88
and the second inspector found that the properties were used as
hostels. On appeal to the High Court the judge upheld the
inspector's decision. On the owner's appeal on the ground that
an issue estoppel arose as a result of the earlier proceedings and
the inspector's decision in 1982 concerning the four properties,
the Court of Appeal allowed the appeals.

H On appeal by the Secretary of State:—

Held, dismissing the appeal, that the doctrine of res judicata
was not confined to adjudications in the area of private law;
that in relation to adjudications in the area of public law, which
were subject to a comprehensive self-contained statutory code,
there was a presumption that where the statute had created a

specific jurisdiction for the determination of any issue which established the existence of a legal right, the principle of res judicata applied to give finality to that determination unless an intention to exclude that principle could be properly inferred from the relevant statutory provisions; that a consideration of the Town and Country Planning Act 1971 led to the conclusion that the determination in favour of the appellant of an appeal against an enforcement notice brought on any of the grounds specified in section 88(2)(b) to (e) of the Act gave rise to an estoppel per rem judicatam; and that accordingly the inspector had erred in law in failing to give effect to such an estoppel (post, pp. 289C-E, 295B, 298A-D).

Per curiam. To adopt the terminology and classification propounded by Diplock L.J. in *Thoday v. Thoday* [1964] P. 181, 197, and applying it by analogy to the issues arising on an appeal against an enforcement notice on any of the grounds specified in section 88(2)(b) to (e) of the Act of 1971, the analogue of a “cause of action estoppel” arises whenever the determination of the ground decided in favour of the appellant on an appeal against one enforcement notice can be relied on in an appeal against a second enforcement notice which is in the same terms and is directed against the same alleged development as the first (post, pp. 295C-D, 296A-C).

Dictum of Diplock L.J. in *Thoday v. Thoday* [1964] P. 181, 197, C.A. applied.

Decision of the Court of Appeal [1988] Q.B. 809; [1988] 3 W.L.R. 1; [1988] 2 All E.R. 781 affirmed.

In the second appeal, the owners and occupiers of a piece of land had been served by the council in 1982 with an enforcement notice relating to a structure situated thereon, alleging a material change of use of the structure for storage purposes without the grant of planning permission. The owners appealed on the ground, *inter alia*, that the use of that structure was part of the use of the land as a whole as a transport and storage depot which was an established use having been carried on before 1964. The inspector upheld the appeal. In 1986 the council served an enforcement notice alleging a material change of the use of the land to a use for the purposes of a business of merchants, importers, repackers and distributors of various named goods without the grant of the relevant planning permission. On appeal by the owners, the inspector dismissed the appeal and found that there had been a material change in the character of the land as a whole since 1963 to the use described in the notice. On appeal by the owners, the deputy judge allowed the appeal holding that he was bound by the decision of the Court of Appeal in *Thrasyvoulou v. Secretary of State for the Environment* as to the application of issue estoppel and that in view of the planning history of the land an estoppel arose which vitiated the 1986 enforcement notice.

On appeal by the council to the House of Lords pursuant to section 12(1) of the Administration of Justice Act 1969, it being expressly conceded that there had been no material change in the character of the use of the land between the dates of the two enforcement notices:—

Held, dismissing the appeal, that the first inspector’s decision involved by necessary implication the finding that the use actually being made of the land at the date of service of the first

2 A.C. **Thrasyvoulou v. Environment Secretary (H.L.(E.))**

- A enforcement notice was an established use, however described; that accordingly, in the circumstances, the council were now estopped from asserting that there was a material change of use between 1963 and 1982 which expressly contradicted a finding made by the first inspector, since it was a finding not merely incidental or ancillary to his decision but was the fundamental basis for his finding that no breach of planning control was involved in the use being made of the structure which was the subject of the first notice (post, pp. 297D–G, 298A–D).
- B Decision of Mr. Malcolm Spence Q.C. sitting as a deputy judge of the Queen's Bench Division affirmed.

The following cases are referred to in the opinion of Lord Bridge of Harwich:

- C *Maritime Electric Co. Ltd. v. General Dairies Ltd.* [1937] A.C. 610; [1937] 1 All E.R. 748, P.C.
Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government [1960] A.C. 260; [1959] 3 W.L.R. 346; [1959] 3 All E.R. 1, H.L.(E.)
Southend-on-Sea Corporation v. Hodgson (Wickford) Ltd. [1962] 1 Q.B. 416; [1961] 2 W.L.R. 806; [1961] 2 All E.R. 46, D.C.
Square Meals Frozen Foods Ltd. v. Dunstable Corporation [1974] 1 W.L.R. 59; [1974] 1 All E.R. 441, C.A.
- D *Thoday v. Thoday* [1964] P. 181; [1964] 2 W.L.R. 371; [1964] 1 All E.R. 341, C.A.
Wakefield Corporation v. Cooke [1904] A.C. 31, H.L.(E.)
Young v. Secretary of State for the Environment [1983] 2 A.C. 662; [1983] 3 W.L.R. 382; [1983] 2 All E.R. 1105, H.L.(E.)

The following additional cases were cited in argument:

- E *English-Speaking Union of the Commonwealth v. Westminster London Borough Council* (1973) 26 P. & C.R. 575
Fairmount Investments Ltd. v. Secretary of State for the Environment [1976] 1 W.L.R. 1255; [1976] 2 All E.R. 865, H.L.(E.)
Fidelitas Shipping Co. Ltd. v. V/O Exportchleb [1966] 1 Q.B. 630; [1965] 2 W.L.R. 1059; [1965] 2 All E.R. 4, C.A.
- F *Newbury District Council v. Secretary of State for the Environment* [1981] A.C. 578; [1980] 2 W.L.R. 379; [1980] 1 All E.R. 731, H.L.(E.)
Padfield v. Ministry of Agriculture, Fisheries and Food [1968] A.C. 997; [1968] 2 W.L.R. 924; [1968] 1 All E.R. 694, H.L.(E.).
Pioneer Aggregates (U.K.) Ltd. v. Secretary of State for the Environment [1985] A.C. 132; [1984] 3 W.L.R. 32; [1984] 2 All E.R. 358, H.L.(E.)
Sennar, The (No. 2) [1985] 1 W.L.R. 490; [1985] 2 All E.R. 104, H.L.(E.)
Shephard v. Buckinghamshire County Council (1966) 18 P. & C.R. 419
- G *Tebbutt v. Haynes* [1981] 2 All E.R. 238, C.A.
Western Fish Products Ltd. v. Penwith District Council [1981] 2 All E.R. 204, C.A.

THRASYVOULOU V. SECRETARY OF STATE FOR THE ENVIRONMENT

H APPEAL from the Court of Appeal.

This was an appeal by the Secretary of State for the Environment against the judgment dated 28 January 1988 of the Court of Appeal (Parker and Ralph Gibson L.JJ. and Caulfield J.) allowing an appeal by the owner, Aristophanes Thrasyvoulou, from the judgment dated 25

November 1986 of McCowan J., dismissing the owner's appeals against enforcement notices dated 7 February 1985 served by Hackney London Borough Council, relating to properties in Wilberforce Road, London, N.4. A

The facts are stated in the opinion of Lord Bridge of Harwich.

John Laws and *Duncan Ouseley* for the Secretary of State.

Michael Rich Q.C. and *Joseph Harper* for the owner. B

The council did not appear and was not represented.

OLIVER AND OTHERS V. HAVERING LONDON BOROUGH COUNCIL

APPEAL from Mr. Malcolm Spence Q.C. sitting as a deputy judge of the Queen's Bench Division. C

This was an appeal by leave dated 21 June 1988 of the House of Lords by Havering London Borough Council from the judgment dated 28 April 1988 of Mr. Malcolm Spence Q.C. sitting as a deputy judge of the Queen's Bench Division, whereby he allowed an appeal under section 246 of the Town and Country Planning Act 1971 (as amended) by Anthony Cyril Oliver, Elsie May Oliver and Oliver's of Hornchurch Ltd., the freehold owners of land at and at the rear of numbers 13-19, The Avenue, Hornchurch, Essex, against a decision of an inspector appointed by the Secretary of State for the Environment to determine an appeal under section 88 of the Act against an enforcement notice issued by the council. By his order the deputy judge remitted the matter to the Secretary of State for rehearing and redetermination by him. The deputy judge by his judgment having held that he was bound by the decision of the Court of Appeal in *Thrasyvoulou v. Secretary of State for the Environment* granted a certificate pursuant to section 12(1) of the Administration of Justice Act 1969 that a point of law of general public importance was involved, namely, whether the concept of issue estoppel should apply in planning law so as to preclude an inspector appointed by the Secretary of State from determining an appeal under the Town and County Planning Act 1971 in accordance with the provisions of the Act. D E F

The facts are stated in the opinion of Lord Bridge of Harwich.

William Glover Q.C. and *Gregory Stone* for the council.

John Laws and *Duncan Ouseley* for the Secretary of State.

Jeremy Sullivan Q.C. and *Brian Ash* for the owners. G

**William Glover Q.C.* and *Gregory Stone* for Havering London Borough Council. The main issue which arises in both appeals is whether the doctrine of issue estoppel applies to enforcement proceedings appeals. If the answer is in the affirmative then a second point arises in the *Oliver* case.

The main issue. The doctrine of issue estoppel does not apply to the proceedings in question, that is, to proceedings relating to an enforcement notice. The doctrine is a principle of private law and should not be H

* Reporter's Note. For administrative reasons counsel for the appellants in the *Oliver* appeal was heard first.

A brought into public law unless a statute so provides: see *Newbury District Council v. Secretary of State for the Environment* [1981] A.C. 578, 605, *per* Lord Fraser of Tullybelton, and *Pioneer Aggregates Ltd. v. Secretary of State for the Environment* [1985] A.C. 132, 140–141, *per* Lord Scarman. This latter passage illustrates Lord Scarman's approach to the question of planning control. The criticism that is made of the decision of the Court of Appeal in the *Thrasyvoulou* case is that the court asked itself the wrong question. It asked whether issue estoppel was excluded on the proper construction of the relevant statutory provisions. The question that should have been asked was whether the statutory provisions in question showed an intention by Parliament to include issue estoppel within the ambit of the relevant statutory procedures applicable to planning law.

C On the face of it, a perusal of section 22(1), section 23(1) and section 87(1)–(15) of the Town and Country Planning Act 1971 (as amended by section 1 of and the Schedule to the Local Government and Planning (Amendment) Act 1981) gives no countenance to the suggestion that only one enforcement notice can be served in respect of a given property; there is no suggestion that the right to serve enforcement notices is limited.

D For the relevant provisions relating to appeals against enforcement notices, see section 88(1)–(4), (6), (10), (11); section 88A(1), (2), (3); section 88B(1) of the Act of 1971 (as amended). The foregoing provisions comprise a complete and comprehensive planning code and they contain nothing which substantiates the proposition that the quashing of an enforcement notice is a complete bar to the serving of another enforcement notice. If this were not the law it could lead to the situation that because an enforcement notice had been quashed in relation to a particular property a public nuisance which subsequently arose in connection with that property could not be dealt with by means of a further enforcement notice. It is not disputed that there are two sides to this argument. On the one hand, a private citizen should not suffer by virtue of having to have a series of enforcement notices served upon him. On the other hand, the public at large should not suffer because the local authority has committed some technical error in endeavouring to enforce proper planning control.

E There are indications of a wide power to serve enforcement notices to be found in section 87(1) and (4) of the Act of 1971 and thus the mistaken withdrawal by a planning authority of an enforcement notice before the hearing of an appeal does not prevent the serving of a further enforcement notice in respect of the property in question. It is difficult to see why the position should be different after the hearing of an appeal. But if issue estoppel applies then the two situations are quite different. Further, Parliament has provided expressly for the circumstances in which an established use certificate can be conclusive for the purposes of an appeal to the Secretary of State against an enforcement notice: see section 94(7). This shows that where under the Act of 1971 a particular force is to be given to any determination it is specifically provided for in the Act. It follows that since the relevant statutory provisions are not completely clear it must be implied as a matter of construction that a

further enforcement notice can be served in the present circumstances. It is always to be borne in mind that the whole purpose of the Act of 1971 is planning control.

There are various types of estoppel and it has been held that estoppel cannot be used to prevent or hinder the exercise of a statutory power: see *Maritime Electric Co. Ltd. v. General Dairies Ltd.* [1937] A.C. 610, 618. An analogy between that case and the present is that the Town and Country Planning Act 1971 is an Act for the benefit of the public: see also *Southend-on-Sea Corporation v. Hodgson (Wickford) Ltd.* [1962] 1 Q.B. 416, 422. These cases (i) show a general rule; (ii) were the background against which the Town and Country Planning Act 1971 was enacted. Accordingly, if Parliament had intended that issue estoppel should apply in the provisions of the Act it would have so stated.

Section 243(1) of the Act of 1971. In the *Thrasyvoulou* case [1988] Q.B. 809, Parker L.J. suggested that section 243(1) may operate so as to prevent a local planning authority from issuing a second enforcement notice alleging a breach of planning control contrary to a finding of fact made in an earlier enforcement notice appeal. This is wrong. If, as in the present case, the first notice had been quashed, there is no extant notice which could be questioned by a second notice. Alternatively, if the first notice had been upheld, a decision on the second notice could not affect its validity. Section 243(1) is of no materiality in the present case.

Before issue estoppel can arise there must be an issue between the parties and subsequently the same issue must arise between the same parties. The issue arising on an enforcement notice is dictated by the form of that notice since the enforcement notice shall state the breach of planning control alleged: section 87(6)–(8) Act of 1971.

The issue raised by the 1982 enforcement notice was a material change of use. The 1985 enforcement notice was in different terms. The question arises: could the issues raised by the second notice have been raised and determined in the first appeal? The answer is in the negative because the first enforcement notice dealt with a substantially different subject matter, although it is conceded that there was no material change in the character of the use of this land between 1982 and 1985.

John Laws and *Duncan Ouseley* for the Secretary of State in both appeals. Estoppel cannot be deployed to displace the exercise of a statutory function. The real point in the present case is that because of the shape of the statute, Parliament did not intend by implication to bring issue estoppel into section 88, and possibly, section 88A and section 88B.

The House is invited to consider once again the terms of section 88 in order to see what are the obligations cast upon the Secretary of State under the section. Judicial review is available if it is alleged that the procedure laid down by section 87 has not been complied with. Certiorari could be obtained to quash the enforcement notice and an injunction obtained to restrain its operation until the hearing of the judicial review proceedings.

A As to the ambit of section 88, an appeal can only be brought under one of the eight grounds specified. In fact an appeal in the present case could not arise under section 88(2)(a), (f), (g), (h). But it is the Minister's statutory duty to determine an appeal pursuant to section 88(2)(b). He cannot refrain from exercising the duty imposed upon him to decide it on the grounds that one of his predecessors had decided the same question. Accordingly, if a Secretary of State or his inspector were to dismiss an appeal because he considered that he was bound so to do in view of a previous decision of a predecessor he would be wrong.

B On the face of it the Minister has to decide the appeal on the facts before him and if he considers himself bound by a previous decision he would be acting unlawfully. The principle is that a Minister's discretion must be unfettered.

C Section 88B(1) provides that on the determination of an appeal, the Secretary of State may grant planning permission for the development to which the enforcement notice relates and determine the use to which the land may lawfully be put: see paras. (a) and (c). Section 88B(3)(b) provides that any such determination shall be final. Section 94 concerns certification of established use. Section 94(7) is an indicator that without a previous statutory use certificate there is no finality because on any appeal the Secretary of State has to decide the matter on the facts then before him. The statute provides for finality in respect of various matters, but it is impossible to construe section 88(2) as implying any such finality in respect of matters such as those under appeal. It is plain that, in effect, the basis of the Court of Appeal's decision was that if the doctrine of issue estoppel were not applicable in this area of planning law there might be a succession of enforcement notices served by planning authorities. But it is not legitimate for the Court of Appeal to allow that fear to colour their approach to the construction of section 88(2). The judgment proceeds on a false premise; it construes section 88(2) as a provision designed to police section 87.

E It is wrong to approach the present question on the footing that Parliament has not been shown to *exclude* the application of the principle of issue estoppel. The question that must be asked is: whether on its true construction the relevant statutory provision expressly or by necessary implication *includes* the principle of issue estoppel.

F Ralph Gibson L.J. founds his decision on *Tebbutt v. Haynes* [1981] 2 All E.R. 238, but that decision and the cases on which it is founded are not concerned with planning matters. The judgment develops no reasoning as to how issue estoppel applies to section 88. As has been contended, it is not possible to incorporate issue estoppel into section 88 unless the section so requires and no basis for that has been shown. Ralph Gibson L.J. was also moved by considerations of unfair action being taken under section 87. If a planning authority acts lawfully there is no possibility of quashing the authority's action—if it has been operating lawfully there is no room for the application of issue estoppel to section 88. If on the other hand, the planning authority has acted unlawfully then such unlawful action will be subject to correction by means of judicial review.

To summarise the foregoing argument and make some additional points (i) as Mr. Glover has said, to ask whether the doctrine of issue estoppel is excluded by the statute is to ask the wrong question. (ii) *Thoday v. Thoday* [1964] P. 181 is based on a doctrine of finality. But the policy of the courts in relation to finality is simply not applicable to section 88 which is concerned with rights running with the land. (iii) Ralph Gibson L.J. appears to have concluded that issue estoppel is a matter of equity or fairness. But it is based on wider considerations of policy. (iv) The application of issue estoppel here may be said to prove too much. If applicable it would prevent the Secretary of State considering a question for the second time on its merits even though the planning authority had acquired convincing fresh evidence as to what the use of the land had been all along. If it is said that it does not apply to new evidence that would be to establish a new and lesser principle. (v) The judgment of Parker L.J. is based on a misunderstanding of the meaning of the word "validity" in the context of paragraph 2(3) of Schedule 9 to the Act of 1971. The determination of a subsequent appeal upon a particular issue in a manner inconsistent with its determination in an earlier appeal does not involve any challenge to the validity of the earlier inspector's decision, contrary to paragraph 2(3) of Schedule 9 to the Act of 1971. That paragraph needs to be read in the light of section 243 of the Act of 1971, so as to achieve consistency of approach to inspectors' decisions and the Secretary of State's own decision. Section 243 only precludes challenge to the validity of the enforcement notice; that is, not to the effect of the subsequent enforcement notice.

Western Fish Products Ltd. v. Penwith District Council [1981] 2 All E.R. 204 is authority for the proposition that the court is loath to allow the doctrine of estoppel to be used to prevent a statutory body performing its statutory duties. That approach should be adopted to the present appeals for the application of issue estoppel here would derogate from the duty of the Secretary of State to determine matters arising on an appeal against an enforcement notice.

In conclusion, the Act of 1971 comprises a statutory code regulating the use of land. The Secretary of State is given the duty of determining the matters prescribed in section 88(2)(a)–(h). Section 88 is no different from any other statutory provision placing a public duty on a public figure to determine matters there specified. It is desired to emphasise that it is illegitimate to use issue estoppel in those cases where the appropriate remedy for an owner of land aggrieved by the service of a second enforcement notice is to apply for judicial review. Further, it is difficult to understand how the doctrine of issue estoppel could apply to the determination by the Secretary of State of a matter pursuant to a default power granted by section 276 of the Act of 1971: see subsections (3) and (5)(a), (b). [Reference was also made to sections 23(9), 34 and 92A of the Town and Country Planning Act 1971; paras. 27–29 of the General Development Order 1986; *Fidelitas Shipping Co. Ltd. v. V/O Exportchleb* [1966] 1 Q.B. 630 and *Young v. Secretary of State for the Environment* [1983] 2 A.C. 662.]

A *Michael Rich Q.C. and Joseph Harper* for Mr. Thrasyvoulou. The principle is accepted that private law rules are not to be introduced into planning legislation. It is also accepted that estoppel by representation cannot be used to prevent the exercise of a statutory discretion. But it is not accepted that issue estoppel is a mere private law rule. It is a rule of public policy. Although it is termed “estoppel” it is not one of the means by which a statutory activity can be held to fetter the discretionary exercise of that activity. It is a rule of evidence recognising a conclusive determination by a competent tribunal exercising its statutory power. It is consistent with the requirement of effective planning control that the restraints of planning control on an owner’s use of his land shall be ascertainable and certain.

B
C *Spencer Bower and Turner, Res Judicata*, 2nd ed. (1969) paras. 8–10, shows the branch of the law of estoppel applicable in the present case is based on the need for finality and on the principle that a party should not be troubled twice in the same cause. Both those aspects of estoppel are applicable in the present case. These are matters of public policy: see *Fidelitas Shipping Co. Ltd. v. V/O Exportchleb* [1966] 1 Q.B. 630, 642. Accordingly, unless there is some overriding rule of public policy to exclude this doctrine in the given circumstances, it ought to apply. As to the requirements for the application of estoppel per rem judicatam, see *The Sennar (No. 2)* [1985] 1 W.L.R. 490, 499B, per Lord Brandon of Oakbrook. *Spencer Bower and Turner, Res Judicata*, 2nd ed., para. 11 shows that public policy as represented by this doctrine may be overruled by statute, but there is no basis for the contention that the doctrine must be specifically imported to be effective. There has been no authority cited that unless the doctrine can be implied by virtue of the language of the Act of 1971 it must be excluded. Nevertheless, it is accepted that it is not applicable in taxing and rating matters.

E
F *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government* [1960] A.C. 260, which was applied in *Shephard v. Buckinghamshire County Council* (1966) 18 P. & C.R. 419, is of importance. In that case, this House held that the fact that there was a specific statutory power under the Town and Country Planning Act 1947 to determine the issue of the legality of a proposed development did not prevent the High Court from determining that very issue in proceedings claiming a declaration. It follows that if that procedure was effective at all it surely must have been effective finally to determine the issue in question.

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H Enforcement notices and the procedure for providing appeals therefrom were instituted by the Town and Country Planning Act 1947. The following outline the history of the relevant legislation: Town and Country Planning Act 1947, sections 15(3), 16, 17, 23(1), (3), (4), (5); Town and Country Planning Act 1959, section 31; Caravan Sites and Control of Development Act 1960, sections 33, 34; and Schedule 4; Town and Country Planning Act 1962 (a consolidating Act); Town and Country Planning Act 1968, sections 15, 16(5)(b), (7) and 17; and Town and Country Planning Act 1971 (a consolidating Act), amended by the Local Government and Planning (Amendment) Act 1981, which sets out the present requirements for enforcement notices which by the insertion

into the Act of 1971 of section 92A requires for the first time registration of those notices. A

From an examination of the earlier planning legislation it is seen that there was a clear procedure to determine whether or not planning permission was required or for defining a particular use, by way of a declaration in the High Court which gave finality. That was superseded by the enforcement notice appeal procedure to the Secretary of State. Accordingly, it would require clear language to support the proposition that the enforcement notice appeal procedure did away with finality. B

Wakefield Corporation v. Cooke [1904] A.C. 31 is authority for the proposition that where a statute had given to justices the exclusive determination of an issue, their determination of that issue is a final determination. The same principle applied to a determination by justices under section 23(4) of the Act of 1947. C

The substitution of appeal to the Secretary of State should not alter the position. *Newbury District Council v. Secretary of State for the Environment* [1981] A.C. 578 is distinguishable for it did not relate to issue estoppel. Similar considerations apply to *Western Fish Products Ltd. v. Penwith District Council* [1981] 2 All E.R. 204, which related to estoppel by representation. D

As regards paragraph 2(3) of Schedule 9 to the Act of 1971, the word "validity" in this context cannot be limited to matters of law but must also extend to matters of fact. It follows that Parker L.J. was correct in holding that an appeal under section 88 is final and binding on both parties, subject only to an appeal on a matter of law under section 246.

In conclusion, the pattern of the Act of 1971 is plain. Where issue estoppel cannot apply the Act specifically provides for conclusiveness. Issue estoppel does not apply to the provisions of section 94(7) because in the circumstances there postulated there is no lis. That is why the final decision of the Secretary of State provided for under section 95 attracts the conclusive provisions of section 94(7). Where there is a lis no such provision for conclusiveness is needed. E

Jeremy Sullivan Q.C. and Brian Ash for the owners in the Oliver appeal. The argument for Mr. Thrasylvoulou is adopted. The planning law is a self-contained code. This emerges most clearly from *Pioneer Aggregates (U.K.) Ltd. v. Secretary of State for the Environment* [1985] A.C. 132. In that case there was an express statutory provision that governed the duration of planning permission: there was simply no possibility for imputing the doctrine of abandonment of planning permission. In the present case the Act is silent as to whether issue estoppel does or does not apply. It is also silent on the issue of the burden of proof. As enacted in 1947 the code was also silent as to how appeal proceedings were to be conducted. F

Issue estoppel is a rule of public policy which reflects the public interest in the finality of proceedings and that citizens should not be vexed twice. It is a wide principle and the anomalies are easily recognised. It has been said that the Act of 1971 is a self-contained code. But the language of sections 65, 105(1)(c) (since repealed) and G

- A 114(6) support the conclusion that issue estoppel would apply in the circumstances envisaged by those provisions.

Fetter. It is not inconsistent with the general proposition that the exercise of a statutory discretion should not be fettered, validly to contend that, if a local authority exercises its discretion to serve an enforcement notice which has adverse consequences to the citizen, who is given a right of appeal, both parties should be bound by the result of the appeal and that neither should be allowed to reopen the issue under appeal. As to the Secretary of State's discretion, it cannot be said that it is disabled if the doctrine of issue estoppel is applicable in the present circumstances. The Secretary of State is no more disabled than if a magistrate had heard an appeal under the 1947 legislation. There is a complete lack of reciprocity in the argument for the Secretary of State.

- B
- C As to the role of third parties, it is to be remembered that a recognition of their rights is relatively recent. Under the Act of 1947 third parties had no locus standi.

Although the Secretary of State may initiate some proceedings the enforcement notice, once issued, is deemed to have been issued by the planning authority in whose area the land in question is situated.

- D As to section 88B(1)(c) of the Act of 1971 (as amended), that language is equally applicable to the owner who has used the land for the same purpose since prior to 1947 and who receives an enforcement notice. He appeals under ground (e), the Secretary of State quashes under ground (e) and may also make a determination under section 88B(1)(c). On the Secretary of State's argument issue estoppel would apply to the latter decision but not the former. Contrast the language of section 88(10) which also refers to "final determination."

- E As to section 94(7) of the Act of 1971, although there is no express language to show that Parliament intended a determination under section 88(2)(e) to be conclusive, it would be extraordinary if Parliament intended a different result depending upon who instituted the procedure. Express provision for finality is necessary in section 94(7) because the certificate is issued by the local planning authority, there is no inquiry, hence no possibility to issue estoppel.

- F *Laws* in reply. The opposing argument has been wide-ranging but there is one essential chasm between the parties. For the Secretary of State it is contended that for issue estoppel to be applicable the principle has to be found positively in the statute in question. For the respondents it is contended that it is a rule of public policy and applies unless it is expressly excluded by the statutory language. The respondents do not contend that the local authority could not issue a second enforcement notice under section 87.

- G The argument for the owners in the *Thrasyvoulou* appeal is wrong because it ignores the relationship between section 87 and section 88 of the Act of 1971. This appeal really relates to what are the powers of a local authority under section 87. The opposing argument comes down to the proposition that the local planning authority cannot issue a second enforcement notice even if it appears to them that they have acquired new evidence relating to the user of the land in question. The result of dismissing these appeals would be that it would prevent a local authority

H

on a change of political control from rectifying the situation where its predecessor had been dilatory in respect of imposing proper planning control. In the end, the parties join issue on opposing contentions of principle. For the Secretary of State it is contended that every enforcement notice which is appealed must be judged by the Secretary of State on the merits of whatever point on appeal is put to him; he is only precluded from doing so where the Act provides for finality arising from some earlier determination. For the respondents it is contended that the Secretary of State is additionally precluded from deciding the merits of (b)–(e) appeals by the application of issue estoppel, even though the Act on its face or by necessary implication does not require such a result.

A
B

The arguments marshalled by the respondents may be summarised thus: (a) *Wakefield Corporation v. Cooke* [1904] A.C. 31; (b) the historic availability of declarations, for example, as to established use; (c) the predecessor legislation, which confided appeals on what are now grounds (b)–(e) to the magistrate’s court; (d) section 88(10)—“final determination;” (e) the consequence of the Secretary of State’s argument, if right, for the operation of other provisions such as sections 65 and 114; (f) the possibility of hardship or injustice to an appellant if issue estoppel does not apply; (g) the general applicability of issue estoppel as a principle of public policy.

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Wakefield Corporation v. Cooke, decided under a different statute, cannot be regarded as a touchstone for the construction of sections 87 and 88 of the Act of 1971: the House in that case was not considering anything analogous to the scheme of planning control constituted by the Town and Country Planning Act 1971; the grant of declarations (and at a time before the decision in *O’Reilly v. Mackman* [1983] 2 A.C. 237) involved no exercise by the court of any such construction; the historic fact that appeals went to the magistrate’s court is insignificant as to the construction of those sections. Section 88(10) cannot be read as imposing an important fetter on the Secretary of State’s function in subsequent appeals; reliance on sections 65 and 114 logically carries the argument no further; an appeal to hardship or unfairness ignores both the purpose of the Act to control the use of land and the availability of judicial review to monitor the use of the section 87 power; and the fact that issue estoppel is a rule of public policy in litigation tells one nothing about how the Town and Country Planning Act 1971 is to be construed.

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If issue estoppel runs in enforcement appeals then it is at least possible that it runs in planning appeals also. Its application cannot be confined to cases in which the appellant asserts some settled *right*; an identifiable issue can arise as readily in other cases. If an applicant for planning permission fails because its development would damage some amenity value, an appeal against the second refusal would raise the same issue. Yet it is accepted that successive applications, and successive appeals, can be mounted.

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The impact of the Secretary of State’s default powers under section 276 cannot be brushed aside. If the local planning authority, having lost an earlier appeal perhaps through their own incompetence, decline to

A enforce again despite much local feeling, the Secretary of State must be entitled to take his own view of the merits in the public interest.

It is beyond doubt that the application of issue estoppel will mean that breaches of planning control may go unenforced in cases other than those (for example under section 87(4), or where the breach took place before the end of 1963) where the Act confers immunity. Such a result frustrates the purpose of the statute and is thus contrary to the principles enunciated in *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] A.C. 997.

B *Glover Q.C.* in reply. On the main issue the argument for the Secretary of State is adopted.

Their Lordships took time for consideration.

C 14 December. LORD BRIDGE OF HARWICH. My Lords, these two appeals raise the question whether a decision of the Secretary of State allowing an appeal against an enforcement notice on one of the grounds in paragraphs (b) to (e) of section 88(2) of the Town and Country Planning Act 1971, as amended by the Local Government and Planning (Amendment) Act 1981, is capable of giving rise to an estoppel per rem judicatam or to an issue estoppel.

D The first appeal arises from the service by the Hackney London Borough Council as local planning authority on the respondent, Aristophanes Thrasyvoulou, in February 1985 of enforcement notices alleging in respect of each of four properties, nos. 11, 13, 15 and 25, Wilberforce Road, London N.4, a breach of planning control by making a material change of use to use as a hostel for homeless families without the grant of planning permission required in that behalf. Mr. Thrasyvoulou appealed to the Secretary of State in each case on the ground, inter alia, that the breach of planning control alleged in the notice had not taken place. The appeals were dismissed by the inspector appointed by the Secretary of State to determine them. An appeal against his decision to the High Court under section 246 of the Act of 1971 was dismissed by McCowan J. The Court of Appeal (Parker and Ralph Gibson L.JJ. and Caulfield J.) allowed Mr. Thrasyvoulou's appeal and remitted the cases of the four enforcement notices for rehearing and determination in the light of the opinion of the court that the inspector was in the circumstances obliged to allow the appeals to the Secretary of State and quash the enforcement notices. The Secretary of State now appeals to your Lordships' House by leave of the Court of Appeal.

G The facts in this case relating to nos. 13 and 15, Wilberforce Road are straightforward. The local planning authority had previously served two enforcement notices in respect of each of these properties in October 1981 which alleged alternatively a breach of planning control by making a material change of use to use as a hotel or to use as a hostel. On appeal to the Secretary of State the inspector appointed to determine the appeal found that the use was correctly characterised as hotel use, not as hostel use, and that the hotel use had been carried on since 1960. He therefore quashed the hostel notices on the ground that the breach of planning control alleged in the notice had not taken place and the

hotel notices on the ground that the breach of planning control alleged in the hotel notices had occurred before 1964. At the hearing of the appeals against the 1985 notices it was common ground that there had been no change in the use of the properties since service of the 1981 notices. The Court of Appeal held that in these circumstances an issue estoppel arose which prevented the council on the appeals against the 1985 notices from contending that the use of either property was as a hostel (which was assumed to be materially different from use as a hotel) and that the inspector had erred in failing to give effect to this estoppel and in making a finding on the evidence and argument before him that the use was as a hostel which contradicted the finding made by the inspector who determined the appeals against the 1981 notices that the use was as a hotel. The facts relating to nos. 11 and 25, Wilberforce Road are more complex, but since it is common ground that if the doctrine of res judicata and issue estoppel applies to determinations by the Secretary of State of appeals under section 88 the Court of Appeal were correct in holding that an issue estoppel arose sufficient to defeat the 1985 enforcement notices in relation to these properties also, it is unnecessary for me to go into them.

The second appeal arises from the service by the London Borough of Havering as local planning authority on the respondents, Mr. and Mrs. Oliver and Oliver of Hornchurch Ltd. ("the Olivers") of an enforcement notice in January 1986 alleging a breach of planning control by making a material change of use of land at the rear of nos. 13 to 19, The Avenue, Hornchurch, to the use described in the notice without the grant of planning permission required in that behalf. The Olivers appealed against the notice to the Secretary of State on the ground, inter alia, that the breach of planning control occurred before 1964. The inspector appointed to determine the appeal dismissed it. The Olivers appealed to the High Court under section 246. The appeal was heard by Mr. Malcolm Spence Q.C., sitting as a deputy High Court judge, who rightly held that he was bound to follow the decision of the Court of Appeal in *Thrasyvoulou v. Secretary of State for the Environment* [1988] Q.B. 809 as to the application of the doctrine of issue estoppel and concluded in the light of the planning history that an estoppel arose which was fatal to the 1986 enforcement notice. He ordered that the matter be remitted to the Secretary of State with the opinion of the court for rehearing and determination, but he granted the necessary certificate under section 12(1) of the Administration of Justice Act 1969 to enable an appeal against his decision to be brought direct to your Lordships' House and leave to appeal was granted by the House.

In this case it is the local planning authority who appeal. They join with the Secretary of State in contending that the doctrine of res judicata and issue estoppel has no application in law to the determination by the Secretary of State of an appeal against an enforcement notice under section 88, but they contend in the alternative that if the doctrine applies, no case giving rise to a relevant issue estoppel arises on the facts. This subsidiary issue depends on the details of the relevant planning history which it will be convenient to examine after considering the issue of principle which is common to both appeals.

A Before turning to the arguments on the issue of principle it is appropriate to refer briefly to the salient features embodied in the statutory code for the enforcement of planning control in the Act of 1971, as amended by the Act of 1981. Under Part III of the Act planning permission is required for development which consists in the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of

B any buildings or other land. If development is carried out without the requisite planning permission or if any conditions or limitations subject to which planning permission was granted have not been complied with there is a breach of planning control: section 87(2). Under section 87(1) the local planning authority may, where it appears to them that there has been a breach of planning control, serve an enforcement notice

C requiring the breach to be remedied. The notice is required to specify the matters alleged to constitute a breach of planning control. Appeal lies against an enforcement notice to the Secretary of State under section 88 on any of the grounds specified in section 88(2). For brevity I omit consideration of breaches consisting of failure to comply with conditions or limitations and consider only the grounds appropriate where the enforcement notice alleges development without the requisite

D planning permission. Ground (a) is that planning permission ought to be granted for the development to which the notice relates. Ground (b) is that the matters alleged in the notice do not constitute a breach of planning control. Ground (c) is that the breach of planning control alleged in the notice has not taken place. Ground (d) applies to notices alleging development by carrying out building etc. operations which can

E only be enforced against within four years of the development taking place. Ground (d) is therefore established if the breach of planning control occurred more than four years before the issue of the enforcement notice. Ground (e) applies to development consisting of making a material change of use of land which can only be enforced against if the change of use was made since 1963. Ground (e) is therefore established if the change of use occurred before the beginning of 1964. The

F remaining grounds (f) to (h) relate to subsidiary issues which may arise as to the service of the enforcement notice, the steps required to be taken to remedy the breach of planning control alleged and the time for taking those steps and these grounds have no relevance for present purposes.

G An issue on ground (a) arises in every appeal against an enforcement notice since by section 88B(3) there is deemed to be an application for planning permission for the development to which the notice relates. In determining whether to allow an appeal on that ground the Secretary of State will decide as a matter of policy and in the exercise of discretion whether planning permission should be granted and in relation to ground (a) no question of legal right arises. By contrast the question whether

H any of the grounds (b) to (e) on which the appellant relies have been established will be answered by applying the relevant rules of planning law to the facts found and the answer will determine in each case an important matter of legal right. This may be simply illustrated by examples. Thus, if an issue is raised on appeal against a notice on

ground (b) as to whether or not a building operation to which the notice relates was within the terms of planning permission granted either upon an express application or by the terms of a development order, a decision of that issue to allow the appeal on ground (b) will determine the status of the building in question as having been lawfully erected. If an issue is raised on appeal against a notice on ground (c) as to whether a change from one use to another to which the notice relates was a material change, a decision to allow an appeal on ground (c) will again determine the status of the existing use of the land as lawful. So also under grounds (d) and (e) a decision that a building operation was carried out more than four years before the issue of the enforcement notice or that a use of land was commenced before 1964 will have the like consequence in determining the status of the building or the use respectively as immune to enforcement proceedings. The main issue in the appeals is simply whether these determinations are final and conclusive in their effect, as the respondents contend, or whether it is open to the local planning authority in fresh enforcement proceedings to ask the Secretary of State to determine these issues in a contrary sense, whether in the light of new evidence or otherwise.

An enforcement notice does not take effect until the final determination of the proceedings on any appeal against it, including proceedings on appeal to the High Court under section 246 of the Act. Once a notice has taken effect following the final determination of the appeal there is no doubt as to its final and conclusive effect in relation to all issues of right determined by the appeal. By section 243(1)(a) the validity of an enforcement notice may not be questioned in any proceedings whatsoever on any of the grounds on which an appeal under section 88 may be brought. If the steps required to be taken by the notice are not taken, this attracts penal sanctions and after those steps have been taken the notice remains effective to render unlawful and to attach penal sanctions to any resumption of a use discontinued or reinstatement of a building demolished in compliance with the notice.

The arguments advanced by Mr. Laws, for the Secretary of State, and Mr. Glover, for the London Borough of Havering, in support of the proposition that no estoppel per rem judicatam or issue estoppel can arise from the determination of an appeal against an enforcement notice whereby the notice is quashed on any of the grounds set out in section 88(2) may, I hope, be fairly summarised in terms of three broad submissions. The first submission is that in the performance of its statutory duties or in the exercise of its statutory powers a statutory body cannot be fettered by any estoppel whatsoever. The second submission is that the Act of 1971 provides a complete and self-contained statutory code governing the enforcement of planning control and that there is no room, as a matter of construction of that code, for the introduction of rules or doctrines applicable in the field of private law to litigation between citizens. The third submission is that the remedy available for the protection of the owner or occupier of land against abuse of enforcement proceedings by the service of repeated enforcement notices directed against the same development must be sought by application for judicial review of the decision of the local

- A planning authority to issue the enforcement notice of which complaint is made, not by appeal to the Secretary of State against it.

It is well established that a statutory body cannot by contract fetter its own freedom to perform its statutory duties or exercise its statutory powers and by parity of reasoning it has been held that no such fetter can arise from an estoppel by representation: see *Maritime Electric Co. Ltd. v. General Dairies Ltd.* [1937] A.C. 610 and *Southend-on-Sea Corporation v. Hodgson (Wickford) Ltd.* [1962] 1 Q.B. 416. But the rationale which underlies the doctrine of res judicata is so different from that which underlies the doctrine of estoppel by representation that I do not think these authorities have any relevance for present purposes.

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- C The doctrine of res judicata rests on the twin principles which cannot be better expressed than in terms of the two Latin maxims “interest reipublicae ut sit finis litium” and “nemo debet bis vexari pro una et eadem causa.” These principles are of such fundamental importance that they cannot be confined in their application to litigation in the private law field. They certainly have their place in criminal law. In principle they must apply equally to adjudications in the field of public law. In relation to adjudications subject to a comprehensive self-contained statutory code, the presumption, in my opinion, must be that
- D where the statute has created a specific jurisdiction for the determination of any issue which establishes the existence of a legal right, the principle of res judicata applies to give finality to that determination unless an intention to exclude that principle can properly be inferred as a matter of construction of the relevant statutory provisions.

- E This approach is, I believe, fully supported by the decision of this House in *Wakefield Corporation v. Cooke* [1904] A.C. 31. In that case a local Act gave the local authority power to carry out private street works in a private street and to recover the expenses from the frontagers, but the frontagers had the right to object to the proposed works on the ground, inter alia, that the street was a highway repairable by the inhabitants at large. The relevant sections of the local Act corresponded to sections 6, 7 and 8 of the Private Street Works Act 1892. Under
- F those provisions objections to proposed works were to be heard and determined by justices. In 1898 the justices held on objection by some frontagers to certain works proposed to be carried out that the street in question was highway repairable by the inhabitants at large. In 1901 the local authority made proposals to carry out works in the same street and other frontagers objected. The justices upheld the objection on the
- G ground that the matter was res judicata by reason of the earlier decision and their view was upheld by your Lordships’ House. The Earl of Halsbury L.C. said, at pp. 35–36:

- H “So that, instead of being, as it is, under the Public Health Act, something removed from the jurisdiction of the justices . . . in this Act the very question whether or not a particular road is or is not a highway repairable by the parish is remitted to that tribunal, and remitted to that tribunal for the purpose of determination. My Lords, for my part I am wholly unable to see anything more in the nature of a judgment in rem than that . . . If there is no appeal, it is a final adjudication and determination. If there is an appeal, I

presume from what has happened the question was in this case determined adversely to those who are at present the appellants against the judgment of the Court of Appeal. In any case it appears to me that this question has been finally and absolutely determined . . .” A

Lord Robertson said, at pp. 38–39:

“The question is truly whether the local Act has given the justices jurisdiction to determine whether the street in dispute is a highway repairable by the inhabitants, as a substantive issue, in rem, or merely as a medium concludendi of the liability or non-liability of the objectors. If the former be the true view, then a decision on that issue, properly raised, is good against all concerned. There is nothing contrary to principle and much convenience in a local tribunal being authorized to adjudicate on a local matter with full notice to all concerned; and the question is merely whether in this instance that has been provided by the legislature. On the whole, I have come to think that it has, and that the appeal therefore fails.” B C

Lord Lindley said, at p. 39:

“It appears to me that the question turns on the fact which occurs in this case . . . namely, the fact that the question raised for the purpose of being decided in accordance with the Act and the question which was decided in accordance with the Act was whether Sludge Lane was a street repairable by the inhabitants at large or not.” D

Much of the argument against allowing a plea of *res judicata* or issue estoppel founded on the determination of an appeal against an enforcement notice under section 88(2) of the Act rested on the proposition that such a determination is characterised as a “planning decision” and emphasis was placed on the rights of members of the public to be heard. Mr. Laws submitted that no distinction could be drawn between a decision on ground (a) of section 88(2) to grant or withhold planning permission for the development the subject of an enforcement notice, and a decision of any issue arising under grounds (b) to (e). If an estoppel arises in the one case, he submits, it must equally arise in the other. I cannot accept this submission. A decision to grant planning permission creates, of course, the rights which such a grant confers. But a decision to withhold planning permission resolves no issue of legal right whatever. It is no more than a decision that in existing circumstances and in the light of existing planning policies the development in question is not one which it would be appropriate to permit. Consequently, in my view, such a decision cannot give rise to an estoppel *per rem judicatam*. I also think that there is a significant distinction between the issue raised by an appeal under ground (a) and the issues raised by any of grounds (b) to (e) in that members of the public have the right to attend any public inquiry and to be heard as objectors against the grant of planning permission, but can have no *locus standi* as objectors, although they may be heard as witnesses of fact, in relation to the issues raised on grounds (b) to (e). E F G H

A The distinction between the issue as to whether planning permission should be granted for development the subject of an enforcement notice and any issue arising as to the legal status of the alleged development which is the subject matter of the notice was more immediately apparent in the original statute which introduced the modern planning code, the Town and Country Planning Act 1947 because under that Act the issues fell for determination by different tribunals. Section 23(3) proviso (a) of the Act of 1947 enacted that if, following the service of an enforcement notice, application was made for permission for the retention on the land of any buildings or works, or for the continuance of any use of the land, to which the enforcement notice related, the notice should not take effect until that application was finally determined. In practice this invariably led to an appeal to the Minister. But section 23(4) enabled any person aggrieved by an enforcement notice to appeal against it to a court of summary jurisdiction and provided that on any such appeal the court:

“(a) if satisfied that permission was granted under this Part of this Act for the development to which the notice relates, or that no such permission was required in respect thereof . . . shall quash the notice to which the appeal relates; . . .”

D Section 23(5) gave a further appeal from the decision of the court of summary jurisdiction to quarter sessions. The language of section 23(4) although not in such wide terms as the language of section 88(2) grounds (b) to (e), nevertheless gave the court jurisdiction to determine the same essential issues of legal right which arise in relation to a building required to be demolished or a use required to be discontinued by an enforcement notice, viz. was the building or use permitted or alternatively established so as to be beyond the reach of enforcement procedure by reason of the lapse of time (four years in all cases under the Act of 1947) since the development took place.

E Alongside the statutory procedures it was also possible to bring actions in the High Court for declarations to determine the status in planning law of proposed developments or of existing buildings or land uses. In *Pyx Granite Co. Ltd v. Ministry of Housing and Local Government* [1960] A.C. 260 the House rejected the proposition that the availability of a specific statutory jurisdiction under the Act of 1947 for the determination of an issue as to the legality of a proposed development had the effect of depriving the High Court of jurisdiction to determine the self-same issue in proceedings claiming a declaration. The particular issue resolved by *Pyx Granite* related to the statutory procedure under section 17 of the Act of 1947 for the determination of questions as to whether any proposed operations on land or change in the use of land would constitute or involve development and, if so, would require planning permission having regard to the provisions of the development order, and it was the availability of the statutory procedure which the House held not to exclude the High Court's parallel declaratory jurisdiction. But it is implicit in the rationale of the decision that the High Court equally had jurisdiction to entertain proceedings for declarations as to the legality or immunity from enforcement procedure

of any existing building or use of land raising parallel issues to those which could be raised, following service of an enforcement notice, by appeal against the notice to justices under section 23(4) of the Act of 1947. A declaration obtained in such proceedings must clearly have been effective to establish the legality or immunity from enforcement proceedings of the building or use of land in question as *res judicata*. A

The law as explained in the two foregoing paragraphs continued in force until 1960. But the multiplicity of jurisdictions proved a great inconvenience in practice, and Parliament enacted provisions to abolish it by section 33 of the Caravan Sites and Control of Development Act 1960. That section is the antecedent of section 88 of the consolidating Act of 1971 combining the dichotomy of jurisdictions under sections 23(3) and (4) of the Act of 1947 in a unified jurisdiction by way of appeal to the Minister against an enforcement notice. It also contained in section 33(8) the antecedent of section 243 of the Act of 1971 providing that the validity of an enforcement notice shall not be questioned except by way of such an appeal. B C

The effect of this latter provision was put to the test in *Square Meals Frozen Foods Ltd. v. Dunstable Corporation* [1974] 1 W.L.R. 59. In that case the owners of a warehouse had planning permission to use it as a "wholesale warehouse or repository for any purpose." They wished to use it for selling packages of frozen food to the public on a cash and carry basis. The local planning authority warned them that such a use would not be use as a warehouse, and would involve enforcement proceedings. The owners sought a declaration in the High Court that the proposed use did not require planning permission, being within the ambit of the permission already granted. Shortly after instituting the proceedings the owners commenced the use of the premises for the cash and carry business. The local planning authority thereupon served an enforcement notice and applied to the court to stay the High Court proceedings seeking a declaration. The Court of Appeal held, affirming the stay granted by the judge, that section 243(1)(a) operated as a bar not only to proceedings started after the service of an enforcement notice but also to proceedings started before the service of such notice in which the validity of the notice would inevitably be questioned. D E F

In the light of this decision it can be seen that the effect of the changes made by section 33 of the Act of 1960 was to substitute for the jurisdiction under section 23(4) of the Act of 1947 and for the jurisdiction of the High Court in proceedings for a declaration directed to the determination of legal rights in existing buildings or uses of land a new jurisdiction conferred exclusively on the Minister. I am of the opinion that before this change was effected, a determination by justices under section 23(4) of the Act of 1947 that an existing building or use of land was either permitted or beyond the reach of enforcement proceedings would have been as effective as a High Court declaration to give rise to an estoppel *per rem judicatam*. But whether this was so or not, the most formidable difficulty which the arguments of Mr. Glover and Mr. Laws must surmount, if they are to succeed, is to persuade the House that the substituted jurisdiction now exercised by the Secretary of State in relation to grounds (b) to (e) of section 88(2) of the Act of 1971 is G H

A intended to be of such limited effect that it deprives the owner or occupier of land of the opportunity which he formerly enjoyed to have it conclusively determined once and for all, by action for a declaration if not by application to justices, that his building or use of land is for one reason or another immune from further attack by enforcement notice.

Certain other provisions of the Act of 1971 are relied on by the appellants. Section 88B(1)(c) provides:

B “On the determination of an appeal under section 88 of this Act, the Secretary of State may . . . determine any purpose for which the land may, in the circumstances obtaining at the time of the determination, be lawfully used having regard to any past use of it and to any planning permission relating to it.”

C Subsection (3)(b) provides that any such determination shall be final. Section 94 provides a procedure whereby an owner or occupier of land may apply for and obtain from the local planning authority in the first instance, or if refused by the local planning authority from the Secretary of State on appeal under section 95, a certificate referred to as an “established use certificate,” that his existing use of land was begun before the beginning of 1964 or in certain other circumstances such as to place it beyond attack by enforcement notice. Section 94(7) provides:

D “An established use certificate shall, as respects any matters stated therein, be conclusive for the purposes of an appeal to the Secretary of State against an enforcement notice served in respect of any land to which the certificate relates, but only where the notice is served after the date of the application on which the certificate was granted.”

E The submission made is that the finality of a determination under section 88B(1)(c), which it is conceded will be effective to defeat an enforcement notice directed against a use of land resumed in reliance on the determination, and the conclusive effect of an established use certificate show that when Parliament intended a determination, in this statutory context, to be final and conclusive of any issue determined, it made express provision to that effect and that the absence of any such express provision as to the effect of a determination by the Secretary of State allowing an appeal on any of the grounds (b) to (e) under section 88(2) demonstrates that Parliament did not intend those determinations to be conclusive.

F I do not accept this submission. It seems to me, on the contrary, that these provisions, on a proper understanding of the role they play in the context of the planning enforcement machinery, do not detract from but lend support to the conclusion that Parliament must have intended the determination of any issue arising under grounds (b) to (e) of section 88(2) in favour of an appellant to be conclusive. The purpose of section 88B(1)(c) can only be understood in the light of section 23(9) of the Act of 1971 which provides:

H “Where an enforcement notice has been served in respect of any development of land, planning permission is not required for the use of that land for the purpose for which (in accordance with the

provisions of this Part of this Act) it could lawfully have been used if that development had not been carried out.” A

The effect of this subsection is that when an owner or occupier of land discontinues a use of land in compliance with the requirements of an enforcement notice, it is not enough to entitle him to resume the immediately preceding use to show that, before the unauthorised change, that use was immune to enforcement procedure, having been begun before 1964; he may only resume a previous use which was itself begun lawfully, i.e. without any breach of planning control: *Young v. Secretary of State for the Environment* [1983] 2 A.C. 662. In these circumstances, it is obviously desirable that an owner or occupier of land who is to be required by an enforcement notice which the Secretary of State upholds to discontinue an existing use of land should be entitled to ascertain what, if any, previous use of the land he may safely resume without being subject to enforcement proceedings directed against that use. But this would not be an issue arising for determination in the appeal against the notice unless express provision authorising its determination were made, as it is, by section 88B(1)(c). It would be futile to provide for such a determination unless it was intended to protect the owner or occupier of land from enforcement proceedings when he resumed the use determined to be lawful; so the concession in this regard is rightly made. But it would surely be a bizarre result that a decision by the Secretary of State dismissing an appeal against an enforcement notice requiring discontinuance of the existing use of land and determining that a previous use might lawfully be resumed should effectively protect that use against future enforcement proceedings, but that a decision allowing the appeal on the ground that the existing use was itself lawful should not. B
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Very similar reasoning applies to the provision in section 94(7) for the conclusive effect of an established use certificate. A certificate may be granted on the application of the owner or occupier of land by the local planning authority without any dispute. If it is so granted, it does not result from the determination of any contested issue and, in the absence of express provision, there would again be no basis for attributing to it conclusive effect. The effect of the express provision is this. If the owner or occupier of land anticipates that his existing use may be subject to enforcement proceedings and wishes to have the matter settled in advance, he may apply for an established use certificate before any enforcement notice is served and if the local planning authority do not grant the certificate, he may eventually succeed on appeal under section 95 and obtain a certificate with conclusive effect. But if the local planning authority forestall him by the service of an enforcement notice requiring discontinuance of the existing use before his application for an established use certificate is made, it will then be too late to apply for a certificate under section 94. Instead he will appeal against the notice on ground (e) under section 88(2) and the Secretary of State on that appeal will have to determine precisely the same issue as that which he would have otherwise determined on an appeal under section 95. It seems to me again a bizarre result which F
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- A Parliament cannot have contemplated or intended that determination of the issue in the appellant's favour on the appeal under section 95 should be conclusive, but that the same determination under section 88 should not.

B All these considerations bring me to the conclusion that the determination in favour of the appellant of an appeal against an enforcement notice on any of the grounds (b) to (e) under section 88(2) does give rise to an estoppel per rem judicatam. In these circumstances I do not need to examine the argument that an alternative protection for owners and occupiers of land against harassment by the service of repeated enforcement notices is available by way of judicial review of decisions by the local planning authority to issue such notices.

- C I would accordingly dismiss the Secretary of State's appeal in *Thrasivoulou*.

D So far in this opinion I have used the expressions "estoppel per rem judicatam" and "issue estoppel" indifferently. But before turning to the subsidiary issue which arises in the second appeal it is necessary to distinguish between them by reference to the careful terminology used by Diplock L.J. in *Thoday v. Thoday* [1964] P. 181. He said, at pp. 197-198:

- E "The particular type of estoppel relied upon by the husband is estoppel per rem judicatam. This is a generic term which in modern law includes two species. The first species, which I will call 'cause of action estoppel,' is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist, i.e., judgment was given upon it, it is said to be merged in the judgment, or, for those who prefer Latin, transit in rem judicatam. If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped per rem judicatam. This is simply an application of the rule of public policy expressed in the Latin maxim 'Nemo debet bis vexari pro una et eadem causa.' In this application of the maxim 'causa' bears its literal Latin meaning. The second species, which I will call 'issue estoppel,' is an extension of the same rule of public policy. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical condition, assert

that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was.”

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Adopting this terminology and classification, and applying it by analogy to the issues which arise on an appeal against an enforcement notice on any of the grounds (b) to (e) of section 88(2), I think the analogue of a “cause of action estoppel” will arise whenever the determination of the ground decided in favour of the appellant on an appeal against one enforcement notice can be relied on in an appeal against a second enforcement notice which is in the same terms and is directed against the same alleged development as the first. That is the position in *Thrasyvoulou*, for example, in relation to the 1985 notices alleging change of use to use as a hostel. On appeal against the earlier notices it had been determined that the use of the premises was not use as a hostel and, there being no subsequent change of use alleged, that determination was conclusive in the second appeal. But the subordinate issue in the *Oliver* appeal is whether an issue estoppel, strictly so called, arose from a successful appeal against an earlier enforcement notice which was effective to defeat the enforcement notice which is the subject of the present proceedings.

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The land which is the subject of the enforcement notice now in question is an area of irregular shape behind numbers 13 to 19, The Avenue, Hornchurch with a narrow strip between numbers 11 and 13 giving access to The Avenue. I shall refer to the land as a whole as “the site.” In 1982 the local planning authority served an enforcement notice relating to a structure standing on the site and alleging a breach of planning control by making a material change of use of the structure to a use for storage purposes without the grant of planning permission required in that behalf. The *Olivers* appealed against this notice on the ground, inter alia, that the use of the structure in question was part of the use of the site as a whole as a transport and storage depot which was an established use of the site having been commenced before 1964 and was therefore immune from attack by enforcement notice. The case for the local planning authority before the inspector appointed to determine that appeal accepted that certain buildings on the site had an established use for storage purposes and that the open parts of the site on which no buildings stood had an established use for what were described as “ancillary purpose such as the parking of vehicles.” In effect the local planning authority were contending that different parts of the site were to be treated as distinct planning units and asserting that the use for storage of the structure to which the notice related, which consisted of a trailer stationed on the site, involved the making of a material change in the use of that unit. The appellants were asserting that the site as a whole was a single planning unit with the benefit of an established use and that the use for storage of the structure in question was part of that established use.

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The inspector resolved the issue in favour of the appellants. He found that at the date of service of the enforcement notice the trailer had become a fixture on the site. He continued:

- A "I take the view that the hard standing, on which the trailer was stationed at the date of service of the notice, is part of the premises which has an established use for storage purposes, which use clearly appertains to the whole of the established use site and not only to the building thereon. Whether or not the trailer, at the date of service of the notice, was a building or structure, its use for storage purposes does not constitute a breach of planning control, and the appeal succeeds on that ground."
- B

The enforcement notice served on 10 January 1986 alleged a breach of planning control by making a material change of the use of the land to a

- C "use for the purposes of a business of merchants, importers, repackers and distributors of goods including paper products textiles and candles without the grant of planning permission required in that behalf."

- The inspector who determined the appeal against this notice in favour of the local planning authority found that there had been a material change in the character of the site as a whole since 1963 to the use as described in the notice.
- D

- It is submitted for the local planning authority that no relevant issue estoppel arises from the first inspector's decision because it concerned a part only of the site and concerned only a use for storage purposes. It seems to me, however, that the first inspector's decision involved by necessary implication the finding that the use in fact being made of the site at the date of service of the first enforcement notice was an established use, however described. It is expressly conceded in these proceedings that there had been no material change in the character of the use between the dates of the two enforcement notices. Accordingly it follows, in my opinion, that the local planning authority are now estopped from asserting that there was a material change of use between 1963 and 1982 which expressly contradicts a finding made by the first inspector, which was not merely incidental or ancillary to his decision but was the essential foundation for his conclusion that no breach of planning control was involved in the use being made of the structure which was the subject of the first notice. As Mr. Malcolm Spence Q.C. said in his judgment:
- E
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- "It does not make the slightest difference to the question of the application or otherwise of issue estoppel to a particular case that on the first occasion the local planning authority described the use in one manner and on the second occasion they described it in another manner, when it is conceded that the actual use is the same use on each occasion. This is merely a matter of language. On each occasion the use was the same, and on each occasion the issue was the same."
- H

I would accordingly dismiss the second appeal.

LORD BRANDON OF OAKBROOK. My Lords, for the reasons given in the speech of my noble and learned friend, Lord Bridge of Harwich, I would dismiss the appeals. A

LORD GRIFFITHS. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Bridge of Harwich. I agree with it, and for the reasons that he gives I, too, would dismiss both appeals. B

LORD JAUNCEY OF TULLICHETTLE. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Bridge of Harwich. I agree with it, and for the reasons given therein I, too, would dismiss the Secretary of State's appeal in *Thrasyvoulou*. I would also dismiss the second appeal. C

LORD LOWRY. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Bridge of Harwich. I agree with it, and for the reasons given by my noble and learned friend, I, too, would dismiss both appeals.

Appeals dismissed with costs. D

Solicitors: Treasury Solicitor; Frank E. C. Forney & Partners; Michael J. Tink, Romford, Treasury Solicitor; Penningtons.

J. A. G. E

[PRIVY COUNCIL]

DAVID HARDY GLYNN APPELLANT
AND
COMMISSIONER OF INLAND REVENUE RESPONDENT F

[APPEAL FROM THE COURT OF APPEAL OF HONG KONG]

1989 Dec. 11, 12, 13, 14; Lord Keith of Kinkel, Lord Templeman,
1990 Jan. 22 Lord Griffiths, Lord Ackner and Lord Lowry

Revenue—Income tax—Employment—Salaries tax—School fees of taxpayer's daughter paid directly by employer pursuant to taxpayer's contract of service—Whether "perquisite" of employment—Whether payments income of taxpayer assessable to salaries tax—Applicability in construing Hong Kong legislation of United Kingdom statutes and cases—Inland Revenue Ordinance (Laws of Hong Kong, 1981 rev., c. 112), ss. 9(1)(a), 11B, 11D(b) G H

Section 8(1) of the Inland Revenue Ordinance provided for salaries tax to be charged for each year of assessment on every person in respect of his income arising in or derived from Hong

Jaques v Secretary of State for the Environment [1994] Lexis Citation 4111

The Independent 8 June 1994, [1995] JPL 1031

QUEEN'S BENCH DIVISION (CROWN OFFICE LIST)

LAWS J

27 MAY 1994

27 May 1994

J Wicks for the Applicant.; J Hobson for the Respondent.

Buss Murton, Tunbridge Wells; the Treasury Solicitor

LAWS J

This is a statutory appeal brought under Paragraph 12 of Sch 15 of the Wildlife and Countryside Act 1981. By it the appellant seeks to have quashed 3 orders made under the Act of 1981 by the Kent County Council which modified the definitive map, maintained by the Council under s53 of the Act, so as to show 3 footpaths as public footpaths over which the public enjoyed rights of way.

The paths in question are near Sevenoaks, on land belonging to the appellant. In February 1986 a Mr Alchin applied to the Council for an order under s53(2) of the Act of 1981 modifying the definitive map and statement by adding 6 new bridleways or footpaths, including the 3 with which I am concerned. The appellant objected. The Council rejected Mr Alchin's application. Mr Alchin appealed to the Secretary of State, who decided to direct the Council to make orders modifying the definitive map as Mr Alchin had proposed. Under the statutory provisions, which I will set out in a moment, those orders were subject to confirmation in accordance with Sch 15. The Secretary of State appointed an Inspector to determine whether they should be confirmed, and a public local inquiry was held in February 1992, at which the appellant was represented. His case was that the footpaths in question were private; they had not been dedicated as public highways either at common law, nor under s31 of the Highways Act 1981.

The Inspector's decision letter is before the court. It was given on 15 January 1993. He confirmed the orders with which this application is concerned, thus rejecting the appellant's case.

The material statutory provisions are as follows:

S53(1) of the Wildlife and Countryside Act 1981 defines the "definitive map and statement" as meaning (so far as relevant to these proceedings) "the latest revised map and statement prepared ... under s33 of the 1949 Act". The 1949 Act is the National Parks and Access to the Countryside Act 1949, into whose provisions it is unnecessary to travel. S53(2) provides:

"As regards every definitive map and statement, the surveying authority shall -

(a) as soon as reasonably practicable after the commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence before that date, of any of the events specified in ss(3); and

(b) as from that date, keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence, on or after that date, of any of those events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of that event."

S53(3):

"The events referred to in ss(2) are as follows -

(a) the coming into operation of any enactment or instrument, or any other event, whereby -

...

(iii) a new right of way has been created over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path;

(b) the expiration, in relation to any way in the area to which the map relates, of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path;

..."

S53(6) engages the provisions of Sch 15 in relation to "the making, validity and date of coming into operation of ... orders under ss(2)". Para 2 of Sch 15 requires that such an order be confirmed before it comes into effect; if there are no objections, the Council may confirm the order itself if it proposes no modification to it (para 6); where an order is opposed, confirmation is for the Secretary of State, and para 7 requires him to hold a local inquiry (or afford an objector an opportunity of being heard by an appointed person). Para 12 of the Schedule then provides for the jurisdiction of this court: the provision is very close to like provisions found in the planning, highways, and compulsory acquisition legislation. It is enough to say that the statutory appeal is not on the merits, but requires a point of law to be shown; and that if the appellant is successful, it is common ground that any order I make under the statute has the effect, not merely of quashing the act of confirmation by the Secretary of State's Inspector: it means that the original orders made by the Council would be quashed, so that the Council would have to embark upon the statutory process again from the beginning if they sought to persist in the designation of these footpaths as public rights of way.

S56 provides in effect that the definitive map and statement is to be conclusive evidence that a footpath shown upon it is subject to a public right of way.

S31 of the Highways Act 1980 provides in part:

"(1) Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually been enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.

(2) The period of 20 years referred to in ss(1) above is to be calculated retrospectively from the date when the right

of the public to use the way is brought into question, whether by a notice such as is mentioned in ss(3) below or otherwise."

Ss(3)-(6) provide for specific means by which a landowner may negative an intention to dedicate the way as a highway.

Miss Wicks for the appellant takes a number of points. One, which concerned the fact that the land where one of the three footpaths (number 717) is situated was requisitioned in wartime, does not bear on the other footpaths. Her major argument, which if good will carry the day as regards all three paths, was that the Inspector found as a fact that the appellant had for the preceding 46 years demonstrated by his overt actions that he had no intention of dedicating the footpaths to the public; that this finding concluded in the appellant's favour the question, arising under the closing words of s31(1) of the Act of 1980, whether there was "sufficient evidence that there was no intention during that period [sc the 20 years of public use] to dedicate it"; and that therefore the Inspector was bound to conclude that the paths were not dedicated under s31 although, in fact, he concluded the contrary. I shall deal first with this submission. As I shall show, its resolution turns largely upon the differences between the old common law rules relating to the dedication of public rights of way and the effect, on its true construction, of s31.

In paras 45-49 of his report the Inspector sets out the appellant's evidence as to what he did to prevent or inhibit public use of his land, including the 3 footpaths. An iron gate was erected at one point in 1955, and there was evidence that it was still there in 1963. It was replaced by various wooden gates, and later by metal ones which stand today. Padlocks and chains were fitted. Workers on the estate knew that gates had to be kept locked. 18 gates were bought in 1967. The whole area enclosing the paths was fenced, and that work was completed between 1957 and 1961. Further fencing was also installed later. Various notices were erected. The Inspector accepted (para 65) that this had been done, but found that there was "no hard evidence" of notices carrying such specific words as "No Footpath". Other notices seem to have said "Private Woods", "Private", and so forth.

The Inspector found, in para 66 to which I must come, that the terminus ad quem for the purposes of the period of time in which public use of two of the footpaths had to be shown for the purposes of dedication was 1970/1. The paragraph on which Miss Wicks relies as containing the finding of fact crucial to her argument is 58. This is the relevant sentence:

"Turning to the possible presumption of dedication under common law I conclude that for the last 46 years, while the Objector has been directly involved with the Estate, he has shown by his various actions that he had no intention of dedicating the FPs."

It is important to notice that this finding is made in the context of the Inspector's consideration of the common law position.

In para 59 the Inspector said:

"In the following paragraphs, as required by WLCA81 s53, and HA80 s31, I will deal with the various Orders by considering initially when the right to use the particular FP was first raised. I will then decide the date on which the right to use it was called into question, which will be the date from which 20 years use must be calculated. I will consider if the public used it freely without being obstructed, without seeing notices or being challenged and believing they did so as of right'. I will also consider what the Objector did to make it clear to the public he had no intention of dedicating the FP. I will then decide whether the FP should be added to the Definitive map or not."

Since he had rejected any question of common law dedication, what follows in the Inspector's report must necessarily be directed to the applicability or otherwise of s31. I should read para 63-66:

"63. I believe the gates were initially aimed at keeping gypsies and vehicles out of the Estate, and it was only as planting advanced that they really became an important part of the effort to exclude pedestrians as well. However,

the number of those who claim to have driven vehicles through estate gates or opened gates after the mid 1950s, supported by those who said they were never obstructed and others who said they would not knowingly trespass, convinces me that the gates were not kept locked in spite of instructions that this should be done.

64. I note that fencing was erected around the estate between 1957 and 1961. More fencing, including rabbit netting, was erected as planting progressed. I also note that staff repaired gaps that were made. I believe the fencing linked to planting was not put across major tracks (needed by forestry workers), but may well have crossed the less important ones. Supporters' evidence convinces me that the fences had little effect on pedestrians. I suspect that people either went through open gates, gaps by the gates, skirted round the end of the fencing, or in some cases cut the fences ... However, I conclude that the majority, who had probably been walking the route for some years, barely noticed the fences.

65. As far as notices are concerned, they must clearly show to the public that there was no intention to dedicate the FPs. I accept that many notices were put up, but there was no hard evidence to suggest that any in this area carried the words 'No Footpath' or something similar. I conclude that the Supporters, virtually all of whom said they remembered no notices until 1970/1, meant that they had not remembered seeing any notice suggesting that a footpath they had used over the years was closed to them. I also accept that PFPs often run alongside and through private woodland.

66. The weight of evidence convinces me that, in spite of efforts by the Objector, the public's right to use SR719 and SR721 was first called into question in 1970/1 when Dragons Teeth and padlocked gates stopped them. I further conclude that the public used them openly, unobstructed and unchallenged and as of right for over 20 years, from at least 1946 until 1970/1."

Footpath 717 is dealt with separately (from para 69 onwards): it engaged the point as to requisition. The Inspector held that the terminus ad quem in relation to this path was 1956. For present purposes I need only set out the last 2 sentences of para 73:

"I therefore conclude that on the evidence presented the public used SR717 for at least 20 years before 1956, and probably as far back as the beginning of the century. I conclude that the use was open and unobstructed, and that users were not challenged, saw no notices telling them the FP was private, and believed they were using it as of right."

Until 1932, the dedication of a footpath as a public right of way was a matter regulated by the common law. Miss Wicks' major submission, as I have indicated, rests on the proposition that the Inspector's finding in para 58, although given in the context of the common law position, concludes the issue of dedication under s31 in her client's favour. It is therefore necessary to describe the old common law; but first I should set out the relevant provisions of the 1932 Act, which, while preserving the common law position, for the first time introduced a statutory regime. S1(1) is strikingly similar to s31(1) of the Act of 1980:

"Where a way, not being of such a character that user thereof by the public could not give rise at common law to any presumption of dedication, upon or over any land has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, such way shall be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate such way, or unless during such period of 20 years there was not at any time any person in possession of such land capable of dedicating such way."

That second proviso is not replicated in s31(1); and

this is of some materiality to the argument concerning

footpath 717 which was requisitioned, a point to which I must

return. SS(2):

"Where any such way has been enjoyed as aforesaid for a full period of forty years, such way shall be deemed conclusively to have been dedicated as a highway unless there is sufficient evidence that there was no intention to dedicate such way."

I need not read further.

The previous common law is described by Scott LJ in *Jones v Bates* [1938] 2 All ER 237 at 244as follows:

"Before the Act [sc the Act of 1932], the law applicable was the common law. The main alteration is effected by s1, which gives a new statutory effect to mere proof of actual user as of right and without interruption. At the time of the passing of the Act, the main outline of the law affecting proof of a public highway ... had been drawn quite clearly by judicial decisions. Whereas in Scotland proof of 40 years' user as of right, and without interruption in the enjoyment of the right, ipso facto established the legal conclusion that the way was public by prescription, in England no such convenient rule of law had been evolved by our courts. Our legal theory had always been ... that the sole origin of a public highway was dedication to the public use by the owners of the land over which it ran, and in consequence that, in case of dispute, the public right could be established only by such evidence as would justify an inference of fact that the way had at some date, known or unknown, been so dedicated. The corollary followed that, on this as on all others issues of fact, the tribunal had to decide, once there was some affirmative evidence before it of user, whether or not on balance it was sufficient to establish dedication. ... the task of the tribunal of fact was not limited to deciding the necessary questions of user - was it of right? Was the exercise of the right interrupted? How long had it continued? These findings would in Scotland have sufficed for the decision of the legal issue. In England, however, the tribunal had to deal with such difficult investigations as the state of the title of the owners and whether there was an owner who could dedicate, and consequently sometimes even the time when the dedication - usually quite imaginary - had in fact taken place. Above all the other difficulties, the Tribunal had solemnly to infer as an actual fact that somebody or other had in fact dedicated. It was often a pure legal fiction, and yet put on the affirmant of the public right an artificial onus which was often fatal to his success. The practical result of the English rule of law was that in many cases, although quite a formidable body of evidence was available to demonstrate what I will call the Scottish premises, the public claimant failed on the additional English requisites."

In *Fairey v Southampton County Council* [1956] 2 QB 439, [1956] 2 All ER 843 at page 456 of the former report, Denning LJ said this:

"The Rights of Way Act 1932 has introduced a new means by which the public may acquire a right of way, in addition to the old means of dedication, which, be it noted, is still preserved ... The new means of acquiring it is by prescription for 20 years. The old common law prescription for a right of way had to run from time immemorial, that is, from the time when Richard Coeur de Lion came to the throne in AD 1189. The new statutory period of 20 years has no fixed starting point, but only a finishing point."

Then at 458:

"In my opinion a landowner cannot escape the effect of 20 years prescription by saying that, locked in his own mind, he had no intention to dedicate: or by telling a stranger to the locality (who had no reason to dispute it) that he had no intention to dedicate. In order for there to be sufficient evidence that there was no intention' to dedicate the way, there must be evidence of some overt acts on the part of the landowner such as to show the public at large - the public who used the path, in this case the villagers - that he had no intention to dedicate. He must, in Lord Blackburn's words, take steps to disabuse those persons of any belief that there was a public right ... Such evidence may consist ... of notices or a barrier: or the common method of closing the way one day a year.

...

I must say at once that to my mind this Act of 1932 is not a procedural Act. It affects the substantive law in the following respects: it creates a new statutory right to a highway by prescription in addition to the old right by dedication. It reverses the burden of proof: for whereas previously the legal burden of proving dedication was on the public who asserted the right ..., now after 20 years user the legal burden is on the landowner to refute it. It gives reversioners a right to interfere and gives the public a right of way if they do not interfere: whereas previously reversioners had no right to interfere and the public could acquire no right of way against them."

Birkett LJ said at 460:

"The main purpose of the Rights of Way Act 1932 was to simplify the procedure when it sought to establish a way as a public highway. It does not profess to alter the general law as to the manner in which public rights are deemed to have come into existence. The important change is in the length of time which is enough to establish the intention. If the way can reasonably be presumed to have been dedicated as public, then proof of public user for 20 years past is now enough, if the user has been as of right', without interruption, and it is not proved by the landowner that the intention to dedicate the way was not continuous during the 20 years: Jones v Bates."

Miss Wicks submits that the only relevant change effected by statute was to reverse the burden of proof in relation to the issue of the owner's intention to dedicate. Since in para 58 the inspector has not merely found (for the purpose of the common law) that those asserting the right of way have failed to prove an intention to dedicate on the part of the appellant, but rather that the appellant has affirmatively proved, by his overt acts, no intention to dedicate, his conclusion suffices to resolve the question of statutory dedication under s31 in the appellant's favour. Mr Hobson for the Secretary of State submits that, for the purposes of the statute, the Inspector's finding in para 58 is not enough, and that in paras 64-66 he found, in effect, that the closing words of s31(1) had not been satisfied.

Taking the passage I have cited from Scott LJ in Jones v Bates as a full and convenient description of the common law, it seems to me that the material change effected by the statute of 1932 (and carried through to the Act of 1980) did not merely consist in a shift of the burden of proof. The common law required not only that the claimant to the right should show that the landowner had evinced an intention to dedicate; he had to show actual dedication; and it was precisely because such an event was usually fictitious or imaginary that the common law was unsatisfactory. But under s31 the landowner must prove merely that he had no intention to dedicate; certainly, he must prove it by overt acts, directed (as Lord Denning indicated in Fairey) to the public who use the way in question. Lord Denning contemplated that the traditional means of closing the way for one day in the year would suffice.

The result is, in my view, that under the statute the landowner has a lesser proposition to disprove than under the common law the claimant had to prove. This approach vindicates the plain purpose of the Act of 1932 for the very reason explained by Scott LJ: it expunges from the law the Alice in Wonderland requirement of any actual dedication.

But on this reasoning, though it is not precisely the way in which she put the matter, Miss Wicks must succeed, since the Inspector has found in terms that the appellant has disproved by overt acts (and they were plainly directed to the users of the ways) any intention on his part to dedicate. I do not think that the respondents' case can be saved by references to paras 64 to 66. The whole burden of those paras goes to the question of open and unobstructed user. There is, it is true, a reference in the first sentence of para 65 to the need for the notices to show to the public that there was no intention to dedicate. It may be that the notices alone would not negative that intention; but even if in para 64-66 the Inspector intended distinctly to find as a fact that the appellant had not negated the relevant intention within the closing words of s31(1), his decision would be flawed because there is no explanation whatever of how such a finding can sit with what he said in para 58. More than this, on the assumption that para 64-66 contain a finding that the appellant's intention to dedicate had not been negated under s31, that finding could only be reconciled with para 58 upon the premise that the appellant had to disprove something more, for the purposes of s31, than the Inspector found that he had disproved in para 58. But on the reasoning I have advanced, that is not the case.

That is the end of the case; but, despite the statutory changes, this area of the law remains convoluted, and I should say something about the relationship between the first and second parts of s31(1). First, persons asserting a right of way under the subsection must demonstrate actual enjoyment, as of right and without interruption, for at least 20 years. The expression "as of right" means that the members of the public using the way must believe they have the right to do so. This is clear from *Hue v Whiteley* [1929] 1 Ch 440 and *R v Secretary of State for the Environment, ex parte Cowell* [1993] JPL 851; indeed, it could not be otherwise, since if the expression "as of right" meant that the public must demonstrate an objective legal right to use the way, the statutory provision would be circular or question-begging. The nature of the user that has to be established is described by the old Latin tag "*nec vi nec clam nec precario*". It means that the use must be open not secret, and in effect unobstructed.

Quite plainly, the second part of s31(1) imports a further requirement. It means that even if use of the required quality is proved, the status of right of way would not be established if the landowner demonstrates an intention not to dedicate. The logical relationship between the two parts of the subsection entails that proof of an intention not to dedicate can be constituted by something less than proof of facts which must have made it clear to the public that they had no right to use the way: otherwise, once the interested public had established their case under the first part of the subsection, there would be no room for the operation of the second part. This is not a very satisfactory state of affairs. It is plain that the landowner must disprove an intention to dedicate by overt acts directed to the members of the public in question, but equally plain that they need not actually bring home to the public that there is no right to use the way. I can only conclude that any sufficiently overt act or series of acts indicating an intention to keep the way private will be enough for the landowner's purposes in relation to the second part of the subsection, though they do not in fact bring home to the public his objection to their using his land.

I may deal with the remainder of Miss Wicks' submissions shortly. She complained that the Inspector did not properly consider whether his own findings relating to the notices ought to have led to the conclusion that there was no intention to dedicate within the closing words of s31(1); and the evidence as to the fences and gates meant that the way cannot have been used "openly, unobstructed and unchallenged and as of right". I have entertained some doubt whether in paras 64-66 the Inspector did give proper consideration to the first, as well as the second, part of ss(1); but while the subsection plainly contemplates two stages, there is no requirement that an Inspector deal with them in any particular way, and were it not for para 58, on balance I would have concluded, particularly in light of para 66, that this Inspector intended to deal with both arms of the subsection. However, the terms of para 58 cast doubt on any such conclusion. So this aspect of the case does not amount to a free-standing basis on which to accord Miss Wicks relief. As regards the fences and gates, the Inspector's conclusion is that, at any rate, most of the public found no obstruction or challenge to their use of the way; that, I think, was a matter of fact for him. It is not enough for Miss Wicks' purpose that I might find his conclusion surprising.

Finally I turn briefly to the point as to requisitioning, which affects only footpath 717. As I have said, the Inspector took the 20 year period as regards this footpath as ending in 1956. There was no contest that there was a time during that period in which land including the footpath had been requisitioned by the military authorities.

There is no dispute between the parties but that when land is requisitioned, the authorities do not obtain the fee simple, but simply a right to possession. Miss Wicks submits that in consequence of this, the authorities have no capacity to dedicate a path as a public right of way, since the power or right to do so lies only with an owner. She says there is an analogy with the position of a tenant, who cannot create a highway over his landlord's land without the freeholder's consent: *Wood v Veal* (1822) 5 Barnewall and Alderson 454, or with the position relating to a tenant for life under a strict settlement: *HM Attorney-General and Newton Abbot Rural District Council v Dyer* [1947] Ch 67, [1946] 2 All ER 252.

Mr Hobson accepts that if the requisition factually interrupted the period of 20 years use by the public, there can be no statutory dedication, on the simple ground that the first part of s31(1) would not then be fulfilled. That was indeed the position in relation to two other footpaths which the Inspector had to consider. But he distinguished the case of 717, "because there was apparently little obvious military presence in Great Britain's Wood [where the footpath

runs] during WW2, and there was also clear evidence that it was used by several people during the period of requisition." (para (70)

The Newton Abbot case was one in which the right of way was in fact upheld under s1(2) of the Act of 1932, on the basis of 40 years user and no sufficient evidence of an absence of intention to dedicate. The judge held, however, that had the plaintiffs needed to rely on the common law, they would have failed for want of a capacity to dedicate in the relevant owner. S1(2), in contrast to s1(1), did not negative dedication in a case where there was no person in possession of the land, during the relevant period, capable of dedicating the way. S31(1) likewise imposes no such requirement. It follows, as it seems to me, that the bare fact that there is not a person in possession of the land capable of dedicating the way cannot of itself defeat a claim under s31(1). Thus, for the purposes of s31(1) of the 1980 Act and s1(2) of the 1932 Act alike, dedication will not be defeated where for example the only person in possession is a tenant who has not himself the capacity to dedicate. So the mere legal circumstance that the military authorities have no title by virtue of their requisition does not of itself negative dedication under s31(1).

However, in my judgment a right of way cannot arise under s31 if at some time during the relevant period there is no person at all having the legal right to create a public right of way. Where the only person in possession is a tenant, he together with his landlord can create a right. But where the land is requisitioned, though the requisitioners take no title, no person having an interest in the land has the power to dedicate it as a public right of way. In *Tehidy Minerals* [1971] 2 QB 528, [1971] 2 All ER 475, which was concerned with rights of common over land which had for a period been requisitioned, Buckley LJ said this at 543G of the former report:

"The effect of the requisition was to displace all other interests in the land during its continuance, with the result that from the date of the requisition until December 31st 1960 no one can have enjoyed any grazing rights on the Down by virtue of any common right. It is therefore impossible for any of the defendants to make out a case under s1 of the Prescription Act 1832, not because the requisition constituted an interruption' within the meaning of the section (which it may not have done, since neither the dominant owners nor the servient owner had any choice in the matter), but because during the requisition there was no enjoyment within the terms of the section."

It seems to me that similar considerations apply here. The fact of the requisition is simply inconsistent with the existence of public rights of way.

In the result, I would have upheld Miss Wicks' case on this ground also in relation to footpath 717.

The Definitive Map Modification Orders relating to each of the three footpaths will be quashed.

Judgment accordingly.

End of Document

R v. SUFFOLK COUNTY COUNCIL ex p. STEED

COURT OF APPEAL (Butler Sloss, Pill and Schiemann L.JJ.): July 11, 1996

Commons—Registration—Land used for sports and pastimes for over 20 years—Application for registration refused—Whether user of land restricted to inhabitants as of right—Evidence needed to establish user by inhabitants as of right—Whether registration of land as town green would create right to pursue sports and pastimes on the land in question

In 1992 the applicants sought to have an area of land in Sudbury known as the People's Park registered as a town green under the Commons Registration Act 1965 ("the CRA"). It was contended on the form of application that the land had been used for recreational use for at least 20 years from 1970. The land had been acquired in 1987 by the Secretary of State for Health with the object of constructing a new hospital on the land, and the Secretary of State objected to the proposed registration. The respondent local authority resolved that the application should be rejected as it did not establish that the necessary statutory criteria for registration as a town green had been fulfilled. The applicants sought judicial review of that decision on the grounds, *inter alia*, that the local authority had misdirected itself in law as to whether the relevant criteria were met. Carnwath J. dismissed the application at first instance. The applicants appealed.

Held, dismissing the appeal, that section 22 of the CRA, provided that a town or village green was land on which either by specific statutory provision, or by customary right, or by continuous use for not less than 20 years, the inhabitants of the locality were entitled to pursue lawful sports and pastimes. It was a serious step to register land as a town or village green whether in public or private ownership, and that other than in the case of specific statutory allotment, the customary or 20 years continuous use as of right by the inhabitants of the locality would need to be properly and strictly proved. In the present case, the evidence failed by a long way to establish that the land in question had been used for sports or pastimes as of right by the inhabitants of Sudbury. It was necessary for the applicants to demonstrate that the fact of being an inhabitant of Sudbury conferred on a person the right to use the land in question, and not merely as a member of the general public. The judge had therefore been correct to conclude that the applicants had failed to establish that the right to use the land was linked to any particular locality.

Per curiam, though the appeal did not turn on this point, it was arguable that registration of land as a new town or village green under section 13 of the CRA and the subordinate regulations had the effect of confirming in the relevant inhabitants a right to indulge in lawful sports and pastimes on the land in question. It was difficult to construe section 22 of the CRA as having any effect other than opening the way for creation of new rights where 20 years continuous user could be established. It was not the fact of registration under section 13 which created the new right but the fact that the land had been in continuous use for the period prescribed by the Act.

Cases referred to

- (1) *Bolton MDC v. Secretary of State for the Environment* [1995] 1 W.L.R. 1176; [1995] E.G.C.S. 126; [1995] N.P.C. 99A; *The Times*, July 17, 1995, HL.
- (2) *Brocklebank v. Thompson* [1903] 2 Ch. 344.

- (3) *Corpus Christi College, Oxford v. Gloucestershire County Council* [1983] Q.B. 360; [1982] 3 W.L.R. 849; [1982] 126 S.J. 578; [1982] 3 All E.R. 995; (1983) 46 P. & C.R. 9; (1982) 79 L.S. Gaz. 1257; (1983) 81 L.G.R. 29, CA
- (4) *Forbes v. Ecclesiastical Commissioners* (1872) L.R. 15 Eq. 51.
- (5) *Hammerton v. Honey* (1876) 24 W.R. 603.
- (6) *Hue v. Whiteley* [1929] 1 Ch. 440.
- (7) *Jones v. Bates* [1938] 2 All E.R. 237.
- (8) *O'Keefe v. Secretary of State for the Environment* [1996] J.P.L. 42.
- (9) *Mercer v. Denne* [1905] 2 Ch. 538.
- (10) *Mills v. Silver* [1991] Ch. 271; [1991] 2 W.L.R. 324; [1991] 1 All E.R. 449; (1990) 61 P. & C.R. 366; (1990) 134 S.J. 1402; *The Independent*, July 11, 1990, CA.
- (11) *New Windsor Corporation v. Mellor* [1975] Ch. 380; [1975] 3 W.L.R. 25; 119 S.J. 440; [1975] 3 All E.R. 44; 78 L.G.R. 337; 30 P. & C.R. 429; CA; affirming [1974] 1 W.L.R. 1504; 118 S.J. 580; [1974] 2 All E.R. 510; 72 L.G.R. 682
- (12) *R v Joliffe* (1823) 2 B. & C. 54.
- (13) *Re Turnworth Down, Dorset* [1978] Ch. 251; [1997] 3 W.L.R. 370; (1976) 121 S.J. 254; [1997] 2 All E.R. 105; (1976) 33 P. & C.R. 192; *Sub nom. Turnworth Down, Turnworth, Dorset* [1977] 75 L.G.R. 710.
- (14) *Tyson v. Smith* (1838) 9 Ad. & El. 406.

Legislation construed

Commons Registration Act 1965, ss.13 and 22.

Appeal from the order of Carnwath J. dismissing the application for judicial review of Mr Colin Steed and Mr David Steed of the decision of the Suffolk County Council made on September 3, 1992, refusing the registration of land known as People's Park, at Sudbury, as a town green under the Commons Registration Act 1965. The full facts and grounds of the application and appeal are set out in the judgment of Pill L.J.

Gerard Ryan, Q.C., for the applicants.
Vivien Chapman for the respondents.

PILL L.J. On February 27, 1992, Mr David Steed and Mr Colin Steed (the appellants) applied to Suffolk County Council (the respondents) for registration of the People's Park Sudbury, Suffolk (the land) as town green under the Commons Registration Act 1965 (the Act) by way of amendment of the register under section 13. The land is about 15.8 acres in extent and is within the urban fabric of the town of Sudbury as depicted on the current Ordnance Survey plan and to the north-east of the town centre. The land had been purchased by the Borough of Sudbury in the 1870s and renamed People's Park. Its use was later regulated by a scheme approved by the High court and administered by trustees. There was grazing and recreational use. In 1987 the land, together with other land, was acquired from the trustees by the Secretary of State for Health with the object of the construction on it by the regional health authority of a hospital.

The Secretary of State object in writing to the application which was refused by the respondents on September 3, 1992. The planning committee resolved that the application "be rejected on the grounds that it failed to establish that all the statutory criteria for amendment of the register of town and village Greens were met".

This is an appeal against the dismissal by Carnwath J. of the appellants' application to quash that decision of the respondents. The court heard submissions on behalf of the Secretary of State (who was heard in opposition to the motion under Ord. 53 r.9(1)) and the regional authority as well as from

the appellants and the respondents. A substantial sum of money has been spent on site for preparatory work for the hospital.

The application

The application to the respondents was made on Form 30 annexed to the Commons Registration (New Land) Regulations 1969 (S.I. 1969 No. 1843) (the regulations). Those regulations were made by virtue of powers conferred in sections 13 and 19 of the Act. Form 30 is headed "Application for the registration of land which became a town or village green after 2 January 1970". The question "On what date did the land become a town or village green?" is answered "1st August 1990 on completion of 20 year period from 31st July 1970". The question "How did the land become a town or village green?" is answered as follows:

By the use thereof by the local inhabitants, *i.e.* the inhabitants of Sudbury. Lawful sports and pastimes including amongst other things football, dog walking, mushroom picking, fetes, children's games, kite flying, cricket, neighbourhood access, rounders.

In answer to a later question enquiring if there are any other facts relating to the application which ought to be brought to the attention of the registration authority, it is stated:

The inhabitants have used People's Park for lawful sports and pastimes "as a right" for the 20-year period 1970–1990. Same identification of usage pre-1970. Commencement date from time immemorial.

The application was supported by 39 forms, six of which were signed by more than one person, completed by local residents and giving particulars of use of the land. A detailed statement in support was submitted by Mr S.J. Blackwell, resident and former borough surveyor. The detailed written objection of the Secretary of State was supported by statements from four trustees of the Sudbury Common Lands Charity who sold the land to the Secretary of State. The appellants and the Open Spaces Society commented in writing and in detail upon the objections.

When the planning committee considered the application, all the above material was available to them together with a report prepared by the county secretary and solicitor who had obtained counsel's opinion. The recommendation in the report was for rejection of the application.

The appellants claim that the respondents were misdirected in law in the solicitor's report. Upon the evidence and a proper legal direction, the respondents ought to have registered the land as a town green, it is submitted. Further, procedural impropriety is alleged in a failure of the respondents to give the consideration to the application which the Act and Regulations required. The application should be remitted to the respondents for reconsideration.

Town or village green

The Act followed in time the report in 1958 of a Royal Commission on Common Land. Further legislation, which has not since been enacted, was plainly contemplated. The Act has been subject to considerable judicial criticism for its uncertainty, for example in *Corpus Christi College, Oxford v. Gloucestershire County Council*.¹

¹ [1983] Q.B. 360.

The essential characteristic of a town or village green as stated in *Halsbury's Laws*, Vol. 6 para. 525 is that

“by immemorial custom the inhabitants of the town, village, or parish should have acquired the right of playing lawful games thereon and enjoying it for purposes of recreation. The nature of the enjoyment is a matter for proof in each case, and the custom must be limited to the inhabitants of the parish, manor or other district for which it is claimed”.

The classic statement of the nature of a customary right is that of Sir George Jessel M.R. in *Hammerton v. Honey*.²

There are certain rights which may be claimed by custom as distinct from prescription. One is called a right of recreation and amusement, and exercise, for the playing of all manner of lawful games and pastimes, is a right in the nature of an easement which may well be claimed by custom.

Now what is the custom? A custom, as I understand it is, local common law. It is common law because it is not statute law; it is local law because it is the law of a particular place as distinguished from the general common law. Now, what is the meaning of local common law? Local common law, like general common law, is the law of the country as it existed for the time of legal memory, which is generally considered the time of Richard I. Therefore, when people allege a custom they allege that which they call a custom as having the law of the place before the time of legal memory

After all, whatever definition you may give to custom and prescription, we all know that they are legal fictions invented by judges for the purpose of gaining a legal foundation or origin to long usage. I do not suppose anybody imagines that in the case of prescription there has been a lost grant or of a custom that there has been from time immemorial a common law of the particular place, and the meaning and substance of the old law is merely this—that when you find long continued usage which can have a legal origin, then, with the view of preserving to the people claiming them the acquired possession of the rights of property or rights of easement which they have so long enjoyed, you shall attribute these rights, if possible, to a legal origin so as to support them . . .

. . . I agree that, the nature of custom being, as it is, local law, you can only get rid of it the same way as other local laws are got rid of, namely, by Act of Parliament. I am not aware of any other means. Of course, it is opposed to the true notion to support there is such other means, but that is an additional reason why the judges have been very careful, not only in restricting the custom to certain classes of cases, but also in seeing custom is properly and strictly proved. If there is such a custom in the inhabitants of a vill you never can get rid of it, as far as I know, by any means short of an Act of Parliament.

Sir George Jessel also stated that when it is said that “custom must be certain, reasonable, and continuous—that all relates to the evidence of a custom”. Tindal C.J. had stated in *Tyson v. Smith*³ that

² (1876) 24 W.R. 603.

³ (1838) 9 Ad. & El 406 at 421.

It is an acknowledged principle that, to give validity to a custom,—which has been well described to be an usage, which obtains the force of law, and is, in truth, the binding law, within a particular district or at a particular place, of the persons and things which it concerns—it must be certain, reasonable in itself, commencing from time immemorial, and continued without interruption.

Custom, stated Stirling L.J. in *Mercer v. Denne*⁴ is “truly described as a local law”.

The 1965 Act became law against the background that such customary rights existed. The central difficulty about construing the Act is in considering whether it was intended merely or primarily to provide a mechanism for registering rights or whether it has the potential to destroy existing rights and permit the creation of new rights.

In section 22 of the Act, the interpretation section, it is stated that:

Town or village green means land which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality or on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes or on which the inhabitants of any locality have indulged in such sports or pastimes as a right for not less than 20 years.

(Lord Denning in the *Corpus Christi College* case referred to the three categories within the definition as classes A, B and C and I will use the same terms).

As the judge pointed out, the statutory definition follows the recommendations of the Royal Commission in adopting a three-part definition but class C is different from that recommended by the commission which was to include

“in a rural parish any unenclosed open space which is wholly or mainly surrounded by houses or their curtilages and which has been continuously and openly used by the inhabitants for all or any such purposes (lawful sports and pastimes) during a period of at least 20 years without protest or permission from the owner of the fee simple or the Lord of the Manor (para. 403 of report).

It may be noted that it has been held that a regular usage of 20 years unexplained and uncontradicted may be sufficient to justify a finding of the existence of an immemorial custom (*Brocklebank v. Thompson*⁵ citing *R. v. Joliffe*.⁶ As will have appeared from the form of the application, Form 30, the appellants however sought to rely upon the third part of the definition, class C, use for lawful sports and pastimes by the inhabitants as of right for the 20 years after January 2, 1970, the 20 being said to commence from July 31, 1970.

⁴ [1905] 2 Ch. 538 at 582.

⁵ [1903] 2 Ch. 344.

⁶ (1823) 2 B. & C. 54.

The statutory framework

It is necessary to set out further extracts from the Act and Regulations. Section 1, insofar as is material provides:

- (1) There shall be registered, in accordance with the provisions of this Act and subject to the exceptions mentioned therein—
 - (a) land in England and Wales which is common land or a town or village green
- (2) After the end of such period, not being less than three years from the commencement of this Act, as the minister may by order determine—[in the event 31 July 1970]
 - (a) no land capable of being registered under this Act shall be deemed to be common land or a town or village green unless it is so registered;
 - (b) no rights of common shall be exercisable over any such land unless they are registered either under this Act or under the Land Registration Acts 1925 and 1936
- (3) Where any land is registered under this Act but no person is registered as the owner thereof under this Act or under the Land Registration Acts 1925 and 1936, it shall—
 - (a) if it is a town or village green, be vested in accordance with the following provisions of this Act

(Section 8 provides that in certain circumstances the Commons Commissioner shall, in the case of a town or village green, direct the registration authority to register as the owner of the land a local authority). Section 3 provides:

- (1) For the purposes of registering such land as is mentioned in section 1(1) of this Act and rights of common over and ownership of such land every registration authority shall maintain—
 - (a) a register of common land;
 - (b) a register of town or village greens;and regulations under this Act may require or authorise a registration authority to note on those registers such other information as may be prescribed.
- (2) Any register maintained under this Act shall be open to inspection by the public at all reasonable times.

Section 10 provides:

The registration under this Act of any land as common land or as town or village green or of any rights of common over any such land, shall be conclusive evidence of the matters registered, as at the date of registration, except where the registration is provisional only.

Section 13 provides:

Regulations under this Act shall provide for the amendment of the registers maintained under this Act where—

- (a) any land registered under this Act ceases to be common land or a town or village green; or
- (b) any land becomes common land or a town or village green; or
- (c) any rights registered under this Act are apportioned, extinguished or released or are varied or transferred in such circumstances as may be prescribed.

Regulation 3 under the heading “Land becoming common land or a town or village green”, provides, in so far as is material:

- (1) Where after 2nd January 1970, any land becomes common land or a town or village green, application may be made subject to and in accordance with the provisions of these regulations for the inclusion of that land in the appropriate register and for the registration of rights of common thereover and of persons claiming to be owners thereof.

Regulation 3 and subsequent regulations state how an application for registration is to be made and what action is required of the registration authority. Regulation 6(1) provides:

As soon as possible after the date by which statements in objection to an application have been required to be submitted, the registration authority shall proceed to the further consideration of the application, and the consideration of statements (if any) in objection thereto, in accordance with the following provisions of this regulation.

The rest of the regulation provides for the consideration by the authority of written and signed statements of objection and the right of applicants to an opportunity to deal with the contents of objections. Regulation 8 specifies the action to be taken by a registration authority which has “disposed of an application”.

There are detailed notes from Form 30 prescribed by the Regulation. Note 5, under the heading “How land can become a Town or Village Green” provides:

Land can become a town or village green after 2nd January 1970 in one of the following ways:

- (1) By or under an Act of Parliament otherwise than as substituted land (as to substituted land see paragraph (4) below.
- (2) By customary right established by judicial decision.
- (3) By the actual use of the land by the local inhabitants for lawful sports and pastimes as of right for not less than 20 years.
- (4) By substitution or exchange for other land which has ceased to be a town or village green under (enactments) ...

The consideration

The evidence submitted to support the application to the respondents consisted of questionnaires completed by residents of Sudbury between May and December 1991. The printed document is headed “Questionnaire for collecting evidence to create a new green”. The uses mentioned are summarised in the written submissions of counsel to this Court as “The playing of football, cricket and rounders, walking with and without dogs, picnics, flying kites, mushroom picking, jogging, children’s playing and cycling”. The “walking of dogs” features prominently on the forms and

“fetes” and “neighbourhood access” are also mentioned in the application. Almost all the forms include negative answers to questions whether the owner’s permission to use the land had been requested and whether the writer had ever been prevented from using the land. In their statements, the former trustees say that permissions to use were given to the local football club and for activities such as fairs and galas.

In his report, the county solicitor identified the issues as follows:

In considering whether the criteria in the third limb of section 22 are met, there are a number of issues between the applicant and the objector, namely:

- (a) Is there a specific locality the inhabitants of which have indulged in lawful sports and pastimes?
- (b) Has the use been for lawful sports and pastimes?
- (c) Has the user been as of right?
- (d) Has there been 20 years user?

The four issues are then considered, with considerable references to counsel’s opinion. The solicitor concludes:

Counsel has advised that the application does not succeed on the 1st and 4th of the statutory criteria. In addition, the evidence that it meets the 2nd criteria is scant while in respect of the 3rd it is inconclusive either way.

Counsel had advised that most of the evidence came from residents of the area immediately surrounding the land and that did not in law amount to a “locality”. He also advised that because the uses relied on are claimed to have existed before 1970 the land cannot have “become” a town green after 1970 within the meaning of the Act.

The minute of the meeting of September 3, 1992 set the background and continued:

The applicant claimed that People’s Park had become a village green by virtue of 20 years use by local inhabitants. The County Secretary and Solicitor, however, had accepted counsel’s advice that the applicant had failed to satisfy the four criteria needed to establish a new village green. The local member urged the committee to hold a public inquiry into the application. The committee considered the arguments that had been put forward by both supporters of and objectors to the application.

The resolution already noted is then set out.

Judgment and submissions

The judge expressed his agreement with the respondents’ decision. He stated:

First, the evidence presented by the applicants in the present case did not in terms give any indication of a right arising since 1970. There was evidence of recreational use since 1970. But there was no indication that those using the land did so by virtue of a right claimed to have arisen since 1970. On the contrary the use is alleged to have continued virtually unchanged since as far back as the 1920’s or before. There is no hint of anything having happened since 1970 which might be thought to give rise to a right which did not previously exist.

Secondly, the evidence presented in the forms does not link the use to

a right claimed by reference to any particular locality. The use appears to have been mainly by those living in the nearby streets but the evidence does not show that they were asserting a right defined by reference to that, or any other area.

Dealing with evidence of earlier use, Carnwarth J. added:

Such a claim, if well founded, could have been registered in 1970. In the absence of registration it can no longer be relied on. It is clearly not something by virtue of which the land can be said to have “become” a village green since 1970.

When dealing earlier in this judgment with the word “locality”, the judge stated:

Whatever its precise limits, it should connote something more than a place or geographical area—rather, a distinct and identifiable community, such as might reasonably lay claim to a town or village green as of right. In the present case the “locality” on which the application for judicial review and the supporting affidavit rely is Sudbury itself; I agree that this is the only realistic basis on which to proceed.

For the appellants, Mr Gerard Ryan, Q.C., submits that what constitutes a “locality” for present purposes is a question of fact in every case subject only to the requirement that the extent of the locality is ascertainable. A pragmatic approach is required. In proving the right enjoyed, it is not necessary to show its exercise by inhabitants of every part of the locality.

The fact that, on the evidence, the land was a town green before 1970 does not prevent registration as a third category town green by virtue of use for 20 years from 1970, it is submitted. The effect of section 1(2)(a) is that the status of land which qualified for registration but was not registered is permanently disregarded. Section 13(b) does not require reconsideration of the earlier qualification; it is made irrelevant. Completion of the new qualifying period is an event independent of the original qualification and the right to have the register amended is not defeated by the presence of the word “becomes”. For the purposes of registration, the previous qualification should be ignored. In cases where there was a failure to register customary rights by 1970, Parliament did not intend so drastic a sanction as to prevent registration for all time when pre-1970 rights continue to be exercised after that date.

Mr Ryan submits that there was a sufficient assertion by the informants of use “as of right”. As well as the denial of permission granted, there was the signed assertion that the land was the “People’s Park”.

The procedural challenge is on the basis that the respondents, as registration authority, gave no sufficient attention to the facts. They were not entitled to devolve their duty to consider the evidence to counsel. “Consideration” of the application under Regulation 6 requires an “element of inquisition. The respondents must analyse the evidence and, if necessary, make inquiries of their own. It was impermissible to relate propositions of law to unconsidered facts.

Mr Ryan submits that the application should be remitted to the respondents for reconsideration first because they acted on an erroneous view of the law and, secondly, and in any event, because there was no “consideration” of the application within the meaning of the regulations.

On the effect of the word “becomes” in section 13(b) of the Act Mr Chapman, for the Secretary of State and the Health Authority, as on other points, seeks to uphold the finding of the judge. Because the evidence showed no difference in the use before 1970 from that after 1970, the land could not “become” a town green registrable under the Act during the period after 1970. There must be some change in the facts on the ground, it is submitted. Mr Chapman relies, though the judge did not, upon the decision of this Court in *Corpus Christi College Oxford v. Gloucestershire County Council*.⁷ It is submitted that the word “ceases” in section 13(a) was construed in that case as postulating “a beginning and ceasing to be,”⁸ and “become” requires a factual change on the ground.

Mr Thomas, for the respondents, submits that the evidence demonstrates a sufficient consideration of the application. The material submitted by the appellants was available to members along with the solicitor’s report. It was necessary for counsel to access the evidence in order to give legal advice.

Locality and “as of right”

The application must be treated for what it purports to be, that is, an application for the registration for a “new” class C town green for the town of Sudbury by virtue of the third part of the definition in section 22 of the Act. It is new not only as being within class C but in relying on post-January 1970 use. However, I approach the issue on the basis that it is no trivial matter for a landowner to have land, whether in public or private ownership, registered as a town green and that the evidential safeguards present in the authorities already cited dealing with the establishment of a customary right (class B) should be imported into a class C case. Use, as of right, and as inhabitants of Sudbury, for sports and pastimes must be “properly and strictly proved”. Mr Ryan rightly agreed that the requirements of reasonableness, certainty and uninterrupted use are imported into class C cases. Considering usage, Tindal C.J. stated in *Hammerton*:

Again what must be the usage proved? It must not only be consistent with the custom alleged, but, if I may use the expression, not too wide. For instance if you allege a custom for certain persons to dance on a green, and you prove in support of that allegation, not only that some people danced, but that everybody else in the world who chose danced and played cricket, you have got beyond your custom.

That the locality must be certain was confirmed by Lord Denning M.R. in *New Windsor Corporation v. Mellor*.⁹

In my judgment the application inevitably failed on the evidence submitted. I would accept that the application does not necessarily fail because the users of the land are in the main those residents of Sudbury nearest to it, nor does it fail for lack of proof of continuous use. Where the evidence fails, and fails by a long way in my judgment, is in establishing use of the land for sports and pastimes as of right as inhabitants of Sudbury. The expression “as of right”, in this context, requires a belief in the users that they are exercising a right enjoyed by the inhabitants of Sudbury to use the land for sports and pastimes. The expression “as of right” has the same

⁷ [1983] Q.B. 360.

⁸ *per* Oliver L.J. at 378B.

⁹ [1975] Ch. 380 at 387B.

meaning in this Act as it has in the Highways Acts, as to which see *Hue v. Whiteley*¹⁰ per Tomlin J., *Jones v. Bates*¹¹ and *O'Keefe v. Secretary of State for the Environment*¹² citing *Mills v. Silver*.¹³ There must in my judgment be an honest belief in a legal right to use, the legal right in this case being the right as an inhabitant of Sudbury, and not merely a member of the public, to indulge in sports and pastimes on the land. I do not propose to dwell on how much of the use described in the answers to questionnaires can be described as "sports and pastimes" because, on the view I take of the expression "the inhabitants ... of any locality as of right", the evidence falls for short of establishing the requisite use. The use does not demonstrate belief in a legal right to use and, even if it did, there is no sufficient definition of the right asserted. It follows that I agree with the judge on the second of his reasons and his comments upon "locality" and would dismiss the appeal on that ground.

"Becomes"

Consideration of the first of the judge's grounds is however appropriate, especially having regard to the most helpful submissions addressed to the court. Had the land become a town green within the meaning of that term in section 13(b) of the Act? Construing the word "becomes" in section 13(b) does involve some assessment of the general effect of the Act, upon which differing views have been expressed. I agree with the judge and with Mr Ryan, that the *Corpus Christi College* case does not assist in the present context. The decision was peculiar to the two-limb definition of "common land" in the context of registration of common rights. On the question whether "becomes" in section 13(b) requires some change in the facts on the ground, the case does not assist.

Having regard to the nature of customary rights, as explained in *Hammerton*, I do not consider that a failure to register a town green under section 1(2)(a) of the Act has the effect of extinguishing the customary rights over the land. The unregistered green shall not be "deemed" to be a green, as registered land would be, but it may still be proved by evidence to be a green. That view is supported by Note 5 to Form 30 (above) which contemplates the existence of customary rights after 1970.

In *Mellor* Lord Denning M.R.¹⁴ cited *Hammerton* as authority for the proposition that a right, once acquired by custom, can only be extinguished by Act of Parliament and added that "no statute can take away that right by a side-wind. It can only be done by express words": see *Forbes v. Ecclesiastical Commissioners*.¹⁵

In *re Turnworth Down Dorset*¹⁶ Oliver J. stated at p.260:

It is not said, it is true, what is the consequence of non-registration of a

¹⁰ [1929] 1 Ch. 440 at 445.

¹¹ [1938] 2 All E.R. 237.

¹² [1996] J.P.L. 42.

¹³ [1991] Ch. 271.

¹⁴ *op. cit.* at 376E.

¹⁵ (1872) L.R. 15 Eq. 51.

¹⁶ [1978] Ch. 251.

town or village green, except to the extent that section 1(2)(a) provides that, after the end of the specified period: "no land capable of being registered under this Act shall be deemed to be common land or a town or village green unless it is so registered". On the face of it, it seems that the local inhabitants are merely left to bear with such fortitude as they can command the fact that the land ... is not deemed to be a town or village green.

I agree with Mr George Laurence, Q.C., in his opinion to the Countryside Commission as published by the Open Spaces Society (*Getting Greens Registered*, 1995), that Oliver J. was indicating in that passage that "the inhabitants will need very little fortitude indeed because, despite the fact that their town or village green is not on the register, their rights to enjoy it remain undisturbed". Oliver J. also stated (at p.260E) that the primary purpose of the Act is "not to derogate from the [common] rights but to provide for their registration and indeed to protect them".

The 1969 Regulations make provision for the registration of "new" greens, that is, greens which did not exist on January 2, 1970. Given that customary rights continue notwithstanding non-registration, and given the apparent purpose of the Act to encourage the registration of town greens, I cannot conclude that Parliament intended in the case of continued use after 1970 to prevent the registration of a new green merely because a customary green had not been registered in time. The Act envisages the creation of class C greens. The word "registered" appears in both paragraphs (a) and (c) of section 13. In the context I read the expression "land becomes a town or village green" in section 13(b) as "land becomes registrable as a town or village green". The way in which Form 30 requires the application to be made supports that view: "Application is hereby made for the registration as a town or village green of the land described below, which *became so registrable* (my emphasis) after 2nd January 1970". Amendment of the register is possible under the section when a green is established as a class C green after January 2, 1970, even if it could have been but was not registered as a class B green under section 1(1)(a).

Creation of rights

Mr Chapman submits that registration of a class C green does not confer on or confirm in the inhabitants of the locality the right to indulge in lawful sports or pastimes on the land. Registration deals not with rights by with registration. The owner can remove the town cricket team from a registered town green.

In *Mellor* application was made, within the time limit imposed by section 1 of the Act, to register land as a village green by virtue of a customary right and also by virtue of 20 years user as of right. The Court of Appeal held that the Chief Commons Commissioner was entitled to find a customary right and it was not necessary to consider the 20 year user. However Lord Denning M.R. stated¹⁷

But the difficulty about this 20-year user is that the Act does not tell us

¹⁷ *op. cit.* at 391H.

what rights, if any, ensue to the inhabitants by virtue of a 20-year user. It enables the land to be registered as a town or village green but that mere fact of registration confer no rights. And at common law 20-year user gives no rights.

Under the heading “The effect of registration”, Lord Denning stated¹⁸:

... there is nothing [in the Act] to tell us what the effect of registration is. It confers no rights in itself. All is left in the air. The estimation is that Parliament intended to pass another statute dealing with these and other questions on common land and town or village greens. This Act twice refers to matters which “Parliament may hereafter determine”: see section 1(3)(b) and 15(3). I hope that another statute will not be long delayed. But, if there should be delay, I would be tempted to infer from this Act of 1965 that Parliament intended that all land registered as a “town or village green” should be available for sports and pastimes for the inhabitants ...”

Browne L.J. stated¹⁹: “I also agree that as the Act stands, and without further legislation, such user (20 year user as of right) confers no rights on the on the public.”

On my earlier findings, the point does not arise for decision in this case but I would respectfully question whether it is correct that registration of a “new” green under section 13 of the Act and the Regulations does not have the effect of confirming in the relevant inhabitants a right to indulge in lawful sports and pastimes on the land. The point was not argued in *Mellor* which in any event concerned pre-1970 and not post-1970 use. Lord Denning recognised that the class C green in section 22 was “a new thing which is not known to the common law”. That proposition cannot, with respect, be challenged but it leaves open the question whether rights may have been created by statute.

Town or village greens undoubtedly have a legal existence. They were expressly exempted from inclosure under section 15 of the Inclosure Act 1845. Section 12 of the Inclosure Act 1857 provided “summary means of preventing nuisances in town greens and village greens”. Section 29 of the Commons Act 1876 provided that “an encroachment on or inclosure of a town or village green, also any erection thereon or disturbance or interference with or occupation of the soil thereof which is made otherwise than with a view of the better enjoyment of such town or village green or recreation ground, shall be deemed to be a nuisance”. Section 15 of the Commons Act 1889 brings town and village greens within the regulatory provisions contained in Part I of that Act. Once it is established that land is a town or village green, there are protectable rights to use it.

While I accept that, by its title, the Act is said to be “an Act to provide for the registration ... of town or village greens” and not an Act to amend the law relating to public rights, section 22 does provide that “in this Act unless the context otherwise requires”, class C land is included within the definition

¹⁸ *ibid.* at 392E–G.

¹⁹ *ibid.* at 395G.

“town or village green”. There is no express limitation upon the purposes for which the land is included within the definition. There is no doubt that the inhabitants have rights over class A and class B greens and the effect of land being a class C green should be considered in that context. I find it difficult to conclude other than that Parliament intended, in section 22, to open the way to the creation of new rights. The right is “to indulge in lawful sports and pastimes” while avoiding the need to prove an immemorial custom or legal origin which would establish a class A or class B green. The limitation of the period of user to 20 years does not offend against principle having regard to *Brocklebank* (above). The land is a town green by virtue of statute and, once it is a town green, should bear the same incidents as any other town green. It is the relevant use which, under the statute, creates the right but once it is registered under section 13, section 10 provides that registration shall be conclusive of the matters registered. Classes B and C should be considered together and just as the evidential requirements of class B are imported into class C, the substantive effect of the required proof is in my view the same in both classes.

The analogy is not exact but I see class C as a way of establishing rights just as section 1(1) of the Rights of Way Act 1932 (now section 31 of the Highways Act 1980) provided a means of proving the existence of a highway. Omitting words of limitation and exception, section 1(1) provided that “where a way ... upon or over any land has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, such way shall be deemed to have been dedicated as a highway”. In *Jones v. Bates*, Scott L.J. stated that the effect of the section was to give “a new statutory effect to mere proof of actual user as of right and without interruption”. An actual dedication need not be proved. I would construe the class C definition as having the same effect in making proof of the appropriate user sufficient to create a right.

The test for considering whether the rights are established is a stringent one, as stated earlier in this judgment. That provides protection for those with an interest in the land. The registration procedure, as laid down in the Regulations, provides further protection by imposing duties upon a registration authority to send, publish and affix notices (Regulation 5(4)) and conferring the right to object. The Regulations, together with the prescribed Form 30 and its notes, appear to me to be drafted on the basis that what is to be registered, if the application is successful, is a right.

Respondents' procedure

Had a different view of the facts by the respondents been a real possibility, I would not have quashed their decision on the ground of procedural irregularity. Regulations require them to consider the application and the material supplied by the applicants and the objectors was available to members. In his report, the respondents' solicitor correctly identified the issues. The regulations do not in my view impose on the respondents in present circumstances a duty to make their own investigations into the use made of the land.

It is right to acknowledge that the solicitor's report did lay stress on counsel's view of the evidence, which the solicitor adopted, but the members were not precluded from making their own assessment of the evidence and, according to the counsel minute, they considered the arguments on both sides. The issues upon construction of the Act are such that legal advice was

not only helpful but essential. There was a “consideration” sufficient to satisfy the requirements of Regulation 6. Nothing I say derogates from the duty of council members to assess the submitted evidence when performing the duty under the Regulations.

Costs

The judge ordered the appellants to pay the costs of the respondents and one half of the costs of the Secretary of State. According to counsel’s note, the Secretary of State was deprived of half his costs on the grounds that the judge took into account “that part of the problem is due to the failure of successive Secretaries of State to implement legislation”.

I do not regard that as a relevant consideration. The Secretary of State for Health cannot be responsible for Parliament’s failure, if it rightly be regarded as failure, to pass legislation on the management of town greens.

This Court should in my view exercise the discretion afresh. The Secretary of State appeared as landowner and developer of land over which rights were claimed by the appellant. His interest was quite different from that of the respondents as registration authority and whose duties were to be performed, it is agreed, in an impartial manner under the Act and Regulations.

There mere fact that the party claiming costs is the developer will not of itself normally justify a second set of costs (*Bolton MDC v. Secretary of State for the Environment*²⁰ per Lord Lloyd.²¹ In this case however, in addition to claiming relief against the registration authority, the appellants sought a declaration that the land was a town or village green. The Secretary of State appeared at the hearing to protect his interest as landowner against a claim to rights over that land. In my judgment, this is one of those cases where the Secretary of State, as well as the respondents, should be awarded costs.

I would dismiss the appeal and allow the Secretary of State’s appeal on costs.

SCHIEMANN L.J. I agree.

BUTLER-SLOSS L.J. I also agree.

*Appeal dismissed.
Secretary of State’s appeal on costs
allowed.*

Solicitors—Barker Gottle, Ipswich; Argles and Court, Maidstone.

Reporter—Christopher Wagstaffe.

²⁰ [1995] 1 W.L.R. 1176.

²¹ *ibid.* at 1178H.

 Todd v Secretary of State for Environment Food and Rural Affairs

Overview | [2004] EWHC 1450 (Admin), | [2004] 4 All ER 497, | [2004] 1 WLR 2471, | [2005] 2 PLR 1,
| [2004] 26 LS Gaz R 29, | [2004] 28 LS Gaz R 34, | (2004) Times, 6 July, | [2004] All ER (D) 239 (Jun)

 Todd and another v The Secretary of State for Environment Food and Rural Affairs [2004] EWHC 1450 (Admin)

QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)

EVANS-LOMBE J

22 JUNE 2004

22 JUNE 2004

Highways — Public footpath — Definitive map and statement — Modification order — Modification confirmed — Challenge to order — Test to be applied — Wildlife and Countryside Act 1981, s 53(3)(c)(i).

G Laurence QC and R Crail for the Claimants

T Morshead for the Defendant

William Sturges & Co; Treasury Solicitor

EVANS-LOMBE J:

[1] This is an application for the quashing of the order made by the Hampshire County Council (“the Council”) on the 26 May 2000 and confirmed on the 15 September 2003 by the Defendant's Inspector, modifying the Council's definitive map of public rights of way pursuant to s 53 of the Wildlife and Countryside Act 1981. The modification in question was to include on the Council's definitive map as a byway open to all traffic (“a BOAT”), a way over land which in the past had formed part of the Bramshill estate in the parishes of Bramshill and Eversley. The way is described in the order as running from the junction of the roads C164 and C24 over a distance of 1,690 metres to the road U241. The Claimants are two persons having an interest in the extent of the rights over the way. The Defendant is the Secretary of State for Environment Food and Rural Affairs. The actual issue between the Claimants and the Defendant is not as to the way's status as a highway but as to the extent of the public's rights over it. Whereas the Claimants would not object to the way's inclusion on the definitive map as a footpath or bridleway, they object to its being included as a BOAT and thus subjected to motorised vehicular traffic.

[2] The way in question is called Sandy Lane. Counsel for the Claimants have helpfully included in their written submissions as an appendix a history of Sandy Lane from the middle of the 19th century in the form of a chronology with, as a further appendix, a description of the persons referred to in that chronology. I do not understand that any of the events and descriptions set out in those two documents are in issue between the parties. I therefore append them to this judgment as a clear and succinct summary of the background events to this application concluding with the issue of these proceedings on the 12 November 2003.

[3] It will be seen that the Defendant's Inspector (“the Inspector”) gave an interim decision by a decision letter dated the 18 July 2002 (“the Interim Letter”) to which references are made in the chronology as OD 2002. The Inspector gave his final decision confirming the Council's order by a letter (“the Final Letter”) dated the 15 September 2003 to which references are made in the chronology as OD 2003. The Interim Letter indicated the

Inspector's intention to modify the Council's order of the 26 May 2000 so as to confirm an entry on the definitive map of Sandy Lane as a way but with user limited to a footpath or bridleway. As a result that modification necessitated re-advertisement of the order and following further objections, a further enquiry. As a result the Inspector received further written submissions from the parties which caused him to change his mind so that the final order confirmed Sandy Lane as a BOAT in accordance with the Council's initial order.

[4] The Claimants seek to have the council's order of confirmation of the 15 September 2003 ("the confirming order") quashed under four heads as follows:

"1. That in confirming the council's order the Inspector applied too low a standard of proof for the existence of a BOAT on Sandy Lane namely that the council could establish facts from which the existence of such a way could 'reasonably be alleged to subsist' as opposed to the normal civil burden of proof that such a way subsisted on the balance of probabilities.

2. That the Inspector's change of mind was caused by a re-evaluation of documents and plans associated with procedures for the purpose of the Finance Act 1910 which he found to have constituted a dedication of Sandy Lane by its then owner, Sir Anthony Cope, which dedication was subsequently accepted by user by the public.

3. That the Inspector's conclusion was reached by procedural unfairness in that the objectors were not given a opportunity to comment upon new material which they submit passages in the final letter show were the product of independent research by the Inspector which plainly affected his decision.

4. That the Inspector's changed conclusion was unsupported by any findings of fact or any findings capable of supporting that conclusion were unsupported by evidence."

[5] I turn to deal with the first and main issue.

The burden of proof required under Schedule 15 for confirming an order

[6] At para 38 of the Final Letter, having analysed the effect of the material before him resulting from the 1910 Finance Act procedures, the Inspector concluded that "this leads to the reasonable allegation that, in completing the procedures required by the Finance Act, Sir Anthony Cope dedicated the order route as a public carriageway". He then went on to consider evidence tending against "this allegation" and concluded at para 54:

"Having deduced that the order route may be reasonably alleged to subsist as a vehicular highway and noting that it is now 'used by the public mainly for the purposes for which footpaths and bridleways are so used', I conclude that the order should be confirmed."

[7] Although there are other passages in the Final Letter, notably at para 46, where the Inspector appears to have been applying the normal civil standard of proof it is not in issue that the standard he ultimately applied in confirming the order was that he was satisfied that a BOAT could "be reasonably alleged to subsist". It is the Claimant's case that in doing so the Inspector made an error of law.

[8] Part IV of the National Parks and Access to the Countryside Act 1949, under the short title "ascertainment of footpaths, bridleways and certain other highways" contained provision for the preparation of maps and statements to record all footpaths bridleways and roads carrying vehicular traffic but which were being used primarily as footpaths and bridleways (referred to as "RUPPS"). The Act's means of doing so was through the preparation of "definitive maps" and supporting statements, covering the whole country, on which such public rights of way were recorded, and once so recorded, were deemed unchallengeably to exist until lawfully terminated. The Act placed a duty on each County Council as "the surveying authority" to prepare, and by periodic reviews, to keep up to date such definitive maps and statements. It will be necessary later in this judgment to examine in some detail the provisions of part IV. Sections of the 1949 Act were repealed and replaced by the Countryside Act 1968. Again it will be necessary to examine the relevant parts of this Act. That process was continued by the Wildlife and Countryside Act 1981. The issues arising from the first ground upon which the Claimants seek to quash the Council's order result from the application to the facts of this case of the provisions of s 53 and Sch 15 of the 1981 Act.

[9] Part III of the 1981 Act, which by s 66 applies to footpaths, bridleways or BOATs, under the heading "ascertainment of public rights of way" provides by s 53 as follows:

"53 Duty to keep definitive map and statement under continuous review.

(1) In this Part 'definitive map and statement', in relation to any area, means, subject to section 57(3) –

(a) the latest revised map and statement prepared in definitive form for that area under section 33 of the 1949 Act; or

(b) where no such map and statement have been so prepared, the original definitive map and statement prepared for that area under section 32 of that Act; or

(c) where no such map and statement have been so prepared, the map and statement prepared for that area under section 55(3).

(2) As regards every definitive map and statement, the surveying authority shall –

(a) as soon as reasonably practicable after the commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence, before that date, of any of the events specified in subsection (3); and

(b) as from that date, keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence, on or after that date, of any of those events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of that event.

(3) The events referred to in subsection (2) are as follows:

(a) the coming into operation of any enactment or instrument, or any other event whereby –

(i) a highway shown or required to be shown in the map and statement has been authorised to be stopped up, diverted, widened or extended;

(ii) a highway shown or required to be shown in the map and statement as a highway of a particular description has ceased to be a highway of that description; or

(iii) a new right of way has been created over land in an area to which the map relates, being a right of way such that the land over which the right subsists is a public path;

(b) the expiration, in relation to any way in the area to which the map relates, of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path;

(c) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows –

(i) that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way to which this Part applies;

(ii) that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description; or

(iii) that there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification.

(4) The modifications which may be made by an order under subsection (2) shall include the addition to the statement of particulars as to –

(a) the position and width of any public path or byway open to all traffic which is or is to be shown on the map; and

(b) any limitations or conditions affecting the public right of way thereover.

(5) Any person may apply to the authority for an order under subsection (2) which makes such modifications as appear to the authority to be requisite in consequence of the occurrence of one or more events falling within paragraph (b) or (c) of subsection (3); and the provisions of Schedule 14 shall have effect as to the making and determination of applications under this subsection.

(6) Orders under subsection (2) which make only such modifications as appear to the authority to be requisite in consequence of the occurrence of one or more events falling within paragraph (a) of subsection (3) shall take effect on their being made; and the provisions of Schedule 15 shall have effect as to the making, validity and date of coming into operation of other orders under subsection (2)."

[10] Section 53 replaces s 33 of the 1949 Act. Section 53 subsection (3) is the subsection with which this part of my judgment is primarily concerned and which replaced s 33(2) of the 1949 Act, but also contained a power to remove a right of way shown on the definitive map which was not contained in the 1949 Act and first appeared in the 1968 Act.

[11] It will be seen that s 53 places a duty on the "surveying authority" ("the Authority"), here the Council, to modify the definitive map by an order under subsection (2) in consequence of the occurrence of any of the events specified in subsection (3). The present case concerns an event specified in subsection (3)(c)(i) namely the discovery by the authority "of evidence which (when considered with all other relevant evidence available to them) shows (i) that a right of way which is not shown on the map and statement subsists or is reasonably alleged to subsist. . . ." It will be observed that there are two tests to be met by the authority before making an order. The authority must be satisfied either, that the right of way "subsists" or, alternatively, "is reasonably alleged to subsist". It is accepted that the former test would require the authority to be satisfied of the subsistence of the right of way to the normal civil burden of proof ie on the balance of probabilities, whereas the latter test imposes on the authority a lesser burden, namely one which obliges them only to be satisfied of the existence of facts which raise a prima facie case for the subsistence of the way.

[12] It is pursuant to subsection (3)(c)(i) that the Council made the order of 26 May 2000.

[13] The "events" specified in subsection (3)(a) primarily concern alterations to the definitive map consequent on prior "legal events" such as orders diverting or stopping up existing rights or creating new ones. That subsection has no application to the facts of this case. Subsection (5) permits members of the public to apply to an authority to make an order under subsection (2) on being satisfied of events falling within subsections (3)(b) or (c). The "making and determination" of such applications are governed by Sch 14 of the 1981 Act. Paragraph 2(1) of Sch 14 requires any applicant to "serve a notice stating that the application has been made on every owner and occupier of any land to which the application relates" and the applicant is required by subparagraph 2(3) to certify to the authority that he has done so. Paragraph 3 of the schedule is headed "determination by authority" and provides:

" 3(1) As soon as reasonably practicable after receiving a certificate under paragraph 2(3), the authority shall –

(a) investigate the matters stated in the application; and

(b) after consulting with every local authority whose area includes the land to which the application relates, decide whether to make or not to make the order to which the application relates . . .

(3) As soon as practicable after determining the application, the authority shall give notice of their decision by serving a copy of it on the applicant and any person on whom notice of the application was required to be served under paragraph 2(1)."

[14] Paragraph 4 gives the applicant a right of appeal against a refusal by the authority to make an order under sub-s 53(2).

[15] Section 3 (6) provides that orders consequent on events specified in sub-s (3)(a) shall take immediate effect but those consequent on events specified in subsections (b) and (c) of sub-s (3) shall take effect subject to the provisions of Sch 15. So far as material to this judgment that Schedule provides as follows:

"Coming into operation

2 An order shall not take effect until confirmed either by the authority or the Secretary of State under paragraph 6 or by the Secretary of State under paragraph 7.

Publicity for orders

3(1) On making an order, the authority shall give notice in the prescribed form . . .

(2) Subject to subparagraph (4) [immaterial] the notice to be given under subparagraph (1) shall be given

(a) by publication in at least one local newspaper . . .

(b) by serving a like notice on

(i) every owner and occupier of any of that land; . . .

(iv) such other persons as may be prescribed in relation to the area in which that land is situated or as the authority may consider appropriate; . . .

Unopposed orders

6(1) If no representations or objections are duly made, or if any so made are withdrawn, the authority may –

(a) confirm the order without modification; or

(b) if they require any modification to be made, submit the order to the Secretary of State for confirmation by him.

(2) Where an order is submitted to the Secretary of State under subparagraph (1), the Secretary of State may confirm the order with or without modifications.

Opposed orders

7(1) If any representation or objection duly made is not withdrawn the authority shall submit the order to the Secretary of State for confirmation by him.

(2) Where an order is submitted to the Secretary of State under subparagraph (1) the Secretary of State shall either –

(a) cause a local enquiry to be held; or

(b) afford any person by whom a representation or objection has been duly made and not withdrawn an opportunity of being heard by a person appointed by the Secretary of State for the purpose.

(3) On considering any representations or objections duly made and the report of the person appointed to hold the enquiry or hear representations or objections, the Secretary of State may confirm the order with or without modifications.”

[16] Paragraph 8 imposes certain restrictions on the Secretary of State's power to confirm orders with modifications and the remaining paragraphs in the schedule provide for local enquiries (para 9), the appointment of inspectors (para 10), the notice to be given of final decisions (para 11), and the power to make regulations “as to the procedure on making submission and confirmation of orders as appears to him to be expedient (para 13(1))”. Paragraph 12 of the schedule provides for any person to challenge an order which has taken effect as not being within the powers conferred ss 53 and 54, or for non-compliance with Sch 15, by application to the High Court. It is pursuant to para 12 that these proceedings have been brought.

[17] It will be seen, therefore, that modifications to the definitive map by an authority consequent on any of the events specified in s 53(3)(b) or (c), to become effective, must proceed through two stages, the order stage and the confirmation stage. The order stage is governed by s 53(5) and Sch 14 and the confirmation stage is governed by s 53(6) and Sch 15. It is accepted that when the authority after consultation decides “whether to make or not to make

the order” within para 3(1)(b) of Sch 14 it is empowered to make the order even if it is not, on the material before it, able to conclude that the relevant right of way subsists, provided it is satisfied, on the material before it, that it can be “reasonably alleged to subsist”. The question on this part of the case is whether when such an order comes to be confirmed under s 53 (6) and Sch 15 the Secretary of State, in the exercise of the discretion conferred on him by para 7(3) of Sch 15, can confirm that order even if satisfied, only, that the allegation of the subsistence of the way is reasonable, or, alternatively whether he must be satisfied on the balance of probabilities that the way subsists.

[18] I have been shown three internally circulated documents intended to guide the Ministry's Inspectorate. The first dated the 21 October 1997 appears at para 10 to advise inspectors that, at the confirmation stage, they need only be satisfied up to the lesser burden of proof. That guidance appears to be withdrawn by a circular of February 2001 but restored by one of April 2003.

[19] It is submitted by the Defendant that the Secretary of State's current view as to the standard of proof required for the confirmation of modification orders under Sch 15 is supported by the recent decision of Collins J in *R (on the application of Leicestershire County Council) v Secretary of State for Environment Food and Rural Affairs*, [2003] EWHC 171 Admin, judgment 20 January 2003. The case concerned a public footpath running between two cottages before debouching onto a main road. To get to the main road it had to pass through either the garden of Manor Cottage or the contiguous garden of Glebe Cottage. The existing footpath, as being used at the time of the application, passed through that of Glebe Cottage but in order to do so it had to do a sharp left turn when reaching the garden fences in order to pass through an existing gate at the top end of Glebe Cottage garden thereafter straightening up to run in a straight line to the road along the boundary between the two gardens, but on the Glebe Cottage side. If the footpath had passed through Manor Cottage garden it would have run in a straight line to the road. The application under the 1981 Act was brought by the owner of Glebe Cottage under s 53(3)(c)(i) for an order modifying the definitive map to make the path run through Manor Cottage garden and under subsection (iii) of (c) to remove the existing entry on the map showing the path as running through Glebe Cottage garden. The matter came before Collins J on a renewed application for permission it having been refused on paper. It is not entirely clear from the report but it seems that the relevant surveying authority, the Leicestershire County Council, had made an order on the application of the owner of Glebe Cottage and the question was whether that order should be confirmed. The authority had referred the order to the Secretary of State who had appointed an inspector to hold an enquiry. It seems that the inspector, regarding himself as at liberty to apply either the test of subsistence on the balance of probabilities or the test of reasonable allegation of subsistence, found that the owner of Glebe Cottage had satisfied the latter test for the purpose of establishing that the footpath should run through his neighbour's garden (s 53(3)(c)(i)) but had failed to establish, to what he regarded as a higher burden of proof, a case justifying the removal from the map of the right of way running through his own garden (s 53(3)(c)(iii)). The inspector regarded the latter finding as taking precedence and accordingly declined to confirm the order under s 53(3)(c)(i) and also that under (c)(iii). It is to be observed that the dual test only applies to cases brought under subsection (c)(i). There is no ambiguity, as to the test applicable to cases under (c)(iii) (or c (ii)), which is the normal civil burden of proof.

[20] I quote from the judgment of Collins J starting at para 20 of the transcript:

“20. The inspector then directed himself as to the correct approach that he should adopt. He relied on a decision which had been put before him, *R (on the application of Norton and Bagshaw) v the Secretary of State for the Environment* (1994) 68 P&CR 402, a decision of Owen J. In that case Owen J was considering, among other things, the correct approach to s 53(3)(c)(i), and what he said about it, at the bottom of p 407 of the report, was this:

‘It is necessary to give some meaning to all the words used. Accordingly, there must be a difference between showing “that a right of way which is not shown in the map and statement subsists” and showing that a right of way which is not shown in the map and statement “is reasonably alleged to subsist”. Accordingly the questions for the council and subsequently for the Secretary of State were: does the evidence produced by the Claimant together with all the other evidence available show that either –

(a) a right of way subsists? (I shall call this test “A”), or

(b) it is reasonable to allege that a right of way subsists? (I shall call this test “B”).

To answer either question must involve some evaluation of the evidence and a judgment upon that evidence. For the first of those possibilities to be answered in the affirmative, it will be necessary to show that on a balance of probabilities the right does exist. For the second possibility to be shown it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege a right of way to subsist.'

21. The inspector then sets out Test A and Test B in the terms of the section. When considering Test A, he says to establish whether a right of way exists on the balance of probabilities would require clear evidence in favour of the applicant and no credible evidence to the contrary. Mr Richards has submitted that that is an incorrect approach to a finding on the balance of probabilities. There may be credible evidence to the contrary, but that would not necessarily prevent a finding that on the balance of probabilities the existence of the right of way was made out. I suppose it must be obvious that, if there is credible evidence to the contrary, it would need clearer evidence to establish on the balance of probabilities that the right of way existed. But, as it seems to me, it is perhaps unsafe and unnecessary for inspectors, as it was for this inspector, to analyse or to use other words to indicate what is the test on the balance of probabilities. All it requires is that the inspector or the council is persuaded that it is more probable than not on the evidence – and on all the evidence – that the right of way exists. If so, it will be established in conformity with the Act.

22. The inspector then sets out Test B, which he explains thus:

'If there is a conflict of credible evidence, and no incontrovertible evidence that a way cannot reasonably be alleged to subsist, then the answer must be that it is reasonable to allege that one does exist.'

That has not been criticised as a proper approach. Indeed, as Owen J made clear, the question is whether a reasonable person could reasonably allege a right of way, having considered all the relevant evidence, and the council and the Secretary of State in turn must be judges of that. It is perfectly obvious that the evidence necessary to establish Test B will be less than that necessary to establish Test A.

23. Mr Morshead has submitted – and, as I understand it, Mr Richards does not dissent from this, although he does not positively put it forward – that the reason for the lesser test in s 53(3)(c)(i) is a recognition by Parliament that, if it can be shown that it is reasonable to allege that a right of way subsists, then it ought to be put down in the public interest on the map, and then it will be for the relevant landowner or whoever to bring forward a case to show that that was wrong and that the map therefore shows a right of way which it should not show. The burden upon the individual to establish that is that set out in s 53(3)(c)(iii).

24. The circular which is published by the Department under the Act makes it clear that the evidence to establish that a public right of way should be removed from an authoritative record will need to be cogent, and indeed that is consistent with what is set out in s 56 as to the effect of a right of way shown on the definitive map.

25. The inspector then considers the tests under s 53(3)(c)(i). On Test A in para 47 he says this:

'The evidence in support of the Manor Cottage route, however, looks at the situation only from the point of view of people walking southwards from the open countryside into Main Street. When considered the other way round, I believe the Glebe Cottage route would have been the more inviting choice. To that should also be added what I consider can reasonably be assumed to have been in the mind of the author of the 1951 Parish Survey Plan and Statement, namely that he knew where the Main Street end of the footpath was, and showed it on his plan accordingly; it therefore did not need also to be recorded verbally.

Taken together, these factors lead me to the conclusion that although there is indeed evidence in favour of the Applicant, that evidence is not clear-cut because there is likewise credible evidence to the contrary. The Order therefore fails Test A.'

Whether or not the language used was wholly satisfactory, it seems to me to be absolutely clear from what the inspector has there said that he took the view that the weight of the evidence was such that he was not persuaded that the right of way over Manor Cottage existed. Indeed, he would not have referred to the Parish Survey Plan and Statement of 1951 and the point about Glebe Cottage being more inviting from Main Street unless he had formed the view that that was the more probable route. But he then went on to consider Test B. He made the point that there was evidence in support of Manor Cottage, in particular a substantial body of user evidence, and in those circumstances he was persuaded that Test B was satisfied because the footpath was reasonably alleged to subsist over Manor Cottage.

26. Mr Richards submits that, in the light of those findings, he was in effect obliged to find in favour of the County Council because the test under (i) had been fulfilled and therefore the only proper course to adopt would be to allow the application because it was shown that the map ought to have the footpath through the curtilage of Manor Cottage. However, the inspector went on, properly in my view, to consider (iii), and made the point there that cogent evidence was needed to remove a footpath and that there was not sufficient evidence to persuade him that it ought to be removed. Mr Richards submits that that is a perverse finding and that he could not properly have found in favour of the Applicant on (i) and against the Applicant on (iii).

27. As I have indicated, it is perhaps unusual for s 53 to come into play where there is no dispute that a right of way exists but there is a dispute as to precisely the route of that right of way. In those circumstances it is not possible to look at (i) and (iii) in isolation because there has to be a balance drawn between the existence of the definitive map and the route shown on it which would thus have to be removed, and the evidence to support the placing on the map of, in effect, a new right of way.

28. As I have already indicated, s 53(3)(c)(i) is usually in play when there is a question as to whether a right of way exists at all, ie when there is no question of any alternative route, merely a battle as to whether the right exists. Likewise, s 53(3)(c)(iii) is normally in issue when there is a battle as to whether the right of way shown on a map should be there at all and it is apparently unusual for the battle to be about alternative routes. If it is, however, it seems to me quite clear that the alternative Test B under s 53(3)(c)(i) is the less important. Indeed, it may well be that it is of no importance because what the inspector is having to do is to decide which is the correct route. If he is in doubt and if he is not persuaded that there is sufficient evidence to show that the correct route is other than that shown on the map, then what is shown on the map must stay because it is in the interests of everyone that the map is to be treated as definitive and if the map has been so treated for some time, then it is obvious that it is desirable that it should stay in place. Hence the circular indicating that cogent evidence is needed to remove a right of way shown on the map. It would be difficult to imagine that a finding that is less than that the alternative exists on the balance of probabilities would be sufficiently cogent evidence to change what is on the map. It would be strange indeed if merely to find that it was reasonable to allege that the alternative existed was in a given case sufficient to remove what is shown on the map. I am not saying it is impossible – it is dangerous to rule out any possibility – but I would be surprised, I am bound to say, if in any given case that amounted to sufficiently cogent evidence to remove the route shown on the map.

29. As I say, where you have a situation such as you have here, it seems to me that the issue really is that in reality s 53(3)(c)(iii) will be likely to be the starting point, and it is only if there is sufficient evidence to show that that was wrong – which would normally no doubt be satisfied by a finding that on the balance of probabilities the alternative was right – that a change should take place. The presumption is against change, rather than the other way around.

30. It seems that the inspector's approach, albeit perhaps expressed in a way which was somewhat over-complicated, was correct and that there is no reason in the circumstances of this case why what was shown on the map should be changed."

[21] It seems to me that this decision is not direct authority for the proposition that the lesser standard of proof is available to the Secretary of State in confirming modification orders under sub-s (c)(i). The case turned on the application to remove under sub-s (c)(iii) under which the judge concluded that the inspector was correct to apply a higher standard of proof to justify a removal than the reasonable allegation standard although there is no direct reference to the civil standard of proof, "on the balance of probabilities". However, Collins J did not disapprove of the inspector's initial conclusion that it would have been sufficient for him, on the material before him, to confirm the existence of the footpath over Manor Cottage if satisfied that the reasonable allegation test had been met but for the failure to satisfy the higher test he applied to the application to remove it from Glebe Cottage. Thus, it seems to me, that Collins J's judgment is consistent with the lower test being available on applications for confirmation in respect of cases under (c)(i) but it was not necessary for him to decide the point, which was not argued before him, and he did not do so.

The 1949 Act

[22] Before the enactment of the 1949 Act there were no official records of public rights of way. If a dispute arose about the subsistence of a right of way over land such dispute was determined by litigation in the ordinary courts usually between the landowner and the person or persons asserting the right of way. In *R (on the application of*

Hood) v Secretary of State for the Environment 1975 1QB p 891, [1975] 3 All ER 243 at p 896 Lord Denning Master of the Rolls described the object of the 1949 Act in these words:

"The object of the statute is this: it is to have all our ancient highways mapped out, put on record and made conclusive, so that people can know what their rights are. Our old highways came into existence before 1835. They were created in the days when people went on foot or on horseback or in carts. They went to the fields to work, or to the village, or to the church. They grew up time out of mind. The law of England was: once a highway, always a highway. But nowadays with the bicycle, the motorcar and the bus, many of them have fallen into disuse. They have become overgrown and no longer passable. But yet it is important that they should be preserved and known, so that those who love the countryside can enjoy it, and take their walks and rides there. That was the object of the National Parks and Access to the Countryside Act 1949 and the Countryside Act 1968."

[23] The relevant provisions were contained in Part IV ss 27 to 38 of the 1949 Act under the heading "Ascertainment of footpaths, bridleways and certain other highways". Section 27 provided:

"27 Surveys of public paths etc, and preparation of draft maps and statements.

(1) Subject to the provisions of this part of this Act, the council of every county in England or Wales shall as soon as may be after the date of the commencement of this Act carry out a survey of all lands in their area over which a right of way to which this part of this Act applies, is alleged to subsist, and shall, not later than the expiration of three years after that date or of such extended period as the Minister may in any particular case allow, prepare a draft map of their area, showing thereon a footpath or bridleway, as may appear to the council to be appropriate, wherever in their opinion such a right of way subsisted, or is reasonably alleged to have subsisted, at the relevant date.

(2) A map prepared in accordance with the last foregoing subsection shall also show thereon any way which in the opinion of the authority carrying out the survey (herein after referred to as 'the surveying authority'), was at the relevant date, or was at that date reasonably alleged to be, a road used as a public path."

[24] Subsection (3) defined "the relevant date". Subsections (4) and (5) set out the recording duties of the surveying authority. Subsection (6) described the various forms of right of way to which the Act applied. Subsection (7) dealt with highways associated with waterways and rights of navigation. Section 29 required notice of preparation of the draft map and statement to be advertised and provided for objections as to anything contained in or (omitted from) them and determination by the authority of such objections with a right of appeal to the Minister.

[25] Section 9(3) provided:

"(3) If any representation or objection is duly made to the surveying authority as to anything contained in or omitted from the draft map and statement, the authority after considering the representation or objection and affording to the person by whom it was made an opportunity of being heard by a person appointed by the authority for the purpose, shall determine what (if any) modification of the particulars contained in the draft map and statement appears to the authority to be requisite in consequence thereof, and shall serve notice of their determination on the person by whom the representation or objection was made."

[26] Subsection (4) provided for advertisement by the authority of any proposed modifications to the draft map and gave persons affected an opportunity to object and make representations whereupon sub-s (4)(b) required the authority to "decide whether to maintain or revoke the determination and serve notice of their decision on the person by whom the representation or objection" was made and "on the original objector". Subsection (5) conferred a right on "any person aggrieved" by such determination to appeal to the Minister, who, on hearing the appellants and the authority and also the original objector, was to dispose of the appeal in various manners including further modification of the draft map.

[27] The next stage was the preparation of a provisional map and statement under s 30, being the draft map and statement modified to reflect the outcome of the objection procedures (if any) which had taken place pursuant to s 29.

[28] Section 1 provided as follows:

"31 Determination by quarter sessions of disputes as to provisional maps and statements.

(1) At any time within twenty-eight days after the publication of a notice under subsection (1) of the last foregoing section, the owner, lessee or occupier of any land shown on the map to which the notice relates, being land on which the map shows a public path, or a road used as a public path, may apply to quarter sessions for a declaration –

- (a) that at the relevant date mentioned in the provisional statement there was no public right of way over the land;
 - (b) that the rights conferred on the public at that date by the public right of way over the land were such rights as may be specified in the application, and not such rights as are indicated in the provisional map and statement;
 - (c) that the position or width of that part of the land on which the public right of way subsisted at the said date was as specified in the application, and not as indicated in the provisional map and statement: or
 - (d) that the public right of way over the land at the said date was not unconditional but was subject to limitations or conditions specified in the application, or, if the said right is indicated in the provisional statement as being subject to limitations or conditions, that the said right was subject to other limitations or conditions specified in the application either in addition to or in substitution for those indicated in the provisional statement.
- (3) If on the hearing of an application under subsection (1) of this section, being an application for a declaration under paragraph (a), (b) or (c) of that subsection, it is not proved to the satisfaction of the court or committee –
- (a) in the case of an application under the said paragraph (a), that there was at the relevant date a public right of way over the land,
 - (b) In the case of an application under the said paragraph (b) that the rights conferred on the public by the public right of way over the land at the said date were rights other than those specified in the application, or
 - (c) in the case of an application under the said paragraph (c), that the position or width of the part of the land therein mentioned was other than that specified in the application,

The court or committee shall make the declaration sought by the applicant.

- (4) Where the court or committee make a declaration in the case of an application under the said paragraph (a) and it is proved to their satisfaction –
- (a) that there was at the relevant date a right of way to which this Part of this Act applies over land other than that to which the application relates, and
 - (b) that the said right is the right of way which the surveying authority had in view when they showed on the map the disputed public path or road used as a public path,

the court or committee may, if satisfied that every owner, lessee and occupier of any of the land mentioned in paragraph (a) of this subsection has had an opportunity of appearing before them, make a further declaration that a public right of way as specified in the declaration subsisted over that land at that date.

(5) Where, in the case of an application under paragraph (b) or paragraph (c) of subsection (1) of this section, the court or committee do not make the declaration sought by the applicant, but the true nature of the rights conferred on the public by the public right of way in question or, as the case may be, the true position or width of the part of the land over which the public right of way subsisted at the relevant date (being different both from that specified in the application and from that indicated in the provisional map and statement) is proved to the satisfaction of the court or committee, the court or committee may make a declaration accordingly:

Provided that the court or committee shall not make a declaration under this subsection unless they are satisfied that every owner, lessee and occupier of any land which would be affected by the declaration has had an opportunity of appearing before them.

(6) A declaration under paragraph (d) of subsection (1) of this section shall not be made unless the matters to be stated in the declaration have been proved to the satisfaction of the court or committee hearing the application.

(8) Subject to the last foregoing subsection and to the next following section, a declaration made under this section shall be conclusive evidence of the matters stated in the declaration.”

[29] It will be seen from s 31 that it gave to the owner lessee or occupier of the land, over which the right of way was being claimed, a right, within 28 days of publication of notice of the provisional map, to apply to quarter sessions for declarations dealing with matters in subsections (a) (b) (c) and (d) of sub-s (1) – issues as to the existence and/or extent of rights of way.

[30] The third and final stage was the preparation under s 32 of the definitive map and statement being the provisional map and statement adjusted as necessary to reflect any declarations made under s 31.

[31] Paragraph 9 of the first schedule to the 1949 Act allowed a six-week period from the publication of notice of its preparation for the validity of the definitive map and statement to be challenged in the High Court on the ground that they were not within the powers of the Act or that any requirements of the legislation had not been complied with at any stage of the above process. Subject thereto, the map and statement were not to be questioned in any legal proceedings whatsoever (para 10). In addition s 32(4) provided that a definitive map and statement were to be conclusive as to the particulars contained therein to the extent specified in that subsection. Section 56 of the 1981 Act contains similar but more extensive provisions making the definitive map and statement conclusive evidence of the public rights of way recorded in it, covering the provisions of s 32 (4) of the 1949 Act, and extending them.

[32] Section 3 of the 1949 Act required each surveying authority to review and revise its definitive map and statement at periodic intervals, having regard to any events of the kind specified in sub-s (2) which had occurred since the relevant date (or the latest review date). These events included (e) the discovery by the authority of new evidence such that if the authority were then preparing a draft map under s 27, it would be required to show as a highway of a particular description a way not shown at the time of the review (ie evidence that a right of way not shown on the map subsisted or was reasonably alleged to subsist). The revised map and statement were to be prepared in three stages corresponding to the stages of preparation of the original definitive map and statement, ie in draft, provisional and definitive forms, and the provisions of ss 28 to 32 inclusive were to apply mutatis mutandis, see s 34.

[33] Four relevant comments should be made as to the provisions of the 1949 Act. They are, first, that there was no provision in the Act for the removal of a right of way from the definitive map and statement which could be shown not in fact to subsist. This omission was provided for, but to a very circumscribed extent, in the 1968 Act.

[34] Secondly, s 31(3) places the burden of proof in the proceedings at quarter sessions introduced by that section in respect of declarations under subsections (a) (b) (c) (but not (d)) of subsection (1), as to the existence, user and extent of the rights of way the subject of challenge, on the surveying authority.

[35] Thirdly, there does not seem to me to be any reason to suppose that in arriving at any conclusion in such quarter session proceedings the court would have done other than apply the normal civil standard of proof.

[36] Fourthly, whereas in s 27 the familiar tests of “subsisted or is reasonably alleged to have subsisted” appear in sub-ss (1) and (2) of s 27, where they define the standard of proof which the surveying authority must apply in deciding what rights of way to insert on the draft maps and statements, there is equally no reason to suppose that the surveying authority or the Minister should have applied other than the normal civil burden of proof in determining the matters referred to them by s 29 when objections to the draft map are being resolved. At the s 27 stage the surveying authority was preparing a draft map and statement for publication in order to invite comment and, in an appropriate case, objection from persons interested in the subsistence or otherwise and the extent of rights of way over land. It seems to me to be entirely appropriate that, at the stage up to publication of the draft map and statement, the preparer of those documents should have been concerned to ensure that all reasonable claims to the existence of rights of way should be reflected in them. Thus it was appropriate that s 27 should provide for the inclusion on the draft map and statement of rights of way only reasonably alleged to subsist. At the s 29 and s 31 quarter session stages, by contrast, the rights of parties arising from the existence or otherwise of public rights of way, which would previously have been determined in hostile litigation between individuals in the civil courts, were being determined finally after an extensive procedure of objection enquiry and appeal laid down by the Act.

[37] It is Mr Morshead's submission for the Defendant that the reasonable allegation burden of proof was that which should properly have been applied to the provisions of Part IV of the 1949 Act, and in particular, to the determinations to be made by the surveying authority and the Minister under s 29 up to, but not including, decisions to be made on applications to quarter sessions under s 31. He submits that this reflects a policy of Parliament in enacting Part IV of the 1949 Act, not only to preserve existing public rights of way by a new system for their ascertainment and recording, but also, in certain circumstances, to create new rights of way where none existed before. That Parliamentary intention is indicated by the absence of any statutory right in a landowner or other person opposing the existence of a right of way, to remove such a right once it has appeared on the definitive map. In those circumstances, he submits, a new right of way could be created where a landowner took no action once the procedure for entry on the map and statement was commenced by a surveying authority. In particular that occurs where the landowner does not apply to quarter sessions within the twenty-eight day period prescribed by s 31. This is consistent, he submits, with the inclusion of the word creation in the short title to the 1949 Act and with the speech of Lord Diplock in *Suffolk County Council v Mason* [1979] AC 705, [1979] 2 All ER 369 in particular the passage at p 712 where, in dealing with a question which has no bearing on the present problem, he embarked upon a survey of Part IV of the 1949 Act. Lord Diplock is recorded as saying:

"The sections which follow s 27 deal with the further steps which have to be taken before the definitive map is completed and published. They provide an elaborate procedure for enabling representations or objections to be made to the surveying authority (with a right of appeal to the minister) as to anything contained in or omitted from the draft map. Such representations and objections can be made not only by persons interested in the land, but also by members of the public, so that a person who alleges that a right of way as shown on the draft map ought to be upgraded from 'footpath' to 'bridleway', or from 'bridleway' to 'road used as a public path', has an opportunity at this stage of adducing evidence to make good his claim.

The next step in the procedure is the preparation by the surveying authority of a provisional map incorporating any modifications to the draft which, as a result of representations, have been accepted by the surveying authority or upheld by the minister on appeal.

The procedure for verifying the accuracy of what is eventually to be shown on the definitive map does not stop here; though the remaining step is not likely to bring to light the existence of more extensive rights of way than are shown on the provisional map. Its presence may, however, supply an explanation of why a reasonable allegation that a right of way of a particular kind exists is treated as sufficient justification for entering it on the draft map. The owner, lessee, or occupier of the soil over which any right of way shown on the provisional map passes has the right under s 31 to apply to quarter sessions (now the Crown Court) for declarations inter alia that a right of way shown on the provisional map either does not exist or is there shown as being more extensive than it really is; and, if he does so, the onus of proving the existence of the disputed right lies on the county council. But failing any proceedings in the Crown Court under this section, an entry of a right of way that originally appeared on the draft map on no firmer basis than that the surveying authority was of opinion that an allegation that it existed was a reasonable one is carried through to the definitive map unaltered."

[38] I am unable to accept these submissions of Mr Morshead. To start with I do not accept that the process described by Lord Diplock was intended by him to indicate that, where there had actually been no public right of way before the institution of proceedings by the surveying authority, a failure by the landowner to challenge the mistaken allegation that such a right of way existed created a right of way where none had existed before, with the effect that it could not thereafter be challenged on the basis "once a right of way, always a right of way" see per Lord Diplock at p 714C of the report. What would result would be a temporarily unchallengeable right of passage by the public over the land in question which would not be capable of challenge pending review by the authority or the exercise of the powers of deletion from the map conferred by the 1968 and 1981 Acts (see para 41 below for the limited power of deletion introduced by the Countryside Act 1968 and s 53(3)(c)(iii) of the 1981 Act).

[39] I do not accept that the creation of new rights of way was part of the statutory policy of Part IV save to the limited extent dealt with in ss 39 to 41 which have no application to the issues before me. Such a policy runs contrary to the short title to the section of Part IV dealing with public rights of way namely "ascertainment of footpaths, bridleways and certain other highways". It is also contrary to what Lord Diplock says in the *Suffolk County Council* case at p 710 of the report of his speech where he says:

"The purposes for which the Act was passed are set out in the long title. Those that are relevant to the instant appeal are: 'to make further provision for the recording, creation, maintenance and improvement of public paths and for securing

access to open country, and to amend the law relating to rights of way'. The provisions which give effect to these purposes are contained in Parts IV and V of the Act; those relating to the recording of public paths by showing them on a definitive map being found in Part IV, sections 27 to 41."

[40] As I have already pointed out the 1949 Act provides a statutory framework for the unchallengeable ascertainment and recording of existing public rights of way replacing, in so far as rights of way were contested, litigation in the civil courts to which the ordinary civil burden of proof would plainly have applied. It includes a right under s 31. for landowners, lessees or occupiers of affected land to seek relief by way of declarations at quarter sessions where any rights would be determined on the normal civil standard of proof. It is not without significance that Lord Diplock in *Mason's* case, in the passage quoted above, found that the s 31 procedure might "supply an explanation of why a reasonable allegation that a right of way of a particular kind exists, is treated as sufficient justification for entering it on the draft map".

The 1968 Act

[41] Section 1 and Sch 3 of the 1968 Act introduced, for the first time, a circumscribed power to revise the definitive map at the instance of a person prejudiced by the entry of a right of way upon it where no right of way existed. The relevant part of part I of Sch 3 to the 1968 Act provides:

"Section 33 (Revision of maps and statements)

In carrying out a review under section 33(1) the authority shall have regard to the discovery by the authority, in the period mentioned in that subsection, of any new evidence, or of evidence not previously considered by the authority concerned, showing that there was no public right of way over land shown on the map as a public path, or as a road used as a public path, or that any other particulars in the map or statement were not within the powers of part IV of the Act of 1949, and their powers of preparing a revised map and statement under subsection (4) or as the case may be proviso (d) to subsection (5) of the said section 33 may be exercised accordingly:

Provided that the authority shall not take account of the evidence if satisfied that the person prejudiced by the public right of way, or his predecessor in title, could have produced the evidence before the relevant date mentioned in the said section 33(1) and had no reasonable excuse for failing to do so."

[42] Otherwise part II of Sch 3 simplified the procedure applicable to reviews begun under s 33 of the 1949 Act after the commencement of the 1968 Act. Instead of three stages there were to be only two. The revised map and statement were to be prepared in draft form and objections to the revision were to be invited by advertisement. Following a local enquiry the Minister was to "take a decision on" any duly made objections and representations (see para 4 (4) of Sch 3) and give the authority such directions to modify the draft map as appeared to him necessary to give effect to his decision. A similar process was prescribed by Pt 3 of Sch 3 pursuant to which the Minister was to direct modifications resulting from objections in relation to the re-classification of routes used as footpaths and bridleways but which carried vehicular traffic – RUPPS – into BOATs as required by the Act. I can see no reason why this decision-making process, as to the subsistence of rights of way or their extent, should be arrived at by the application of a burden of proof different from the normal civil burden of proof as I have found applied to similar decisions under s 29 of the 1949 Act.

The 1981 Act

[43] Part IV of the 1949 Act and Sch 3 of the 1968 Act were repealed by the 1981 Act and replaced with the provisions of s 53 to 58 and Schs 14 and 15 of that Act. The system of periodic reviews of the definitive map and statement was abolished and a rolling review system was introduced in its place. I have described s 53 and Schs 14 and 15. Section 54 requires the surveying authority as soon as reasonably practicable after the commencement date, to review RUPPs remaining on their definitive maps and make modification orders reclassifying them. The provisions of Sch 15 apply to orders made under both the s 53 (except s 53(3)(d) and s 54. Section 56(1) of the 1981 Act provides that a definitive map and statement shall be conclusive evidence as to the particulars contained therein to the extent specified in that subsection.

[44] The 1981 Act, therefore, abolished the review system and the recourse to quarter sessions and substituted the procedure under s 53 and Schs 14 and 15. And so, for instance, the provisions of s 31(1)(a) of the 1949 Act

permitted any owner lessee or occupier of any land shown on the map, in proceedings at quarter sessions, to apply for a declaration “that at the relevant date mentioned in the provisional statement there was no public right of way over land”, such a person and others may now under s 53(3)(c)(iii) apply under subsection (5) for an order under subsection (2) modifying the map so as to show “that there is no public right of way over land shown in the map and statement . . .”. It will be seen that the power to remove a right of way from the definitive map provided for in that sub-s (iii) is much less restrictive than that inserted by the 1968 Act. However the Leicestershire County Council case shows that inspectors are requiring “cogent” evidence to justify the exercise of the power to remove.

the Inspector's conclusions

[45] The principal conclusions of the Inspector contained in the Interim Letter and the Final Letter are helpfully summarised in the Claimants' written submissions. This summary is not, as I understand it, challenged and I will incorporate it in this judgment. The conclusions of the Interim Letter are summarised as follows:

Although Sir William Cope (the then landowner) made a new road along the route of Sandy Lane between 1866 and 1885, and asked the local highway authority to adopt it as a “public highroad”, it was not made up to the satisfaction of the Surveyor of Highways or adopted. Sir William's intention to dedicate the route as an all purpose highway was conditional upon its being adopted and that condition not having been fulfilled, it remained at his death in 1892 a private estate road (paras 3.5–3.14).

Sir William's description of the road as “a public convenience” in his 1885 letter to the highway authority requesting adoption suggested current use of the road by the public, but there was no other evidence to support that, and while the 1888 letter from the Surveyor of Highways referred to “wheel traffic” having been over it, there was no direct evidence of that being public wheeled traffic and it was more likely to be estate traffic (paras 3.9,3.13,4.4).

Sandy Lane was not included in any taxable hereditament in the valuation carried out by the Inland Revenue for the purposes of the Finance (1909–1910) Act 1910; the land on either side was comprised in Hereditament no 34 (owner Sir Anthony Cope, Sir William's son and heir), but Sandy Lane (separate OS parcel no 52) was omitted from that hereditament; however, this did not support the County Council's contention that Sandy Lane had been dedicated as a public carriageway by 1910 (paras 3.17-3.21).

In 1922 the Forestry Commission took a 198-year lease of the land adjoining Sandy Lane on both sides. Sandy Lane was not included in the demise but the lease included a grant of a right of way over it for all purposes. The Inspector concluded it was “very unlikely that a mistake was made in 1921/2 about the private status of Sandy Lane”. He also took the view that Sandy Lane was not mentioned as a highway of any kind in the Acquisition Report prepared for the Forestry Commission in 1921 (paras 5.1–5.5).

Further confirmation that Sandy Lane was not public was to be found in its omission from the 1929 highway handover records of publicly maintainable highways (para 5.3) and the 1949 declaration of the then owner Lord Brocket, as Chairman of Bramshill Parish Meeting, as to what rights of way existed in the parish (para 5.8).

Lord Brocket showed that he had no intention to dedicate Sandy Lane by that declaration and by telling the Forestry Commission that it was a private road (paras 5.8, 6.2).

Such pre-1949 user evidence as there was did not give rise to an inference of dedication of Sandy Lane as a public highway (para 6.9).

But (and this was common ground between the County Council and the objectors) there was enough evidence of user by walkers and horseriders after 1970 to support a deemed dedication as a bridleway under s 31 of the Highways Act 1980) (paras 2.4, 7.1-7.4).

[46] The conclusions of the Final Letter can be summarised as follows.

The Inspector adhered to his view that the new road was not dedicated by Sir William and remained a private Estate road at the date of his death in 1892 (para 22).

He reiterated his view that the public were enjoying the “convenience” of the road by 1885, but said that no documentary evidence had been presented to show that this public user was by vehicle, although vehicles were used along Sandy Lane (para 22).

Contrary to his initial opinion, the Finance Act evidence did support the case for public carriageway status. The exclusion of Sandy Lane from valuation, variously:

was consistent with Sandy Lane being considered a public carriageway (para 36);

showed that on the balance of probabilities, Sandy Lane was considered to be a public carriageway in 1910 (para 37);

led to the reasonable allegation that “in completing the procedures required by the Finance Act”, Sir Anthony dedicated Sandy Lane as a public carriageway (para 38: see also para 48 and paras 53–54).

There was some, “not strong” evidence of public vehicular user (by four persons) from 1918–1936, and “stronger” user evidence after that. This user from 1918 was “evidence that the public accepted dedication, in 1910, of Sandy Lane as a vehicular highway” (paras 26, 49–53).

Sandy Lane's being treated as a private road by subsequent owners of the Estate could not undo that: “once a highway, always a highway” (para 53).

The authorities

[47] Save for the *Leicestershire County Council* case, counsel have been unable to find any authority which deals with the burden of proof applicable by the Secretary of State in confirming orders modifying the definitive map and statement. In *R (on the application of Norton and Bagshaw) v Secretary of State for the Environment* [1994] 68 P&CR 402 Owen J was considering two cases where county councils had refused to make orders under s 53(3)(c)(i) of the 1981 Act at the preliminary, ie Sch 14 stage. In that case, therefore, the judge was properly applying the dual test contained in that subsection and quashed both decisions, which had been made on the basis that insufficient evidence had been shown by the Applicant to establish, prima facie, the existence of the two public rights of way in question. At p 408 of the report Owen J is recorded as saying:

“The wording of the section [53(3)(c)(i)] indicates, as I consider, that the evidence necessary to establish that a right of way is reasonably alleged to subsist over land must be less than that which is necessary to establish that a right does subsist. Indeed, bearing in mind the structure of the Act, this seems to be clear. That structure is, in this respect, that an application under s 53(3)(c)(i), if upheld, will be followed by an order, consequent upon which, after an objection, there may be some form of enquiry with either confirmation or a refusal to confirm.”

[48] Later at p 409 the judge continues:

“Whether an allegation is reasonable or not will no doubt depend on a number of circumstances and I am certainly not seeking to declare as law any decisions of fact. However if the evidence from witnesses as to user is conflicting but, reasonably accepting one side and reasonably rejecting the other, the right would be shown to exist, then it would seem to me to be reasonable to allege such a right. I say this because it may be reasonable to reject the evidence on the one side when it is only on paper, and the reasonableness of that rejection may be confirmed or destroyed by seeing the witnesses at the enquiry.”

[49] Owen's J judgment in the *Bagshaw* case was considered by the Court of Appeal in *R (on the application of Emery) v Secretary of State for Wales* [1998] 4 All ER 367, 96 LGR 83. That again was a case where a local authority had declined to make an order under s 53(3)(c)(i) at the Sch 14 preliminary stage on the basis that the applicant had failed to establish a reasonable allegation of subsistence of the right of way in question in a case where there was conflicting evidence of user of the way by the public between the landowner and the Applicant. The Court of Appeal approved the approach of Owen J in the *Bagshaw* case and in particular the second passage

which I have quoted from his judgment above. The leading judgment was given by Roch LJ. At p 377 of the report he is recorded as saying this under the heading “The test that the Secretary of State should apply at the Sch 14 stage”:

“Section 53(3)(c)(i) relates to discovery by the authority of evidence of two separate things. First, evidence that a right of way which is not shown on the maps subsists and, second, evidence that a right of way which is not shown on the map is reasonably alleged to subsist. Difficulty is caused by these two limbs of this subsection. There can only be discovery by the authority of evidence that a right of way which is not shown on the map subsists if there is clear evidence of 20 years' user uncontroverted by any credible evidence to the contrary and no credible evidence that there was on the part of the landowner no intention during the period to dedicate the way to the public.

Where there is no credible evidence of 20 years' user or where there is incontrovertible evidence that the landowner had no intention during the period to dedicate the way to the public, for example by the landowner complying with s 31(6) of the 1980 Act . . . then the decision should be not merely that the allegation that a right of way subsists is not reasonable, but that no right of way as claimed subsists.

The problem arises where there is conflicting evidence on one or other or both issues. In approaching such cases, the authority and the Secretary of State must bear in mind that an order under s 53(2) made following a Sch 14 procedure still leaves both the applicant objectors with the ability to object to the order under Sch 15 when conflicting evidence can be heard and those issues determined following a public enquiry.”

[50] It seems to me that both these passages from the judgments of Owen J and Roch LJ are similar in effect to the passage from Lord Diplock's speech in the *Mason* case. Both clearly accept the principle that a lower standard of proof applies at the preliminary stage and that that is acceptable because where the evidence of the subsistence of a right of way is conflicting “those issues” will be “determined following a public enquiry”. There would seem to me to be a clear implication that the judges in those cases anticipated that such “determination” would take place applying a higher standard of proof than one of a merely justifiable allegation.

Conclusion under head 1

[51] In my judgment this issue is to be determined in favour of the Applicants. It follows that to the extent that the decision of Collins J in the *Leicestershire County Council* case is authority for a contrary conclusion I must respectfully decline to follow it. I have arrived at this conclusion for the following reasons:

(i) I have already concluded that the purpose of Part IV of the 1949 Act was to assist in the preservation of existing public rights of way by their ascertainment and by recording them and by providing such record to be conclusive evidence of their subsistence. It seems to me that the pattern of the 1949 Act has been carried through by the legislature into the 1968 Act and on into the 1981 Act although the detailed provisions have developed over the years. That pattern is one of requiring the local authority to prepare a preliminary record in cases where there is evidence of the existence of a public right of way. That preliminary record is then published with the object of inviting comments and objections from persons interested either in the subsistence of the right of way or to deny its subsistence. There is then a procedure for resolving issues thrown up by objections to the preliminary record. Finally there is the preparation of the final record reflecting those decisions which is given the status of conclusive evidence. In the case of the 1949 Act there can be no doubt that the procedure under s 31 at quarter sessions would be subject to the civil burden of proof. I have formed the view that the determinations by the surveying authority and the Minister under s 29 would be subject to the same burden. That is because those determinations were quasi judicial and, in the absence of a further challenge under s 31 would be determinative of the existence or extent of the rights of way in question. The same is true under the abbreviated review system introduced by part II of Sch 3 to the 1968 Act. See para 4(4). Schedule 15 gives no express guidance as to the burden of proof applicable on confirmation of a subsection (c)(i) order. In the absence of an express provision it seems to me to be reasonable to assume that the legislature intended to replicate the pattern of the 1949 Act in the 1981 Act so as to subject the issue of proof of the existence and extent of public rights of way to the ordinary civil burden of proof namely the balance of probabilities. The contrary contention that it is sufficient to establish a right having serious consequences for land owners and other users by a mere finding that it was reasonable to allege that such a right subsists seems to me to be counter-intuitive.

(ii) It would be surprising if rights in property of such importance were capable of being determined in the course of a statutory procedure applying a lower burden of proof than that which would be applicable were the existence of those same rights to fall to be determined in the course of ordinary litigation in the civil courts. This is illustrated by the decision of Mr Prosser QC sitting as Deputy Judge of the Chancery Division in *Shears Court (West Mersea) Management Company Ltd v Essex County Council* [1986] 85 LGR 479. In that case the deputy judge was dealing with an claim by residents to use a way over the plaintiff's land as access to a beach. The County Council after representation by the residents instituted proceedings under the 1981 Act having concluded that there was a public right of way. Meanwhile the Plaintiff landowner issued a writ seeking a declaration that no public footpath existed over its land. The County Council sought to have the writ struck out. The deputy judge having considered such authority as there was concluded:

"There is nothing in these cases which supports the contention that once the procedure of the Act of 1981 is under way but not yet completed there is no right to bring a question concerning the alleged right of way before the court. That such an action may be stayed is one thing, but to say that it should be struck out is entirely without foundation."

He therefore declined to strike it out but ordered the proceedings under it to be stayed pending resolution of the local authority's enquiries and determinations under the 1981 Act. No question of differing burdens of proof appears to have been raised.

(iii) Sch 15 para 6 confers on the authority a discretion to confirm unopposed modification orders or, if the authority considers that changes should be made to the order requires the authority to submit the revised order to the Secretary of State who is given a further discretion whether or not to confirm it or to confirm it after a further alteration. The provisions of para 6 seem to me to imply a revisiting by the authority or the Secretary of State of the material upon which the original order was made with a view to subjecting it to a more stringent test at the confirmation stage.

(iv) There would seem to be little point in having a full public local enquiry with oral evidence and submissions if the inspector is not required finally to resolve material conflicts of fact and adjudicate on disputed issues of law. A distinction between the approach of the authority and the Secretary of State on a Sch 14 appeal to the making of an order, and the Sch 15 enquiry stage for the purposes of confirmation of that order seems to be implicit in the decisions of the courts in *Bagshaw* and *Emery* and in the speech of Lord Diplock in *Mason*.

(v) It is anomalous if it is sufficient for the purposes of adding a way to the definitive map under sub-s (c)(i) that a test of reasonable allegation is sufficient when the civil burden of proof is required to obtain an order varying the permitted user of a way under (c)(ii) and in removing a way under (c)(iii).

(vi) In his judgment in the *Leicestershire County Council* case Collins J said:

"The reason for the lesser test in s 53(3)(c)(i) is a recognition by Parliament that, if it can be shown that it is reasonable to allege that a right of way subsists, then it ought to be put down in the public interest on the map, and then it will be for the relevant landowner or whoever to bring forward a case to show that that was wrong and that the map therefore shows a right of way which it should not show. The burden of proof upon the individual to establish that is that set out in s 53 (3)(c)(iii)."

With great respect I do not agree for the following reasons:

(a) The sub-s 53(3)(c)(iii) procedure would not inevitably be available to an applicant to remove a way from the record because of the necessity prescribed in sub-s (c) for there to have been a subsequent "discovery" of evidence to trigger the power and the duty to make an order under sub-s (2). If the applicant simply wanted to argue his case on the basis of the evidence already known at the Sch 15 enquiry which had resulted in the way being put on the map by the application of the lower test, he might have no forum

in which to do so. An application to the High Court under para 12 of Sch 15 to have the order set aside would fail because, on the basis of reasonable allegation only, it would have been quite properly made. An application for a declaration that the right of way did not exist would be struck out because of the conclusive evidence provisions of s 56.

(b) An applicant under (c)(iii), as has been found by Collins J in the *Leicestershire County Council* case, must produce "cogent" evidence to justify an order. This seems to mean that he must satisfy, at least, the civil burden of proof. If he is alerted in time, raises objections, and takes part in an enquiry under Sch 15 it is theoretically possible that, at the enquiry, he could raise a case that there was no right of way satisfying the civil burden of proof and still lose if it could also be said that the preliminary order by the authority had met and continued to meet the criterion of reasonable allegation.

(c) The proposed solution to the problem produces a duplication of proceedings and costs which would not occur if at the hearing of any enquiry by an inspector or otherwise those supporting and opposing the existence or extent of a public right of way were treated as at any other enquiry to determine rights, namely, that in order to win a party must establish his case to the civil burden of proof.

(d) If all that is necessary for a proponent to do to obtain confirmation of an order modifying the map so as to include a new right of way is to satisfy a test of reasonable allegation that places upon his opponent the burden of proof of establishing that no right of way exists to at least the standard of the balance of probabilities and, as I have said, even then he may not succeed. It is also contrary to the pattern of ss 29 and 31 of the 1949 Act.

[52] It is Mr Morshead's submission that a higher burden of proof, on the balance of probabilities, is not required at the confirmation stage because if, at that stage, the landowner or other objector satisfies the Secretary of State or his inspector by evidence on the balance of probabilities that no right of way exists it is unlikely that the order will be confirmed because it will no longer be reasonable to allege that it subsists. As I have pointed out this places the burden of proof on the objector at the enquiry stage which seems to be unjust. Alternatively if what is being said is that the stronger the case which the objector can present the more unlikely it will be that the Secretary of State will confirm the order on the basis of reasonable allegation, then the result is that it is being accepted that to confirm the order the Secretary of State must be satisfied of a case for the subsistence of the right of way in question on the balance of probabilities.

The remaining heads

[53] I turn to consider the Claimants' ground 2.

[54] Until the enactment of s 31 of the Highways Act 1980 the only way in which a public highway could be created was, at common law, by express dedication by the landowner over whose land it was to be created or by implied dedication by him, to be implied from the public's user of the way over an appreciable period of time and to be treated as accepted by the public as a result of that use. See the judgment of Wills J in *Eyre v New Forest Highway Board* [1892] 56 JP 517:

"All highways, all rights of passage over the property of individuals, have their actual or presumed origin, although it is not often the origin in point of fact, in a dedication by the owner of the soil, that is to say he either says in so many words, or he so conducts himself as to lead the public to infer that he meant to say: 'I am willing that the public should have this right of passage.' If a man has actually conceded that right of passage to the public it is irrevocable, and that is expressed by the maxim with which we are all familiar, I suppose, 'once a highway always a highway'. Up till the year 1835, when the Highway Act, which is the foundation of our present system, was passed, if there was a dedication of a road to the public by the owner either expressed by deed, as occasionally happens, or inferred from public user for such a time as to any tribunal who judges the case will appear sufficient to found that inference, if the proper inference was that he had said or so conducted himself as to imply that he had granted that right of passage to the public; and the public had on their part accepted it and used the road, from that moment there was not only a right of passage on the part of the public but there was the liability to repair on the part of the parish. . ."

[55] Thus the creation of a right of way at common law involved a two stage process: the first stage dedication by the landowner express or to be implied from his toleration of public use of the way over an appreciable period of time, and second, acceptance by the public by use of the way after dedication.

[56] Section 1 of the Highways Act 1980 provides for an alternative route to the creation of a public highway so that a way could be established where such a way "has been actually enjoyed by the public as of right and without interruption for a full period of 20 years".

[57] It is not in issue that the fundamental cause of the Inspector's change of mind between the publication of the Interim Letter and the Final Letter was a re-evaluation by him of documentary evidence of proceedings in relation to Sandy Lane caused by the provisions of the Finance Act 1910 which imposed a tax on the values of land holdings. A landowner could not be taxed in respect of land which comprised a public highway or could obtain relief from tax in respect of land that was his property but which was subject to public highway rights. In the present case there was documentary evidence which established that Sandy Lane had a separate OS number and was excluded from the valuation of Sir Anthony Cope's land tax although it had plainly formed part of the estate of which he was owner being the route which his father, Sir William Cope, in the late 19th century had tried but failed to make into a public road.

[58] It is common ground that the Inspector's re-evaluation was not as a result of any fresh evidence being put before him, but as a result of fresh submissions as how the existing evidence before him should be treated.

[59] In the Final Letter the Inspector reviewed the 1910 Finance Act evidence between paras 29 and 36. At para 30 he says this:

"30. Uncoloured. I have researched the use of large-scale maps in relation to Finance Act documentation. Two sets of plans (ie base maps with annotations) were produced for each area – Field Plans (working copies) and Official Plans. The base map strips submitted in this case were almost certainly Field Plans. I have discovered that on these, the boundaries of hereditaments were often carelessly delineated and only outlined with coloured crayon. The Official Plans, thought to be held in the Public Records Office at Kew, have each hereditament carefully filled in with colour wash. They could have helped to clarify this case. It is unusual that on the Field Plan submitted, Hereditament 34 was not given at least an outline colour. However, taking the evidence of the Plan and the associated Field Book together, I think it reasonable to conclude that Hereditament 34 consisted of those OS plots enumerated in the Field Book extract and probably did not include the area of Sandy Lane . . ."

[60] He continues at para 33:

"33. Bridleway or Footpath rights over Sandy Lane. I have researched the objectors' contention that Sandy Lane might have been excluded from valuation because commoners had rights of footway along it and it was therefore considered to be a public footpath. If Sandy Lane had been a private carriageway with a public right of way on foot, normal practice would have been inclusion of the Lane in valuation and a deduction made for 'Public Rights of Way or User'. Such appears to have been the case with the Footpath shown as 'FP'. on the Field Plan to the west of Sandy Lane, and with any other paths crossing Hereditaments 34, 84, 98 and 694 . . ."

[61] The Inspector's conclusions on this part of the Final Letter are at paras 37 and 38 as follows:

"37. Dedication by Sir Anthony Cope. From paras 29–36 two facts emerge and I now have more confidence in their implications than I did last year. First, Sandy Lane has a unique parcel number on the 1909 base map (no 52, as on the 1894 OS 1:2500 map). Secondly, this plot was not included in the list of those valued in the Field Book extract. Such exclusion normally indicates public rights, sometimes bridleway but usually vehicular. It could not be reasonably be alleged that the exclusion of Sandy Lane from valuation was a 'powerful' indication of public carriageway rights along it if the circumstances before and around 1910 suggested otherwise. But they do not. The 'Road' was intended to be part of a through route between Hazeley etc and Wokingham (para 19). It was described as a Road in the Book of Reference for the 1871 OS 1:2500 map and shown as a way without obstructions across it on that map, and the 1894 and 1909 OS 1: 2500 maps (para 20). In 1885 it was 'a public convenience, being a direct communication between Odiham and Wokingham . . .' (para 21). Vehicles were used along it (para 22). There is evidence of its reputation as an uninterrupted highway and of vehicular user along it (paras 24,26). The evidence of its reputation as a 'Road' is supported by small scale map evidence (paras 27, 28). I therefore conclude that exclusion of Sandy Lane from valuation does show that, on the balance of probabilities it was considered to be a public carriageway in 1910. I consider it unlikely, in the context of this case and in the light of para 33 above, that it was bridleway or footpath rights that existed along the order route, as contended by the objectors.

38. There is no evidence to suggest that the procedures laid down for the completion of assessment under the Finance Act were not applied in the case of the Bramshill Estate. These included checks by the landowner of the Field Book entries and of the provisional valuation. Accordingly, the omission of Sandy Lane from valuation and the public carriageway implications of this were open to Sir Anthony Cope's scrutiny. This leads to the reasonable allegation that, in completing the procedures required by the Finance Act, Sir Anthony Cope dedicated the Order route as a public carriageway. There then follows a considerable amount of evidence against this allegation and I address it carefully before determining the Order."

[62] The Inspector summarised that documentary evidence at para 46 as follows:

"46. The documentary evidence supporting the claim can be summarised briefly. Between 1866 and 1871 Sir William Cope built a road over a part of his estate, intended to be a section of a through route between Odiham, Hazeley etc and Wokingham. The public were using it by 1885 but Sir William did not expressly dedicate it as a highway because the Highway Authority did not accept his condition for such dedication: that it should be adopted as publicly maintainable. Finance 1909/10 Act evidence was consistent with Sandy Lane being considered a public carriageway and the circumstances of this evidence indicated that on the balance of probabilities, the lane was dedicated as such by Sir Anthony Cope . . ."

[63] The Inspector's conclusion is at para 53 of the Final Letter as follows:

"The Order route as a Vehicular Highway

53. Paragraphs 26 and 49-52 summarise the evidence of continuous public vehicular user along Sandy Lane from 1918. This was neither challenged nor obstructed until 1958. There is no evidence to show that the gates placed across the lane in that year and from time to time thereafter were erected with the owners' permission or on their instructions: the public vehicular user continued despite the gates. This record of user is evidence that the public accepted dedication, in 1910, of Sandy Lane as a vehicular highway. The maxim 'once a highway, always a highway' has to be applied to the claims of Captain Cope and Lord Brocket that, between 1921 and 1961, the Lane was private."

[64] The Claimants' initial submission is that the passages from the Final Letter which I have set out above, and, in particular the last but one sentence of para 38, show that the Inspector was proceeding under a fundamental mistake of law, namely, that Sir Anthony Cope's acquiescence in the preparation and submission of documents and plans required by the Finance Act 1910, which excluded Sandy Lane, constituted dedication by him of Sandy Lane as a public highway. Mr Morshead's answer for the Defendant is the suggestion that, when the Inspector used the word dedication in these passages from the Final Letter, he was not using that word in its technical legal sense to describe a landowner making an oral or written express dedication of the land as a public highway but rather as describing acceptance of a situation which had already come into existence as a result of public user of the way before 1910 from which dedication by Sir Anthony or his father could be implied and which his acquiescence in the exclusion of Sandy Lane from the 1910 Finance Act returns confirmed as having taken place.

[65] I am unable to accept Mr Morshead's submission. It is absolutely inconsistent with the words in para 38: "this leads to the reasonable allegation that in completing the procedures required by the Finance Act, Sir Anthony Cope dedicated the Order route as a public carriageway" when read with the words in para 53: "paras 26 and 49-52 summarise the evidence of continuous public vehicular user along Sandy Lane from 1918 . . . this record of user is evidence that the public accepted dedication, in 1910, of Sandy Lane as a vehicular highway." It is true that there are passages in the Final Letter which support Mr Morshead's submission such as the penultimate sentence in para 46 which I have set out above. However, it seems to me to be incontrovertible from para 53 that the Inspector was coming to his changed conclusion to confirm the Council's order adding Sandy Lane as a BOAT on the basis of a finding "that in completing the procedures required by the Finance Act, Sir Anthony Cope dedicated the order route as a public carriageway".

[66] Mr Morshead does not suggest that the evidence of what took place to complete the 1910 Finance Act procedures could possibly support a conclusion that Sir Anthony Cope's part in those procedures amounted to an express dedication of Sandy Lane as public highway.

[67] It follows that the Inspector's change of mind was based on a finding which is shown to be erroneous in law.

[68] I turn to consider the Claimants' head 3.

[69] In *Fairmount Investments Ltd v Secretary of State for the Environment* [1976] 2 All ER 865, [1976] 1 WLR

1255the House of Lords were considering a case where a local authority had made a compulsory purchase order in respect of certain buildings. That order was challenged and an enquiry held by an inspector appointed by the Secretary of State. The inspector, after the conclusion of the hearing, conducted his own inspection of the premises as a result of which he formed the view that the foundations were defective. His decision letter revealed the fact that this was a ground upon which he came to the conclusion that the compulsory purchase order should stand. At p

1260 of the report Viscount Dilhorne says:

“It was on account of his belief as to the inadequacy of the foundations that the inspector, taking that into account with the other defects, ruled out rehabilitation. So it appears that the inspector attached great weight to a factor which formed no part of the council's case, of which the Respondents had not been given notice and with which they had been given no opportunity of dealing.

In my opinion there is great substance in the Respondents' complaints. Just as it would have been contrary to natural justice if the Secretary of State in making his decision had taken into account evidence received by him after an enquiry without an objector having an opportunity to deal with it, so here in my view it was contrary to natural justice for his decision to confirm the order to be based to a very considerable extent on an opinion, which investigation might have shown to be erroneous, that the foundations were not taken down deep enough, and an opinion, which also might have been shown to be erroneous, that the inadequacy of the foundations showed that rehabilitation was impractical.”

[70] The Claimants complain that the Inspector's conclusions are vitiated by procedural unfairness on two grounds: the first that the suggestion that Sandy Lane became a public right of way as a result of express dedication by Sir Anthony Cope in 1910 was a point which was not raised at the first enquiry and they had no notice was being raised in the course of the second enquiry by the written submissions passed to the Inspector for that purpose. Their second complaint is that the text of the Final Letter reveals, in the passages which I have quoted above, that the Inspector conducted his own investigations into the 1910 Finance Act procedure and documents, and into how that material should be treated for the purpose of his enquiry, without notifying the parties and without giving them an opportunity to comment upon the material which he turned up.

[71] Mr Morshead for the Defendant does not seriously suggest that once it is established that the Inspector based his conclusions in the Final Letter on a finding of express dedication as a result of the 1910 Finance Act material then the conclusion should not follow that it was a breach of natural justice by him, and so procedural error, not to give the Claimants notice of this and of any fresh material resulting from his investigations so that they could deal with it.

[72] As to the Claimants' fourth ground, in the light of the conclusions which I have already reached it is unnecessary for me to deal with this issue which would involve a substantial investigation of the evidence and needlessly prolong this judgment.

[73] For these reasons it appears to me clear that the order confirmed by the Defendant's decision through her Inspector of the 15 September 2003 must be quashed.

Judgment accordingly.

APPENDIX I

Chronology

<i>Date</i>	<i>Event</i>

1850s	– Sir William Cope took up residence on his Bramshill Estate (which included the route of Sandy Lane).

15.12.1866	– Letter written by Sir William Cope and Mr Mark Wyeth proposing to make a road along the route of Sandy Lane if sufficient subscriptions could be obtained.

July 1885 – Letter from Sir William Cope to the Hartley Wintney Rural Sanitary Authority (as highway authority) stating that a road (Sandy Lane) had been made (principally at his expense) and indicating an intention to dedicate it to public use conditional upon its being formally adopted by the authority.

Report by the Surveyor of Highways that the road was too narrow and ended 30 yards short of New Mill Lane.

1.9.1885 – Eversley Vestry Meeting (attended by the Surveyor and Sir William Cope): following Sir William's promise to gravel the sides of the road and extend it to New Mill Lane, resolution to apply to the justices to declare Sandy Lane a public highway passed [no evidence that such application was made].

August 1888 – Surveyor reported to the authority that Sir William had not done the promised gravelling.

1892 – Death of Sir William Cope. Ownership of the Bramshill Estate passed to his son Sir Anthony Cope.

1910 – Enactment of the Finance (1909–10) Act requiring a survey and valuation of all land in England and Wales to be carried out by the Inland Revenue for the purposes of a tax on land values to be levied on each occasion of a transfer of ownership.

1910 – The year in which the Inspector found it reasonable to allege that “in completing the procedures required by the Finance Act, Sir Anthony Cope dedicated the Order route as a public carriageway”.

1918 – The first year in which the Inspector found there to be evidence of public vehicular use of Sandy Lane having occurred.

Date unknown – Transfer of ownership of the Bramshill Estate to Sir Anthony Cope's son Captain Denzil Cope.

18.6.1921 – Acquisition Report prepared for the Forestry Commission by one of its officers for the purposes of its proposal to take a lease of parts of the Bramshill Estate; Sandy Lane not mentioned as a public highway.

5.4.1922 – Lease by Captain Denzil Cope to the Forestry Commission of parts of the Bramshill Estate, including the land on both sides of Sandy Lane, together with the grant of a right of way for all purposes over Sandy Lane.

1929 – Transfer of responsibility for maintenance of highways maintainable at the public expense from Rural District Council to County Council; handover map prepared for that purpose does not include Sandy Lane as a highway.

1932 – Death of Sir Anthony Cope.

1936 – Sale of Bramshill Estate to Lord Brocket.

May 1949 – Lord Brocket (in his capacity as Chairman of Bramshill Parish Meeting) signed map (for sending to the County Council) stating that the rights of way shown on it (not including Sandy Lane) were the only ones in Bramshill Parish.

Todd and another v The Secretary of State for Environment Food and Rural Affairs [2004] EWHC 1450 (Admin)

1952 – Bramshill Estate broken up and sold off in lots; some parts retained (it was common ground at the inquiry that these probably included the route of Sandy Lane).

1958 – Forestry Commission first locked gates across Sandy Lane.

9.9.1958 – Letter from Clerk to County Council to Eversley Parish Council confirming acceptance of Lord Brocket's 1949 declaration for the purposes of the 1949 Act survey.

1967 – Bramshill Parish Meeting made representations to the County Council claiming Sandy Lane as a public right of way; County Council responded that it was not satisfied that Sandy Lane was a highway.

1984 – Application to County Council by Bramshill Parish Council for addition of Sandy Lane to the definitive map as a byway open to all traffic.

1985 – Locked gate installed at northern end of Sandy Lane.

1999 – County Council resolved to make an order in accordance with the application.

Bramshill Parish Council produced additional evidence and asked the County Council to make an order adding Sandy Lane as a bridleway instead.

26.5.2000 – Making by the County Council of the Hampshire (Hart District No 9) (Parishes of Bramshill and Eversley) Definitive Map Modification Ord 2000 ("the Order"), adding Sandy Lane as a byway open to all traffic.

Objections to the Order made by the Claimants and others (including the Bramshill and Eversley Parish Councils) Order submitted for confirmation to the Defendant's predecessor, the Secretary of State for the Environment, Transport & the Regions.

26–28.3.2002; 5, 23.4.2002 – Public local inquiry into the Order held by the Inspector.

18.7.2002 – Issue of Inspector's interim Decision Letter proposing to confirm Order subject to modification showing Sandy Lane as a bridleway (instead of a byway open to all traffic).

12.2002–1. 2003 – Objections to proposed modification. Inquiry into proposed modification conducted by way of written representations.

15.9.2003 – Issue of Inspector's final Decision Letter confirming Order as originally made.

3.10.2003 – Publication of notice of confirmation of Order under para 11 of Sch 15 to the 1981 Act.

12.11.2003 – Issue of these proceedings.

APPENDIX II

List of persons referred to

The Secretary of State for Environment, Food and Rural Affairs – The Defendant, in her capacity as the Secretary of State responsible for definitive map modifications under the Wildlife and Countryside Act 1981 (“the 1981 Act”).

Hampshire County Council – The surveying authority for its area for the purposes of the 1981 Act; made the definitive map modification order under challenge (“the Order”) adding Sandy Lane in the Parishes of Bramshill and Eversley as a byway open to all traffic.

D Brook CB CBE – The inspector appointed by the Defendant to conduct the public local inquiry into the Order, whose decision to confirm it is under challenge.

Philip Napier Todd – The First Claimant; resident of Eversley, Chairman of Eversley Parish Council, Chairman of Forest of Eversley Trust and Secretary to the Hart & Rushmoor District Group of the Campaign to Protect Rural England; objector to the Order.

Douglas Bradley – The Second Claimant; owner and occupier of Broom Cottage, New Mill Lane, Eversley, a property which adjoins Sandy Lane; objector to the Order.

Philip Graham Plumbe FRICS FCI Arb – Chartered Surveyor and Chartered Arbitrator; acted as representative for the objectors to the Order; maker of two witness statements in support of this claim.

The Reverend Sir William Cope – 12th Baronet of Bramshill; owner of the Bramshill Estate (including the route of Sandy Lane) from the 1850s to 1892.

Sir Anthony Cope – Sir William Cope's son and heir; owner of the Bramshill Estate from 1892 until a date unknown prior to 18.6.1921.

Captain Denzil Cope – Son of Sir Anthony Cope; acquired the freehold to the Bramshill Estate from his father prior to 18.6.1921 and owned it until 1936.

Lord Brocket – Purchaser of the Bramshill Estate from Captain Denzil Cope in 1936: sold it off in 1952, in a number of lots none of which included Sandy Lane; Chairman of Bramshill Parish Meeting 1949

Forestry Commission – Lessee of the land adjoining Sandy Lane on both sides under a lease for 198 years of that and other land on the Bramshill Estate dated 5.4.1922; grantee of an all-purpose right of way over Sandy Lane for the duration of the lease.

End of Document

[2008] 1 AC

R (Godmanchester TC) v Environment Secretary (HL(E))

A

House of Lords

**Regina (Godmanchester Town Council) v Secretary of State
for the Environment, Food and Rural Affairs**

Regina (Drain) v Same

B

[2007] UKHL 28

2007 May 8, 9, 10;
June 20

Lord Hoffmann, Lord Hope of Craighead,
Lord Scott of Foscote, Baroness Hale of Richmond
and Lord Neuberger of Abbotsbury

C

Highway — Right of way — Dedication — Application for modification order adding footpath to definitive map and statement — Whether overt acts required as sufficient evidence of intention not to dedicate footpath — Whether necessary for evidence of intention not to dedicate to have been brought to users' notice throughout whole of relevant period — Highways Act 1980 (c 66), s 31(1)

D

In each of two cases, an application by the claimant to the surveying authority for a modification order under section 53 of the Wildlife and Countryside Act 1981 adding a public footpath to the definitive map and statement of the local area was refused but, following a successful appeal, the Secretary of State for the Environment, Food and Rural Affairs directed the making of the order. The landowner objected, the order was submitted for confirmation to the Secretary of State and a public local inquiry was held. The inspector concluded that there was sufficient evidence, within section 31(1) of the Highways Act 1980¹, of a lack of intention on the part of the landowner to dedicate a footpath during the relevant 20-year period and that the order should not be confirmed. The claimants sought judicial review of the inspector's decisions. The Divisional Court of the Queen's Bench Division dismissed the claims, and its decision was affirmed by the Court of Appeal.

E

On the claimants' appeals—

F

Held, allowing the appeals, that on the true construction of section 31(1) of the 1980 Act a landowner's intention not to dedicate a way as a highway had to be objectively established and "intention" meant what users of the way would reasonably have understood his intention to be; that "sufficient evidence" that there had been no intention to dedicate required evidence of some overt acts on the part of the landowner such as to come to the attention of the public who used the way and demonstrate to them that he had no such intention, and it was not sufficient for him simply to give evidence that he had not so intended; that although the landowner's intention did not have to be continuously manifested "during" the whole of the 20-year period, but merely at some point during that period, the inspector had been wrong in principle to take into account in the first case a letter written by the landowner to the local planning authority complaining of pedestrian trespass and in the second case a clause in a tenancy agreement by which the tenant had agreed not to allow any footpaths to be created; and that the decisions should be quashed and the cases remitted to the Secretary of State for decision (post, paras 20, 32, 39, 42, 47, 57, 59, 68–71, 72, 77–78, 87).

G

Dicta of Denning LJ in *Fairey v Southampton County Council* [1956] 2 QB 439, 458, CA applied.

H

R v Secretary of State for the Environment, Ex p Billson [1999] QB 374 and *R v Secretary of State for the Environment, Transport and the Regions, Ex p Dorset County Council* [2000] JPL 396 disapproved.

¹ Highways Act 1980, s 31(1): see post, para 1.

Decision of the Court of Appeal [2005] EWCA Civ 1597; [2006] QB 727; [2006] 2 WLR 1179; [2006] 2 All ER 960 reversed. A

The following cases are referred to in the opinions:

- Barraclough v Johnson* (1838) 8 A & E 99
British Museum (Trustees of the) v Finnis (1833) 5 C & P 460
Bryant v Foot (1867) LR 2 QB 161
Fairey v Southampton County Council [1956] 2 QB 439; [1956] 2 WLR 517; [1956] 1 All ER 419, DC; [1956] 2 QB 439; [1956] 3 WLR 354; [1956] 2 All ER 843, CA B
Folkestone Corpn v Brockman [1914] AC 338, HL(E)
Jaques v Secretary of State for the Environment [1995] JPL 1031
Jones v Bates [1938] 2 All ER 237, CA
Lewis v Thomas [1950] 1 KB 438; [1950] 1 All ER 116, CA
Mann v Brodie (1885) 10 App Cas 378, HL(Sc) C
Merstham Manor Ltd v Coulsdon and Purley Urban District Council [1937] 2 KB 77; [1936] 2 All ER 422
O'Keefe v Secretary of State for the Environment [1996] JPL 42
Poole v Huskinson (1843) 11 M & W 827
Powell v McFarlane (1977) 38 P & CR 452
Pye (J A) (Oxford) Ltd v Graham [2002] UKHL 30; [2003] 1 AC 419; [2002] 3 WLR 221; [2002] 3 All ER 865, HL(E) D
R v Broke (1859) 1 F & F 514
R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335; [1999] 3 WLR 160; [1999] 3 All ER 385, HL(E)
R v Secretary of State for the Environment, Ex p Billson [1999] QB 374; [1998] 3 WLR 1240; [1998] 2 All ER 587
R v Secretary of State for the Environment, Ex p Blake [1984] JPL 101
R v Secretary of State for the Environment, Ex p Cowell [1993] JPL 851, CA
R v Secretary of State for the Environment, Transport and the Regions, Ex p Dorset County Council [2000] JPL 396 E
Secretary of State for the Environment v Beresford Trustees (unreported) 31 July 1996; Court of Appeal (Civil Division) Transcript No 1031 of 1996, CA

The following additional cases were cited in argument:

- Applegarth v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 487; [2001] EGCS 134 F
Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223; [1947] 2 All ER 680, CA
Attorney General ex rel Yorkshire Derwent Trust Ltd v Brotherton [1992] 1 AC 425; [1991] 3 WLR 1126; [1992] 1 All ER 230, HL(E)
Cumbernauld and Kilsyth District Council v Dollar Land (Cumbernauld) Ltd 1992 SC 357; 1992 SLT 1035
Gloucestershire County Council v Farrow [1985] 1 WLR 741; [1985] 1 All ER 878, CA G
Leckhampton Quarries Co Ltd v Ballinger (1904) 20 TLR 559
Mills v Silver [1991] Ch 271; [1991] 2 WLR 324; [1991] 1 All ER 449, CA
Newnham v Willison (1987) 56 P & CR 8, CA
Norman v Secretary of State for the Environment, Food and Rural Affairs [2006] EWHC 1881 (Admin); [2007] EWCA Civ 334, CA
R v Lloyd (1808) 1 Camp 260 H
R (Beresford) v Sunderland City Council [2003] UKHL 60; [2004] 1 AC 889; [2003] 3 WLR 1306; [2004] 1 All ER 160, HL(E)
Shearburn v Chertsey Rural District Council (1914) 78 JP 289
Turner v Walsh (1881) 6 App Cas 636, PC
Ward v Durham County Council (1994) 70 P & CR 585, CA

A APPEALS from the Court of Appeal

R (Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs

- B This was an appeal by the claimant, Godmanchester Town Council, by leave of the House of Lords (Lord Hoffmann, Lord Scott of Foscote and Lord Rodger of Earlsferry) given on 14 March 2006 from the decision of the Court of Appeal (Auld and Arden LJ and Bennett J) on 19 December 2005 dismissing the claimant's appeal from the Divisional Court of the Queen's Bench Division (Maurice Kay LJ and Richards J) [2005] 1 WLR 926 on 22 July 2004. The Divisional Court had dismissed the claimant's claim for judicial review of a decision contained in a letter dated 21 March 2003 of Helen Slade, an inspector appointed by the Secretary of State for the Environment, Food and Rural Affairs, by which she had refused to confirm the Cambridgeshire County Council (Public Footpath No 15 Godmanchester) Definitive Map Modification Order 2002 made on 20 March 2002.

R (Drain) v Secretary of State for the Environment, Food and Rural Affairs

- D This was an appeal by the claimant, Leslie Ernest Drain, acting on behalf of the Ramblers' Association, by leave of the House of Lords granted on 14 March 2006 from the decision of the Court of Appeal on 19 December 2005 dismissing his appeal from the decision of the Divisional Court on 22 July 2004. The Divisional Court had dismissed his claim for judicial review of a decision contained in a letter of the inspector, Helen Slade, dated 9 June 2003 refusing to confirm the West Berkshire District Council Definitive Map and Statement Footpath 25, 25a and 25b Aldworth/17 Streatley Modification Order 2000 made on 4 September 2000.

The appeals were consolidated. The facts are stated in the opinions.

- F *George Laurence QC* and *Ross Crail* for the claimants. The questions (a) of what counts as "sufficient evidence" and (b) of what "during" means cannot be considered or answered independently of one another. The proviso has to be construed as a whole, and the interplay between the answers is part of that process. The combined effect of the Court of Appeal's rulings on both questions is to render the section ineffective. If the claimants' submissions on question (a) are rejected, the argument for their proposed answer to question (b) is all the stronger, and vice versa.

- G The approach to the interpretation and application of the proviso to section 31(1) of the Highways Act 1980 endorsed by the Court of Appeal has only been adopted by the courts relatively recently and represents a significant departure in favour of landowners from what had previously been understood to be, and acted on as being, the law. That interpretation does not strike the balance between the interests of landowners and the public interest in the preservation of rights of way that have been in de facto use for many years where Parliament in enacting the Rights of Way Act 1932 and its successor provisions in the Highways Act 1959 and the 1980 Act intended it to be struck but tilts it overwhelmingly too far in favour of landowners. [Reference was made to *Fairey v Southampton County Council* [1956] 2 QB 439; *R v Secretary of State for the Environment, Ex p Blake*

[1984] JPL 101; *R v Secretary of State for the Environment, Ex p Cowell* [1993] JPL 851; *Ward v Durham County Council* (1994) 70 P & CR 585; *O’Keefe v Secretary of State for the Environment* [1996] JPL 42 and *Jaques v Secretary of State for the Environment* [1995] JPL 1031.]

The decision of the Court of Appeal as to the meaning of the proviso in *Secretary of State for the Environment v Beresford Trustees* (unreported) 31 July 1996; Court of Appeal (Civil Division) Transcript No 1031 of 1996 was clearly part of the ratio, because to evaluate the inspector’s treatment of the evidence going to the satisfaction of the proviso and decide whether or not it had been irrational it was necessary first to decide what the test for the application of the proviso was. The court did not simply assume the correctness of the test in *Fairey v Southampton County Council* [1956] 2 QB 439, 458. That could be seen from the novelty of the “subjective”/“objective” terminology, which did not derive from *Fairey’s* case, and Hobhouse LJ’s reference to section 31(3)(5), which shows that the court gave thought to the interplay between those provisions and the proviso and concluded that the section as a whole was supportive of Denning LJ’s construction of it.

As to the observations of Sullivan J, obiter, in *R v Secretary of State for the Environment, Ex p Billson* [1999] QB 374, 394–396, first, the *Beresford Trustees* case was not drawn to his attention; secondly, he wrongly interpreted the authorities as doing no more than establishing the proposition that evidence of the landowner’s intention had to be overt, in the sense of not being locked in his own mind, and contemporaneous, as opposed to a retrospective assertion. [Reference was made to *Norman v Secretary of State for the Environment, Food and Rural Affairs* [2006] EWHC 1881 (Admin) at [16] and [26]; [2007] EWCA Civ 334.]

Adopting the “pure” construction of the proviso and rejecting the existence of any “overt acts rule” (as Dyson J, going further than Sullivan J, had done in *R v Secretary of State for the Environment, Transport and the Regions, Ex p Dorset County Council* [2000] JPL 396, 404–408) leads inexorably to the position that all that a landowner need do to defeat a section 31 claim is to lead oral evidence, which the court or tribunal hearing it accepts as truthful, that he (and/or his predecessors in title) did not intend to dedicate the way in question. There is no warrant for saying, as the Divisional Court said [2005] 1 WLR 926, para 29(3), that “in the absence of something overt and contemporaneous, a landowner will generally find it difficult to point to ‘sufficient evidence’ of a negative—a lack of intention to dedicate”. If the only issue is as to his subjective state of mind, he is in the best position to say what it was. In the nature of things, the public will be unable to lead any directly contrary evidence. One cannot have it both ways and reject the existence of any rule of law or evidence that there should have been overt and contemporaneous acts while at the same time positively encouraging the fact-finder to look for them in most if not all cases. That approach is unworkable: see *Norman’s* case [2006] EWHC 1881 at [26]. The judicial instinct that bare retrospective assertions of no intention to dedicate should not be enough to satisfy the proviso is correct, is in tune with the legislative intention and can and should be given effect in interpreting the statute. However, as soon as the pure construction is abandoned, the proviso must, guided by what must ultimately be policy considerations, be construed by drawing a line, and the question is where it is to be drawn.

- A Considerations of the legislative policy and purpose point towards drawing it not where Sullivan J in *Ex p Billson* was inclined to draw it but more where the judges in earlier cases were inclined to draw it. At the very least, it should be construed so as to exclude from satisfying the proviso purely private acts or statements that the public have no reasonable chance of discovering. In the Divisional Court and the Court of Appeal the claimants
- B contended that there had to be evidence of acts that were overt in the sense that they came or were likely to come to the attention of users. The proviso should be interpreted no more favourably to landowners than that.

- As to the position at common law prior to 1932, see the principles stated in *Mann v Brodie* (1885) 10 App Cas 378, 386, per Lord Blackburn; *Folkestone Corpn v Brockman* [1914] AC 338, especially per Lord Kinnear, at pp 352–358, Lord Atkinson, at pp 361–367, and Lord Dunedin, at p 375;
- C *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335, per Lord Hoffmann, at pp 349 (referring to the distinction between Scottish and English law), 351H–353E (referring to *Mann v Brodie*) and 358F–G; *Jones v Bates* [1938] 2 All ER 237, 244A–245A, 247C–G; *Attorney General ex rel Yorkshire Derwent Trust Ltd v Brotherton* [1992] 1 AC 425, 432B, 438A, 447A–B and *Trustees of the British Museum v Finnis* (1833) 5 C & P 460. Long-standing public user did not give rise to any
- D presumption of dedication at common law. An inference of dedication could be drawn, but did not have to be; the landowner’s inaction could be attributed to toleration instead. The Court of Appeal’s interpretation of the proviso fails to recognise and give effect to the legislative policy and intent underlying section 31 and its statutory predecessors beginning with the 1932 Act and is incompatible with Parliament’s objectives of facilitating the
- E establishment of public rights of way, simplifying the law relating to the proof of their acquisition and making the outcome of disputes less unpredictable. It cannot have been the intention of Parliament in enacting the 1932 Act or its successor provisions to create an alternative statutory method of establishing public rights of way that was so easily circumvented, throwing the public back on to the common law with all the inherent
- F difficulties of which it was, according to previous decisions of the House of Lords, an object of the legislation to relieve them.

- The Court of Appeal’s rejection of the “overt acts rule” means that a section 31 claim, based on however long a period of uninterrupted as of right user, can be defeated by the landowner or a predecessor in title coming forward and saying that he did not intend to dedicate the way but was merely tolerating its use by the public. Its interpretation of “during” means
- G that such evidence need only pertain to a small proportion of the 20-year period preceding the “bringing into question”. Parliament would not have replaced the situation postulated by Lord Blackburn in *Mann v Brodie* 10 App Cas 378, 386, with one no less unsatisfactory. The legislative intention would have been that, once the public had used a way as of right and uninterruptedly for 20 years or more (without any manifestation of an intention that they should not acquire a right by so doing, sufficient to
- H disabuse them of the belief that that was what would happen), they should be entitled to assume that they had acquired that right, not have to proceed on the uncertain basis that the fruits of their user might at any time be snatched from them. The landowner should have to show his hand openly at the time of the user, just as the users show their hand openly by using the

route. The evidence of no intention to dedicate should be sufficient for that purpose, not just sufficient to satisfy a tribunal after the event. Moreover, Parliament cannot have intended the reference to evidence in the proviso to be a reference to evidence that was not reasonably discoverable by members of the public at a time when they were deciding whether or not to apply for a definitive map modification order or otherwise assert the existence of a right but was in the sole knowledge of the landowner or a predecessor in title and might be brought out as a trump card only at a late stage of the relevant proceedings. That is unfair to the public. Arden LJ's suggestion [2006] QB 727, para 95 (see also per Auld LJ, para 63) that the fact-finder should weigh the landowner's evidence about his intentions against his omission to take steps to publicise them, taking into account other factors such as the location and features of the way and the extent of user, sounds very well (and is not something that the inspector did in either of the instant cases) but calls for a complex analysis of the subjective state(s) of mind over a period of at least 20 years of at least one landowner, perhaps a series of successive landowners. That is hardly a simplification of the law. Moreover, the exercise of inferring the landowner's true state of mind from his actions (or, rather, inaction) in all the circumstances would be virtually indistinguishable from the exercise at common law of deciding whether or not to infer the existence of an intention to dedicate. [Reference was made to J G Riddall, "‘Umm . . .’, Said the Solicitor" [2006] Conv 285 and the *Sunningwell* case [2000] 1 AC 335, 356.]

Honestly and openly challenging the public's right to use a way (by, e.g., erecting a gate or notice) would bring it into question, crystallise it and enable the public to establish and enforce it by an application for a definitive map modification order or appropriate legal proceedings. If the Court of Appeal is right, the landowner can avoid that result and defeat the public's inchoate claim by doing some (perfectly genuine) private act, such as writing and sending a letter declaring that he has no intention of allowing the way to become a highway, waiting for a few days or weeks and then openly challenging the public's right to use it by, e.g., barring the entrance. The writing and sending of an appropriately worded letter would satisfy the fact-finder of the presence of a genuine intention, albeit one only just conceived, not to dedicate at a point in the relevant 20-year period. Parliament cannot have intended the section to be so easily circumvented, and one or other, if not both, of the Court of Appeal's rulings must be flawed. The Divisional Court's only answer to this point [2005] 1 WLR 926, para 43 was that even if a claim under the statute could be defeated by such a device it might well still be possible to infer a dedication at common law. But that is cold comfort for the public, since whether the decision-maker would actually do so is a very different matter. The alternative inference of toleration could just as easily be drawn.

The adoption of criteria for assessing what is "sufficient evidence" is not inconsistent with its being a question of fact in each individual case whether those criteria are satisfied (per Rose LJ in *R v Secretary of State for the Environment, Ex p Cowell* [1993] JPL 851, 855). Although there are in section 31(1) no words that expressly require proof of overt acts on the part of the landowner (in any sense of the word "overt") to satisfy the proviso, neither are there any that would prevent it being given a purposive construction that achieves the objects of the section by imposing a

A requirement for overt acts that come or are likely to come to the attention of users.

Subsections (3), (5) and (6), which all entail acts of a public nature, are clear positive indicators of a legislative intention that acts satisfying the proviso have to be in the public domain and involve an element of continuity throughout the 20-year period. Deposit of a declaration under subsection (6) is statutorily deemed to be sufficient evidence. One would expect such a deeming provision to offer the landowner an alternative course of action less, not more, onerous than he would otherwise have to take to satisfy the proviso. If the Court of Appeal is right, however, he need not go to the trouble of drawing up a formal document and depositing it with the local authority and renewing it at intervals thereafter; he can just write a letter to friends, or do nothing. If that is the case, Parliament need not have enacted these subsections. Likewise, in the 1932 Act (and its successors) Parliament gave landlords specific means of rebutting the presumption of dedication that could otherwise have arisen from user that their tenants did nothing to prevent. Those means involved directly and openly intervening so that everyone might know their position: see section 31(4) as well as subsections (5) and (6), and compare sections 1(5) and 4 of the 1932 Act. That is another pointer to the legislative intention, and Parliament did not contemplate the same result being achieved by the insertion of a covenant in the lease that the tenant proceeded with impunity to breach and the landlord made no attempt to enforce, while users remained in ignorance, as in *Dr Drain's* case (a fortiori where, as in that case, the covenant had been inserted 22 years before the 20-year user period began and there had been a change of landlord in the interim). It would be paradoxical if a landowner who went to the trouble of erecting a notice or making a deposit should have to comply with strict conditions as to form and content, positioning, legibility and maintenance (in the case of notices) and renewal (in the case of deposits), whereas another landowner could achieve the same effect by doing something much less formal, or nothing.

Further or alternatively, the “throughout” construction of “during” (see the *Concise Oxford Dictionary*) is implicit in section 31(3) and (6). The erection of a notice complying with subsection (3)(a) is not given retrospective effect, neither will it have any prospective effect unless it is “maintained”. It is effective to satisfy the proviso only if and for so long as it is maintained in position. Similarly, the initial subsection (6) deposit is given no retrospective effect and, once made, its efficacy depends on continuity achieved by regular renewals. It would be anomalous if a one-off, temporary episode of intention not to dedicate were to stand on an equal footing with the fulfillment of these strict requirements. The structure of section 31(1), in particular the positioning within the proviso of the words “during that period”, is more consistent with “during” meaning “throughout” than its meaning “at some or other point in”. The words “at any time”, which appear in section 1(1) of the 1932 Act but not in section 31(1) of the 1980 Act, are also significant.

The Court of Appeal overestimated the difficulties that adopting the claimants’ construction of the proviso in either or both respects would pose for landowners. First, if there is not much public use of a way, so that the landowner could not reasonably become aware of it, there will not be enough use to count for the purposes of section 31: see the passages from

Mills v Silver [1991] Ch 271 and *Cumbernauld and Kilsyth District Council v Dollar Land (Cumbernauld) Ltd* 1992 SLT 1035 quoted in *R (Beresford) v Sunderland City Council* [2004] 1 AC 889, paras 6, 67, 77 and 78. Secondly, a landowner who neither troubles to inform himself of what is going on on his land nor takes precautionary measures to protect himself in case it is being used in an adverse manner has only himself to blame. Any purchaser of land takes the risk that it is subject to adverse rights, claims or usage of which the vendor (deliberately or otherwise) fails to warn him. Tracks that are or may be being used in the manner of a highway should be detectable on inspection, and appropriate inquiries can be made of the vendor as to what use has been made of them and what the vendor has done by way of evincing no intention to dedicate them. Thirdly, a landowner does not have to worry about erecting notices, fences or gates. All that he needs to do is to take advantage of the mechanism in section 31(6), which has been available since 1932. That does not involve seeking “officially to exclude” members of the public, who can be left to carry on using the route without any confrontation but will acquire no right by doing so. The “notice” route in section 31(3) also allows the public to enjoy the route while retaining for the landowner or his successors the right to bring such use to an end at some time in the future should he or they wish to do so. Fourthly, the statutory means of negating the intention to dedicate are proactive, not reactive. The owner of a large estate can cover the whole of it for ten years by using the subsection (6) procedure. He does not have to wait until the use of the way has started; he can act pre-emptively. Fifthly, the acts relied on as evidencing no intention to dedicate (other than the statutorily prescribed methods) would not have to be repeated every day in order to have the continuing effect that the “throughout” construction of “during” requires. Recurrent but discontinuous acts such as the annual charging of a toll (*R v Secretary of State for the Environment, Ex p Cowell* [1993] JPL 851), or turning users back (*Fairey v Southampton County Council* [1956] 2 QB 439) might manifest a continuous intention not to dedicate. The “throughout” construction requires only that, taking such acts together, the effect properly to be attributed to them covers the whole period.

As to the concern expressed by the Court of Appeal and the Divisional Court that interpreting “sufficient evidence” as requiring acts or declarations in the public domain would leave no scope for the proviso to operate because such acts or declarations would amount to a “bringing into question” or render use not “as of right” or constitute an “interruption” to use so as to prevent the presumption of dedication arising in the first place, user can be “as of right” and “without interruption” even if and while the landowner is manifesting no intention to dedicate. The concept “as of right” does not entail a subjective belief on the part of the public in their right to use the way: *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335. The Divisional Court’s reasoning in dismissing *Sunningwell* as irrelevant and adopting Dyson J’s reasoning in its entirety stemmed in part from the passage of Laws J’s judgment in *Jaques v Secretary of State for the Environment* [1995] JPL 1031, 1037 that was based on the misapprehension corrected in the *Sunningwell* case and to that extent can no longer hold good in the light of the *Sunningwell* case. The relationship between the two parts of section 31(1) does not demand that in disproving an intention to dedicate the owner must not indicate to the users that there is no right to use the way.

- A What troubled Laws J in *Jaques's* case as being “not a very satisfactory state of affairs” does not exist. As to “interruption”, see *Merstham Manor Ltd v Coulsdon and Purley Urban District Council* [1937] 2 KB 77. It is possible for a landowner publicly to manifest an intention not to dedicate, e.g. by erecting a notice, without physically interfering with the use of the way. Not all acts manifesting an intention not to dedicate that come or are likely to come to users’ attention would suffice to bring it home to the public that their right to use the way is being challenged so as to satisfy section 31(2).
- B A landowner’s turning back some users, putting an advertisement in the local newspaper or posting a notice on the Internet might all satisfy the proviso (so construed) without becoming so widely known as to stop time running. In any event, if there is, as Auld LJ acknowledged, an inevitable overlap between the notions of interruption, evidence of intention not to dedicate and bringing into question, an interpretation of the section that leaves little scope for the operation of the proviso would be less unsatisfactory than one that leaves little scope for the operation of the section. Requiring an act or acts likely to have come to the attention of users would not deprive the proviso of its function.
- C The Court of Appeal’s interpretation fails to take account of what kinds of evidence were regarded at common law as “sufficient to negative” (or rebut) “any intention to dedicate” (*Leckhampton Quarries Co Ltd v Ballinger* (1904) 20 TLR 559, 560) and the way in which those expressions were used and understood at common law. When the 1932 Act was drafted, the choice and meaning of the expressions “sufficient evidence that there was no intention . . . to dedicate” (section 1(1)(2)) and “sufficient evidence to negative the intention of the owner of the land to dedicate” (section 1(3))
- D would have been conditioned by the way in which those expressions were used and understood at common law. That was as meaning (and meaning only) overt acts directed at users, such as the erection of gates or notices or turning people back. The Court of Appeal was referred to a number of authorities and textbooks antedating, and contemporaneous with, the 1932 Act to support that proposition. Two of the cases are alluded to in Arden LJ’s judgment, at para 95: *Trustees of the British Museum v Finnis* 5 C & P 460 and *Barraclough v Johnson* (1838) 8 A & E 99. However,
- E others are not referred to or dealt with in the Court of Appeal’s judgments, notably *R v Broke* (1859) 1 F & F 514 and *Leckhampton Quarries Co Ltd v Ballinger* 20 TLR 559. The latter is significant because it contains an exposition by Swinfen Eady J, at p 560, of what acts were at common law “sufficient to negative any intention to dedicate”. There is no suggestion that
- F a private act or statement would be so regarded. In *R v Broke*, Pollock CB rejected evidence that the landowner’s predecessor in title had given instructions to his servants to turn back certain classes of persons, on the basis that such evidence, taken alone (ie in the absence of evidence of communication to users of the path), would not be relevant, by which he presumably meant that it would be insufficient in law to defeat the claim.
- G No case is cited in the books, and the claimants have found none, in which acts or statements by a landowner that were not directed at users were held sufficient to rebut an inference of dedication at common law. (Of course, at common law, in contrast to under the statute, a landowner’s failure to rebut the inference by such evidence was not the end of the matter because the fact-finder then had a choice between inferring an intention to dedicate
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(dedication) and inferring mere tolerance (no dedication): see *Mann v Brodie* 10 App Cas 378, 386.) The emphasis was entirely on acts directed at the public: see *Trustees of the British Museum v Finnis* 5 C & P 460, 465 and *R v Lloyd* (1808) 1 Camp 260, 262. Leaving aside *R v Broke*, the claimants have not even been able to find a case in which an attempt was made by the landowner to bolster, let alone establish, a lack of intention to dedicate by evidence of private acts and statements. It would appear to have been taken for granted that only evidence of acts directed at users would suffice to rebut (negative) the inference (or, as it is often called in the older case reports, presumption) of dedication. Nor have the claimants been able to find a case in which a landowner's evidence that he did not intend to dedicate a way has been held, or even been relied on, to rebut an inference of dedication at common law. That is not because such evidence was technically inadmissible before 1932. The evidence of parties has been admissible since the Evidence Act 1851 (14 & 15 Vict c 99) (amending the Evidence Act 1843 (6 & 7 Vict c 45), which rendered admissible the evidence of persons with an interest). It was accepted that intention could be proved by the direct testimony of the party whose intention was in question, as well as by proof of his declarations made out of court at the time such intention was material: see *Halsbury's Laws of England*, 2nd ed, vol XIII (1934) ("Evidence"), p 566. The reason must, therefore, have been that such evidence would not have been regarded as relevant for the purpose. The only judicial discussion that the claimants have found on the subject of the admissibility of weight to be given to a landowner's own declarations as to intention to dedicate in the common law context is in *Barraclough v Johnson* 8 A & E 99, 104–105, per Littledale J (obiter). There is some ambiguity in the passage, in that the judge might have been saying that no regard at all should be had to the landowner's declaration, or that regard could be had to it but it would not suffice to rebut the inference of dedication; he would have to have done something at the time to evince his lack of intention to dedicate to users. The Court of Appeal was referred to the editions of *Halsbury's Laws of England* on "Highways" and of *Pratt & Mackenzie's Law of Highways* that respectively preceded and post-dated the 1932 Act. There is nothing in the 1st edition of *Halsbury's Laws of England*, vol XVI (1911), paras 51–57 or the 18th edition (1932) of *Pratt & Mackenzie's Law of Highways*, pp 37–38, to suggest that at common law private acts or statements, or the landowner's retrospective assertions that he had no intention to dedicate, would suffice as evidence rebutting an inference of dedication. Nor is there anything in *Halsbury's Laws of England*, 2nd ed, vol XVI (1935), para 269, or the of *Pratt & Mackenzie's Law of Highways*, 19th ed (1935), pp 610–612, 630, or *Halsbury's Statutes of England*, vol 25 (1932), pp 191–193, to indicate a contemporaneous perception on the part of the editors or authors that (the statutorily prescribed methods apart), anything less than acts or statements directed at users would do for the purpose of satisfying the first proviso to section 1(1) or the proviso to section 1(2) of the 1932 Act. Both commentaries on the 1932 Act refer back to the passages on rebutting the inference of dedication at common law.

It has hitherto been universally assumed that the methods prescribed by Parliament for negating the intention to dedicate now embodied in section 31(3), (5) and (6) of the 1980 Act were not intended by Parliament to be exhaustive. Rather, it has been taken for granted that those methods were

- A intended to qualify as “sufficient evidence that there was no intention during that period to dedicate it” along with an unlimited range of unspecified other methods. The claimants have not until now sought to disturb that common assumption. They seek now to do so. The contrary has never been argued, and there is no reasoned authority for the proposition at any level. The House of Lords is invited to approach the question *de novo*. There is nothing in section 31, as there was nothing in section 1 of the 1932 Act, to preclude these subsections from being read as exhaustive and giving the complete answer to the question of what is sufficient evidence. Section 31(1) (compare section 1(1) and (2) of the 1932 Act) does not close with the words
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“unless there is sufficient evidence that there was no intention during that period to dedicate it, whether in the form of a notice such as is mentioned in subsection (3) below or a notice such as is mentioned in subsection (5) below or a statutory declaration such as is mentioned in subsection (6) below or otherwise”;

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contrast the closing words of subsection (2), or of section 1(6) of the 1932 Act. Subsections (3), (5), and (6) state clearly what “is [are] sufficient evidence to negative the intention to dedicate the way as a highway”, as did subsections (3) and (4)(b) of section 1 of the 1932 Act, except that they used the expression “shall be” rather than “is” or “are”. All the difficulties that have been experienced in trying to interpret “sufficient evidence” in the proviso may be resolved by reading those subsections instead of looking outside the section for some alternative answer. The simple solution of treating section 31 as a comprehensive, self-contained code would enable everyone (users and landowners alike) to know exactly where they stand, both during and after the relevant 20-year period. It would make the outcome of claims more predictable and simplify and facilitate them. It would be equally fair to users and landowners and eliminate the need to make findings or draw inferences as to the subjective state of mind of the landowner: a clear distinction from the common law. It could not be objected to on the ground that it would run counter to the operation of section 31 read as a whole or leave no scope for the operation of the proviso.

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The circumstances in which the proviso would operate, on this construction, are those in which the section itself says in terms that it does. More traditional methods of evincing an intention not to dedicate would still serve a purpose. The landowner who closed a gate across the way one day a year would establish that the use was permissive (*precario*), and so not as of right: see the analysis in *R v Secretary of State for the Environment, Ex p Cowell* [1993] JPL 851, especially per Balcombe LJ, at p 858 (and see per Rose LJ, at p 856), and *R (Beresford) v Sunderland City Council* [2004] 1 AC 889, per Lord Bingham of Cornhill, para 5, and Lord Walker of Gestingthorpe, para 83; cf *Trustees of the British Museum v Finnis* 5 C & P 460, 465. The landowner who challenges or turns back users can claim that he thereby rendered use contentious and so *vi* and not as of right: see, e.g., *Newnham v Willison* (1987) 56 P & CR 8, 19. It is appropriate that such conduct should not come under the umbrella of the proviso, because the proviso only comes into play when the presumption of dedication has been raised by proof of 20 years’ use that was, *inter alia*, as of right.

As to “bringing into question”, see *Fairey v Southampton County Council* [1956] 2 QB 439, 456–458; *R v Secretary of State for the Environment*,

Transport and the Regions, Ex p Dorset County Council [2000] JPL 396, 401–403; David Braham QC, “Section 31(2): ‘bringing into question’”, *Rights of Way Law Review*, February 2002, section 6.3, p 75, referring to *Gloucestershire County Council v Farrow* [1985] 1 WLR 741 and *Applegarth v Secretary of State for the Environment, Transport and the Regions* [2001] EGCS 134. If a challenge is sufficiently clear and unambiguous to stop time running, a fortiori it will be sufficient evidence of absence of intention to dedicate.

Crail following. As to the subsidiary issue in Dr Drain’s appeal, on a proper reading of the Aldworth decision letter, the inspector’s finding that the proviso was satisfied by the existence of clause 17 in the 1950 tenancy agreement between 1972 and 1986 involved an error of law and/or a conclusion that could not reasonably be reached.

The only fair reading of the inspector’s finding in relation to clause 17 is as a bare finding on the legal consequences of succession and continued existence of the tenancy agreement. So read, her finding is unsustainable in law. It is clear from the context that she treated the evidential effect of the 1950 tenancy agreement, in particular clause 17, as a new, separate and self-contained topic. She was looking at whether the agreement in isolation satisfied the proviso. Clearly, too, she was turning to it as a last resort, having found nothing else that in her view was capable of constituting sufficient evidence of no intention to dedicate by itself or in combination with other factors. She did not make a positive finding that the company “took over” the agreement, including the covenant, with the same intention as Lord Iliffe had had in entering into the agreement. It does not follow, as she thought, merely from the intervener having inherited from Lord Iliffe the benefit of all rights and the burden of all obligations in the 1950 tenancy agreement as a package that it could point to clause 17 as an expression of its intentions with regard to the Aldworth footpath. No evidence was given that the intervener had applied its corporate mind in any way to the provisions of clause 17 at the time of “taking it over” in 1955 or at any other time, and the inspector made no finding that it had. The intervener was not an original party to the 1950 tenancy agreement and was not even formed until 1955. Accordingly, the original inclusion in the 1950 tenancy agreement of clause 17 could not have been evidence of any intention on the part of the intervener, only of Lord Iliffe as the then freeholder. The intervener’s not determining the 1950 tenancy agreement during the period 1955 to 1986 cannot be taken as evidence of an intention not to dedicate the Aldworth footpath. It could not in any event have done so save on the restricted grounds permitted by sections 23–25 of the Agricultural Holdings Act 1948. Nor can its not varying the tenancy agreement so as to exempt the Aldworth footpath from clause 17 be taken as evidence for the purposes of the proviso. Such an omission is equivocal. On the inspector’s findings, the intervener took no steps to enforce clause 17 during the period 1972–1986, notwithstanding the considerable volume of public use that the tenant did nothing to prevent.

As a matter of construction of section 31 of the 1980 Act, the intentions of a landowner cannot be attributed to his successor(s) in title save in the case of the limited exception expressly provided for by subsection (6), and in that instance for a maximum of only six (or, now, ten) years. What the section is

A concerned with is the intentions of the person(s) who owned the land during the 20-year period in question; they cannot pray in aid the intentions of others who owned it before that period began, and it would be an error of law for the fact-finding tribunal to attribute such intentions to them.

B As to remedy, the inspector's decisions should be quashed. There is no purpose to be served by remitting either matter to the Secretary of State for reconsideration. The inspector considered all the evidence, oral and written, which the parties wished to present, and made all necessary findings. The only decision that could properly be reached in each case on her findings is to confirm the modification order in question. The Secretary of State should be directed to confirm the orders (subject, in the case of the Aldworth order, to the modifications proposed by the inspector); alternatively, it should be declared that they should be confirmed.

C *Timothy Mould QC* and *David Blundell* for the Secretary of State. The conclusions of the Court of Appeal on both issues are correct and should be upheld. Far from rendering the section ineffectual, its approach is firmly rooted in the statutory language, gives effect to the policy of section 31 and enables a sensible and balanced decision to be made by the tribunal on the facts of the case.

D (1) The proviso to section 31, both on its terms and in the context of the section as a whole, is concerned with intention and its proof, not with communication of intention to users of the way. (2) To construe section 31(1) as requiring such communication in every case to give effect to the proviso would be to read words into it that would have been expressed if that had been the legislative intention and would be inconsistent with section 31 read as a whole. (3) The jurisprudence on the meaning and operation of the proviso supports the approach of the Court of Appeal that, subject to *Wednesbury* principles (see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223), it is for the fact-finding tribunal to determine whether the act or acts relied on by the landowner are sufficient evidence of his lack of intention to dedicate the way as a highway. (4) That approach, free from any gloss on the plain words of the proviso and the section, gives effect to the legislative policy, which is that the landowner should be able to rebut the statutory presumption of his dedication of the way as a highway by bringing before the fact-finding tribunal evidence that is, in that tribunal's judgment, sufficient to demonstrate that he lacked any intention to dedicate the way. (5) Such evidence must demonstrate that he lacked the intention to dedicate the way as a highway during the relevant 20-year period of its use by the public but need not, as a matter of law, establish that lack of intention to have been continuous throughout that period.

H As to section 31(1), Dyson J's analysis of the statutory language and its import in *R v Secretary of State for the Environment, Transport and the Regions, Ex p Dorset County Council* [2000] JPL 396, 406 is correct. The language of the proviso is to be given its straightforward meaning within the context of section 31(1). Neither section 31(1) nor section 31 read as a whole give any guidance as to what will be taken to be "sufficient", or as to what will amount to "evidence".

As to the proviso, (i) it relates to *intention to dedicate*. (ii) No express mention is made of the communication of that intention. (iii) The state of

mind of the users of the way is not in issue. (iv) What is in issue is the *sufficiency* of the evidence relied on by the landowner to demonstrate that he lacked the *intention to dedicate*. Had Parliament intended to circumscribe the fact-finding tribunal's consideration of and judgment on those matters in the way that the claimants contend, it plainly could have done so by express words, but it did not. On the contrary, the simplicity of the language strongly supports the conclusion that it intended the fact-finding tribunal to be the sole judge of the sufficiency of the evidence relied on by the landowner, subject to *Wednesbury* considerations and supervision by the court applying public law principles. That, rather than the judicial gloss on the statutory language for which the claimants contend, is the appropriate limit of judicial control over the operation of section 31(1). The decision-maker will have regard to all the available evidence and the surrounding circumstances.

The claimants' argument effectively equates communication with intention to dedicate. That cannot be correct. The intention to dedicate or lack of it is logically formed independently of its communication. Communication may, and in many cases will, enable the landowner to prove that he lacked the intention to dedicate, but it is a logically distinct, evidentiary consideration. The fact that it will serve to strengthen the landowner's case for the operation of the proviso does not lead to the proposition that it is a necessary legal prerequisite for its operation in every case. Moreover, the claimants' contention that the act or acts relied on by the landowner must at least be shown to have come or have been likely to have come to the attention of users of the way entails the fact-finding tribunal examining the question of intention and its demonstration only from the perspective of users of the way, rather than that of the landowner whose intention is under scrutiny.

In most cases, for the reasons given by Auld LJ [2006] QB 727, paras 63 and 64, the fact-finding tribunal will look for proof by the landowner of some overt and contemporaneous act or acts. That requirement is not, however, necessarily inherent in section 31. The clear implication of section 31(1) and section 31 as a whole is that Parliament acknowledged that there might be cases, albeit rare, where a landowner might not have demonstrated his lack of intention overtly but none the less is able to produce sufficient evidence that he never intended that a way should be dedicated to the public at large: see the reasoning of Sir Donald Nicholls V-C in *Ward v Durham County Council* 70 P & CR 585, 590 and of Dyson J in *R v Secretary of State for the Environment, Transport and the Regions, Ex p Dorset County Council* [2000] JPL 396, 406. The more exiguous the landowner's evidence is, the less likely it is that the fact-finding tribunal will be in a position rationally to conclude that it suffices to rebut the statutory presumption. Thus a bare, retrospective assertion by a landowner that he never intended to dedicate will be wholly insufficient as evidence of that fact when considered against a background of clear, consistent public user of the way, of which he was fully aware, over the 20-year period. The landowner's "device" suggested by the claimants (see ante, p 226E–G) would thus be defeated. "No intention to dedicate" means the same as "intention not to dedicate".

A private expression of intention is unlikely to be sufficient unless the landowner can point to an overt act: for example, a lease making it clear that

A the landowner and the leaseholder would take action to turn away members of the public. Declarations of intention carry such weight as the fact-finding tribunal considers appropriate.

The claimants' proposed interpretation of the proviso does not accord with the meaning of section 31 read as a whole. It would remove any meaningful distinction between the operation of the proviso and section 31(2): see per Auld LJ [2006] QB 727, para 62. It would deprive the
 B proviso of any practical significance in the operation of section 31. Hilbery J's observations in *Merstham Manor Ltd v Coulsdon and Purley Urban District Council* [1937] 2 KB 77 were not intended to provide an exhaustive list of the means whereby a landowner may effectively interrupt public enjoyment of a way over his land: see per Denning LJ in *Fairey v Southampton County Council* [1956] 2 QB 439, 456–457. Section 31(2)
 C expressly identifies the erection of a notice under subsection (3) as one means whereby the right of the public to use the way may be brought into question. [Reference was also made to Paul Baker, "Beating the Bounds at Lincoln's Inn" (1970) 86 LQR 158.]

The claimants' fundamental contentions are inconsistent with subsections (3) to (6), which identify specific acts stated by the Act to be sufficient evidence in their own right of a landowner's lack of intention.
 D They do not purport to be an exhaustive list of the actions that may suffice for that purpose on the facts of any given case: see per Rose LJ in *R v Secretary of State for the Environment, Ex p Cowell* [1993] JPL 851, 855 and Walton J in *R v Secretary of State for the Environment, Ex p Blake* [1984] JPL 101. As the claimants acknowledge, it has long been established that a landowner may rebut any inference that he intends to dedicate a way
 E across his land as a highway by closing the way to the public for one day a year: see, e.g., *Trustees of the British Museum v Finnis* 5 C & P 460, 465. Likewise, it is well established that the levying of a toll may suffice: per Rose LJ in *Ex p Cowell* [1993] JPL 851, 856. Neither of these established means of demonstrating the lack of an intention to dedicate is expressly acknowledged in section 31 of the 1980 Act, neither were they expressly
 F acknowledged in its statutory predecessors, the 1932 and 1959 Acts, yet it cannot have been the purpose or effect of the 1932 Act to have so changed the established position at common law that such acts are no longer capable of being sufficient evidence of such lack of intention.

The alternative methods in subsections (3) to (6) of section 31 do not assist the claimants' principal contentions. A notice erected by the landowner following the procedure in subsection (3) may have been "torn
 G down or defaced" very soon afterwards, and very few users of the way may have had any knowledge of its existence before that, yet a notice thereafter given by the landowner to the appropriate council under subsection (5) will suffice in itself to negative his intention to dedicate. Similarly, documents deposited under the procedure in subsection (6) are required to be kept available for public inspection under section 228 of the Local Government Act 1972. They are not, however, required to be drawn to the attention of
 H users of the way, nor does it follow from the fact that they are kept available for public inspection that they are likely to come to their attention.

Auld LJ's analysis of the jurisprudence in paras 19–28 of his judgment [2006] QB 727 is correct. Denning LJ's comments in *Fairey v Southampton County Council* [1956] 2 QB 439, 458 were obiter. He neither needed nor

purported to analyse in any detail the particular question raised by the claimants in the present cases, ie the need for communication (or the likelihood of communication) of the landowner's lack of intention. There is no reason to read his dictum as having been intended to provide a comprehensive judicial account of the various means whereby a landowner may, in the particular circumstances of any case, give sufficient evidence of such lack of intention. The question whether communication or its likelihood is necessary did not arise for Walton J's consideration in *R v Secretary of State for the Environment, Ex p Blake* [1984] JPL 101, and his observations, at p 102, must be read with that point in mind. Sir Donald Nicholls V-C's description in *Ward v Durham County Council* 70 P & CR 585, 590 (see also at p 591) of the correct approach of a decision-maker to the proviso is accurate and completely consistent with the approach of the Court of Appeal in the present case. It would establish the following propositions. (i) The best evidence of intention not to dedicate will be overt acts. (ii) In the absence of such evidence, the decision-maker will rarely be persuaded that there is sufficient evidence of an intention not to dedicate based on an unexpressed intention. (iii) There is, however, no legal bar to a finding of sufficient evidence in such circumstances. Sir Donald Nicholls V-C's fact-sensitive approach to the construction and application of the proviso is correct and fully reflected in the approach of the Court of Appeal in the present case. The observations of Laws J in *Jaques v Secretary of State for the Environment* [1995] JPL 1031, 1037 in relation to the interrelationship between the proviso and section 31(2) bear out the problems identified by the Court of Appeal in the practical operation of section 31 on the claimants' approach. Laws J clearly acknowledged that something less than communication of the landowner's lack of intention to dedicate to the public using the way would suffice as evidence for the purpose of the proviso. Taken as a whole, the approach of Pill J in *O'Keefe v Secretary of State for the Environment* [1996] JPL 42, 59 is consistent with that of Sir Donald Nicholls V-C in *Ward's* case and with that taken by the Court of Appeal in the present appeals. The question whether, to satisfy the proviso in any case, it is necessary at least to provide evidence that the landowner's lack of intention to dedicate did or was likely to have come to the notice of the public using the way did not arise for consideration in *Secretary of State for the Environment v Beresford Trustees* (unreported) 31 July 1996. The fact-finding tribunal must reach its own judgment as to the sufficiency of the evidence relied on to establish the landowner's lack of intention to dedicate. The reasoning of Dyson J in *R v Secretary of State for the Environment, Transport and the Regions, Ex p Dorset County Council* [2000] JPL 396, 406-408 is correct and should be accepted. It is properly founded on the words of section 31(1) when considered in the context of section 31 as a whole and based on a correct analysis of the principles that can be derived from the previous cases and properly reflects the policy of the legislation. [Reference was also made to *R v Secretary of State for the Environment, Ex p Cowell* [1993] JPL 851, 855-857 and *R v Secretary of State for the Environment, Ex p Billson* [1999] QB 374, 395.]

At common law, the creation of a highway has always depended on the landowner being shown to have had the necessary intention to dedicate the way as a highway: see *Poole v Huskinson* (1843) 11 M & W 827, 830, per Parke B, cited with approval in *Folkestone Corpn v Brockman* [1914]

- A AC 338, 352, and *Turner v Walsh* (1881) 6 App Cas 636, 642. His intention might be inferred from evidence of uninterrupted public user as of right of the way in question. This gave rise to unpredictable results: see *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335, 352–353, 358; see also *Jones v Bates* [1938] 2 All ER 237, 244–245 and *Fairey v Southampton County Council* [1956] 2 QB 439, 449, 459, 460.
- B Rejection of the claimants’ contention that, to give effect to the proviso, the landowner must in every case produce evidence of an act or acts likely to have come to the notice of users of the way does not result in the risk of a return to the evidential difficulties that the 1932 Act was enacted to avoid. The legislative purpose, of relieving those asserting the existence of a public right of way based on long user of the need to prove actual dedication of the way to the public by the landowner, is unaffected by the Court of Appeal’s
- C approach to the construction and operation of the proviso. Unless the landowner places evidence before the fact-finding tribunal sufficient to demonstrate his lack of intention to dedicate, the tribunal will have no proper basis in law to do other than give effect to the statutory presumption of dedication. The decisions in *R v Secretary of State for the Environment, Ex p Billson* [1999] QB 374 and *R v Secretary of State for the Environment, Transport and the Regions, Ex p Dorset County Council* [2000] JPL 396 do
- D not represent a “significant departure” (in favour of landowners) (see ante, p 223G) “from what had previously been understood to be, and acted upon as being, the law”: claimants’ written case. At common law, it was always open to the landowner to adduce evidence to rebut any inference that might otherwise be drawn from the fact of the public’s use of a way across his land that he intended to dedicate the way as a highway: see *Barracough v Johnson* 8 A & E 99, 104–105. The Secretary of State has found no case in
- E which the court has been called on to consider whether an act or acts relied on by the landowner but not communicated to users of the alleged way were nevertheless sufficient to rebut the inference of intention to dedicate. The claimants cite a number of old cases in which reference is made to well established means of rebutting any inference of dedication drawn from
- F proof of actual use by the public. Those references are of no significant assistance in relation to the fundamental questions raised by the claimants. The correctness of *R v Broke* 1 F & F 514, from which the claimants seek to derive some support, was doubted in the first edition of *Halsbury’s Laws of England*, vol XVI (1911), p 41, para 55. That commentary indicates the
- G author’s opinion that there was no reason in principle at common law why a landowner should not rely successfully on his private act to rebut the inference of dedication from public use of the way, albeit that users of the way lacked any actual notice of that act. At least, the author appears not to have “taken it for granted”, as the claimants suggest, that only evidence of acts directed at users would suffice to rebut the inference of dedication. The observations of Littledale J in *Barracough v Johnson* are the closest that the old cases come to providing any judicial consideration of the issues raised in these appeals. It is to be noted that, in the passage cited by the claimants, at
- H pp 104–105 (ante, p 230D), Littledale J was apparently considering the weight to be attached to the landowner’s declaration alone as evidence to rebut the inference to be drawn from very substantial evidence of public user. Moreover, he emphasised that the question was one for the jury to decide in the light of all the evidence, rather than simply giving effect to the

landowner's declaration. There is a need for caution in approaching the old cases at common law. They are an uncertain guide to the principles on which section 31 operates. [Reference was made to *Ward v Durham County Council* 70 P & CR 585 and Sir Lawrence Chubb, "The Rights of Way Act 1932. Its History and Meaning", Journal of the Commons, Open Spaces and Footpaths Preservation Society, vol II, no 8 (October 1932), pp 256–257.]

Whether there was sufficient evidence to rebut the statutory presumption of intention to dedicate (ie whether the proviso applied) did not arise for consideration in *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335. The Court of Appeal's approach is consistent with the *Sunningwell* case; indeed, it is arguable that the position is a fortiori in the light of that case. The actual state of mind or belief of the actual users of the claimed public right of way during the relevant period is immaterial in itself to the question whether the right has come into existence by virtue of long use by the public: the *Sunningwell* case, at p 356. That being the law, there appears to be no logic in the claimants' contention that, to bring the proviso into operation, the policy of the legislation requires the landowner necessarily to prove that the act or acts on which he relies as evidence of his lack of intention to dedicate came, or were likely to have come, to the notice of the public using the way.

The Court of Appeal [2006] QB 727 was correct in its approach to the meaning and effect of the phrase "during that period" in section 31(1). A single act during the relevant period of 20 years demonstrating that the landowner lacked intention to dedicate may suffice. The reasoning of Auld LJ, at paras 74–78, and Arden LJ, at paras 96–97 is adopted. Moreover, the proviso must be construed as a whole and the two main issues raised by the claimants cannot be considered or answered independently of one another. If the Secretary of State's submissions as to the correct approach to the consideration of whether there is sufficient evidence of the landowner's lack of intention to dedicate are accepted, it would follow that the words "during that period" should not be read as necessarily requiring that lack of intention to have been demonstrated throughout the full period of 20 years, though the extent to which the landowner's lack of intention was evident during the course of that period will be a relevant factor for the fact-finding body to consider in reaching its decision as to whether he has adduced sufficient evidence of such lack and so satisfied the proviso. The more exiguous that evidence, or the more limited its duration, the less likely it is that it will be capable of founding a finding of lack of intention to dedicate. There is support for the Secretary of State's approach in the second proviso to section 1(1) of the 1932 Act as originally enacted, now repealed (by section 58(1) of the National Parks and Access to the Countryside Act 1949). The use of the words "at any time" contrasts sharply with the absence of such words in the first proviso. They were clearly intended to indicate that, for the purposes of the second proviso, "during" meant "throughout" the 20-year period.

The claimants' alternative approach, construing section 31 of the 1980 Act as a self-contained code and reading the means of negating intention to dedicate stated in subsections (3), (5) and (6) as exhaustive, is unsustainable. As the claimants themselves point out, at common law there were in Victorian times a number of well established, practical methods, such as turning back users, charging a toll or erecting a gate across the way, whereby

- A a landowner could avoid any inference being drawn, from the fact of public use of a way over his land, that he intended to dedicate the way as a highway. By no means all those long-established methods are prescribed in section 31 of the 1980 Act as being sufficient evidence to negative the statutory presumption of dedication. There is no substantial difference between the 1980 Act and the 1932 Act on this point. In the result, if the claimants were
- B correct, the effect of the 1932 Act, maintained by the 1980 Act, would have been very significantly to circumscribe the landowner's opportunity to rebut the presumption of dedication by comparison with the position previously established at common law. It would be surprising if such a major legislative change had gone without any judicial notice hitherto in any of the many cases that have considered the operation of section 31 of the 1980 Act and its statutory predecessors. The claimants' contention that such acts go to the
- C question of whether the public's use of the way has been shown to be uninterrupted or as of right is no answer to the Secretary of State's submission. In practice, there will be many cases where the fact-finder reasonably concludes that the evidence shows that the public has enjoyed uninterrupted use of the way as of right for 20 years notwithstanding that there is also evidence that, on occasions, users were turned back, or a gate was in place, or certain persons used the way by permission. In such a case,
- D the question then arises whether those acts were nevertheless sufficient evidence of the landowner's lack of intention to dedicate the way: see per Denning LJ in *Fairey v Southampton County Council* [1956] 2 QB 439 and Rose LJ in *R v Secretary of State for the Environment, Ex p Cowell* [1993] JPL 851. [Reference was also made to *Leckhampton Quarries Co Ltd v Ballinger* 20 TLR 559, 560.]
- E On the subsidiary issue in Dr Drain's case, the evidence on which the inspector based her conclusion that she should give effect to the proviso was, in all the circumstances, capable of constituting sufficient evidence of the landowner's lack of any intention to dedicate. It was primarily for her to consider the particular significance of the 1950 tenancy agreement and of the fact that it subsisted, following the conveyance of the freehold reversion to the intervener, until well into the 20-year period. Contrary to the claimants'
- F contention, she did find that the tenancy agreement continued to be the expression of the intervener's wishes in relation to its tenant's management of the property until 1986. That was a finding that she was entitled to make having heard and considered the evidence. If the Secretary of State is right that there is no need for intention to be communicated, any objection on the basis that the users of the way were not aware of the terms of the tenancy
- G agreement could not be upheld. It is difficult to see what objection can realistically be maintained on the ground that the intervener in Dr Drain's case obtained the benefit of clause 17 of the tenancy agreement by operation of law. The law (sections 141 and 142 of the Law of Property Act 1925) makes specific provision for the passing of the benefit and burden of the covenants in the event of the disposition of the freehold estate. There is no reason why a landowner, who for all other purposes is entitled to rely on the
- H benefit of those covenants, should not be taken positively to rely on that benefit for the purpose of controlling or regulating the public's access to the land subject to those covenants.

In Dr Drain's case, the intervener in its skeleton argument in the High Court expressed particular concerns about the fairness of the approach to

relief argued for by the claimants. In the circumstances, if the claimants' appeals were to be allowed, the correct course would be to quash each decision and remit each case to the Secretary of State for redetermination in accordance with your Lordships' opinions.

Edwin Simpson for Yattendon Estates Ltd, intervener in the second appeal. The intervener adopts the written submissions of the Secretary of State on the issues concerning the operation of the proviso. On the subsidiary issue, the inspector's conclusion in the second decision letter that the proviso was satisfied by the existence of clause 17 of the tenancy agreement, either alone or interpreted in conjunction with the evidence of Mr Petter (the intervener's land agent) and the evidence of challenges and notices, was a matter of fact for her and in any event correct in law.

The claimant seeks to persuade the House of Lords (i) of a particular construction of the inspector's decision letter, viz that "the bare fact of succession" was all that was relied on in holding that the intervener had satisfied the proviso (ante, p 232C), and (ii) that such a conclusion is unsustainable in law.

As to (i), paras 48–51 of the decision letter, read fairly as a whole, show that in fact her approach was to consider the effect of clause 17 in the context of the evidence given by Mr Petter that "the estate [i.e. the intervener] never had any intention of dedicating this track as a public path" and in the context of the evidence reviewed by her of challenges and notices. Although the overt steps taken on behalf of the intervener were found by her not *alone* to have been sufficient evidence of a lack of intention to dedicate, she clearly concluded that, in conjunction with the existence of clause 17 and the evidence of Mr Petter, there was sufficient evidence to satisfy the proviso. In this case, the landowner's intention not to dedicate *was* likely to come to the attention of the public.

As to (ii), it was, alternatively, properly open to the inspector to conclude that the proviso was satisfied solely on the basis of the existence of clause 17. The claimant's argument here is, essentially, that there was no evidence before the inspector of a lack of intention to dedicate that could properly be attributed to the intervener. There is nothing in the point that the intervener did not exist at the time when the original 1950 tenancy agreement was entered into. The position of a successor in title would be no different if the successor were an individual who was unborn at the time of the original tenancy. Such non-existence at the earlier date has no effect on the passing of the benefit of covenants at the time of the transfer of the freehold title; neither should it on the extent to which the passing of the benefit of such a covenant can be relied on as an expression of continuing intention by the successor in title concerned. The claimant accepts that the intervener was entitled to the benefit of the covenant contained in clause 17 from 1955 to 1986, including the 14 years from 1972 to 1986 within the relevant 20-year period for the purposes of section 31. Even if, which is not admitted, no steps were taken during that period to enforce the covenant, or to bring to the attention of the public the continuing lack of intention to dedicate, or to confirm the continuing lack of any such intention without bringing such to the attention of the public, the lack of any such steps could not affect the enforceability of the covenant. It is equally the case that the continuing existence of an enforceable covenant must be taken as a continuing

- A expression of the intentions (or lack of intentions) reflected in its terms. Accordingly, the intervener can rely on the continuing force of clause 17 as an expression of its lack of intention to dedicate precisely because it can rely on its continuing right to enforce the covenant without any further steps on its behalf and without any element of legal fiction. There is no suggestion that clause 17 was a sham in 1950, nor that it became a sham in 1955.
- B Accordingly, an element of legal fiction would only exist if the covenant remained enforceable but could not be regarded as evidence of the intervener's intention. The inspector was therefore correct to regard this piece of evidence, contained in a "legal document" and so creative of legal rights and obligations, as a fortiori a sufficient expression of the intervener's intention.

- C On the wider issue, the intervener relies on the simple words of the proviso, which mean precisely what they say. Otherwise, one has either to read words in or to have regard to the pre-1932 position. It was not the case pre-1932 that the landowner's action had to be overt. It was sufficient that it was *nec vi*, etc, and that there had been no interruption, unless it could be said to have been the result of tolerance. As to the reason for the words "sufficient evidence that", see *R v Broke* 1 F & F 514. There is no authority
- D for any overt requirement prior to 1932: *Barraclough v Johnson* 8 A & E 99. Although there are many examples given in *Pratt & Mackenzie's Law of Highways*, 21st ed (1967) (see at pp 34–35) of rebutting evidence, there is no case that says that a bare assertion is insufficient, although it may be unlikely that the landowner would be believed. There being no overt act is far from the usual position. It is a matter of the landowner's subjective, rather than objective, intention.

- E As to "brought into question" (section 31(2)), three views have been put forward as to what is needed: (i) an act done that brings home to the public the landowner's lack of intention to dedicate (the Secretary of State's contention); (ii) anything capable of satisfying the proviso should also be regarded as bringing the right of the public to use the way into question; (iii) a suggestion put forward by Lord Hoffmann in the course of argument
- F that it might require a causal connection of some kind between the acts done and the subsequent litigation. The intervener opposes (ii), which restricts the operation of the proviso. As to (iii), a composite act, e.g, writing a letter followed six months later by locking the gate, would be sufficient.

- G Should the claimant succeed on either the main or the subsidiary issues, relief going further than quashing the inspector's decision letter would be inappropriate. This is not a case where it can properly be said, on the basis of the other findings of the (second) inspector, that the only decision that could properly have been reached would have been to confirm the order. On the contrary, each fact-finding tribunal that has considered the matter has resolved those facts against the existence of the right of way claimed by Dr Drain. It cannot be maintained, on the facts of this case, that, had the inspector not reached the view that she did of clause 17, she would have had
- H no alternative but to deny the intervener the benefit of having satisfied the proviso. Both inspectors who have heard evidence on this matter have held that the intervener did so, the first without reliance on the terms of clause 17. Although his decision was quashed for error of law, it was for an error that cast no doubt on his conclusions of fact.

Further, it would be wrong to do other than quash the second inspector's decision given the approach adopted by her to the record of the first inquiry contained in the first decision letter, in particular, her conclusion that she "would not be taking into account the previous order decision" (i.e. the decision of the first inspector) "in terms of the views expressed in it with regard to the evidence, as a record of the previous inquiry or for any reason". As she correctly records, the intervenor was concerned (i) that she should not risk falling into the same trap as the first had done; (ii) that she should be aware of evidence presented at the first inquiry that, for whatever reason (most obviously the quite understandable non-availability of particular witnesses), was not available to the second inquiry and (iii) that she should be astute to observe for herself where testimony had changed from the first inquiry to the second. Accordingly, it ought to have been permissible at the second inquiry for the inspector to have had regard to the first decision letter as a record of the evidence as recorded by the first inspector, given that his record of that evidence was not affected by the ground of the quashing by consent of his decision. The fact that the intervenor's submissions on this point were rejected necessarily removed from the process of the second inquiry the primary record of what had been given in evidence at the first inquiry and of the view taken of that evidence by the first inspector. The second inspector was free to reach her own evaluation of the evidence available to the Secretary of State as a whole, but she ought not artificially to have restricted that evaluation by "not . . . taking into account the previous order decision". This mistaken approach is a further reason why this is not an appropriate case for the House of Lords to conclude that there is no purpose to be served by remitting the matter to the Secretary of State for reconsideration.

Further, were the claimant to succeed on the main, rather than the subsidiary, issues (that is on the proper interpretation of the proviso), then it is even more apparent that the matter would need to be reconsidered at a further public inquiry, rather than finally resolved by the House of Lords. If the law were to develop in the way argued for by the claimant, the intervenor's consistent view of the evidence in this case (that is, that there has never been a period of sufficient user "as of right" for any "bringing into question" to have been possible) will demand more careful consideration than it has yet received. On this hypothesis, the House of Lords will have concluded that landowners can only rely on actions directed towards, or coming or likely to come to the attention, of users, or some such, to satisfy the proviso. It will be very much more likely than under the existing law that such facts will also have operated to bring a 20-year period to an end. The distinction proposed by the claimant between "bringing home to users" (as bringing into question for the purposes of section 31(2)) and "coming or likely to come to the attention of users" (for the operation of the proviso) will be a very fine one. Inspectors in such circumstances will then (as the first inspector ought, it appears, to have done) be required to consider an earlier 20-year period ending with the events satisfying the "bringing home to users" test; but then, in cases where challenges and notices are alleged, the very same fine distinction would simply arise once, and possibly many times, more. The better analysis of such facts may be, as the intervenor has consistently argued, that, in cases of regular challenge by one means or another, a sufficient period of "as of right" user simply never begins, so that

A there can be no question of any relevant “bringing into question” and so no question of the application of section 31(1).

Given all these circumstances, it would not be safe for the House of Lords to conclude that there is only one decision that can be reached on the facts of this case. The only appropriate remedy will be for the decision of the second inspector to be quashed and for the House of Lords to give guidance as to how the (on this hypothesis) two quashed decision letters should be treated by an inspector at any consequent inquiry. [Reference was made to Schedule 15 to the Wildlife and Countryside Act 1981 and *R v Secretary of State for the Environment, Ex p Blake* [1984] JPL 101.]

B
C *Laurence QC* in reply. As to “contrary intention”, see The Commons, Open Spaces and Footpaths Preservation Society, “The Rights of Way Act 1932: An Explanation of the Act as affecting the Proof of Dedication of Highways with special reference to the Powers and Duties of Local Authorities”, pp 4–5. [Reference was also made to *R (Beresford) v Sunderland City Council* [2004] 1 AC 889, para 77 and section 31A of the 1980 Act.]

D *Crail*, following, referred to *Shearburn v Chertsey Rural District Council* (1914) 78 JP 289, 290; *Barraclough v Johnson* 8 A & E 99 and *Leckhampton Quarries Co Ltd v Ballinger* 20 TLR 559, 560 (regarding negating “intention to dedicate”).

E On the subsidiary issue, the Secretary of State conceded in argument that a provision in a lease would not be sufficient to satisfy the proviso if for 20 or more years no action was taken to turn away members of the public. That was the case here, where no act was done by the landowner between 1972 and 1992.

The inspector’s conclusion that the proviso was satisfied was based on clause 17 of the tenancy agreement in isolation, and not in conjunction with Mr Petter’s statement or the evidence of notices and challenges. She had found there to be no notices or challenges evidencing lack of intention to dedicate during the 20-year period in question.

F The inspector’s treatment of the first inspector’s decision was correct in law. As indicated by the inspector in para 14 of the Aldworth decision letter, where a party’s witness gave evidence to her that was inconsistent with the record of the evidence that he or she had given to the first inspector embodied in the first decision letter, the relevant passage of the first decision letter could be, and was, put to that witness in cross-examination. Where the evidence presented to her was consistent with the evidence given at the first inquiry, it was neither necessary nor appropriate for such reference to be made, and the intervener was not disadvantaged by its not being made. As for the intervener’s suggestion that the inspector ought to have taken account of the first inspector’s views of the evidence, for her to have done so would have been wrong in principle and potentially prejudicial to both parties. It was for the inspector to form her own impressions of the witnesses whom she saw and heard, to make her own assessment of their credibility and to make her own findings of fact, uncoloured by the first inspector’s impressions and views.

H The minimum relief to which the claimants are entitled, if successful, is an order quashing the inspector’s decision to refuse to confirm the modification orders. There is a precedent for the House of Lords to go further and

direct that they be confirmed. In *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335, 359G–360A, after holding that its sole reason for rejecting the application for registration of the glebe as a town or village green had been wrong in law, the House of Lords directed the registration authority to register the land. These appeals are directly comparable. But for the inspector’s legal error in applying a wrong interpretation of the proviso, she would have confirmed the Godmanchester and Aldworth orders.

The Committee took time for consideration.

20 June. **LORD HOFFMANN**

1 My Lords, these two appeals are test cases brought before the House for a ruling on the effect of the presumption in section 31(1) of the Highways Act 1980:

“Where a way over any land . . . has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.”

2 The main issue in both appeals is over the nature of the evidence which will be sufficient to demonstrate that there was no intention to dedicate. Although the point can be put in a variety of ways, it seems to me to turn in the end on the meaning of the word “intention”. The respondent landowners say that intention is a state of mind, with all the subjectivity which that implies. In principle, the owner himself is the person best qualified to give evidence about his own state of mind. Such evidence could be confirmed by acts done during the relevant period, such as putting up notices or barriers or recording his intentions in letters or memoranda. In evaluating such acts, no distinction can be drawn between those which would have come to the attention of users of the way and those which would not. What matters is the owner’s state of mind and not what users of the way would have thought about it.

3 The contrary view is that the term intention is being used in an objective sense. It means what users of the way would reasonably have thought to be the owner’s state of mind, which may or may not coincide with his actual state of mind. Similarly when one speaks of the intention of the parties to a contract, one means what a reasonable person, possessed of the background knowledge available to the parties, would have understood what they meant by using the language in which they expressed their agreement. Likewise, adverse possession by a squatter is said to require an *animus possidendi*, an intention to possess. But, as Slade J said in the leading case of *Powell v McFarlane* (1977) 38 P & CR 452, 472 (approved as a “remarkable judgment” by the House of Lords in *J A Pye (Oxford) Ltd v Graham* [2003] 1 AC 419, 432, per Lord Browne-Wilkinson):

“In such a situation the courts will, in my judgment, require clear and affirmative evidence that the trespasser, claiming that he has acquired possession, not only had the requisite intention to possess, but made such intention clear to the world.”

A 4 Before I say anything about the facts of this appeal, I must put
 section 31(1) into its wider setting. It is derived from section 1(1) of the
 Rights of Way Act 1932, which in turn built upon foundations laid by the
 common law. As has often been explained, English law differs from civilian
 systems such as the law of Scotland by having no doctrine of acquisition of
 rights, public or private, by long user: see *R v Oxfordshire County Council*,
 B *Ex p Sunningwell Parish Council* [2000] 1 AC 335, 349. Instead, it treats
 user since time immemorial, that is to say, since 1189, as raising an
 irrebuttable presumption that the right had a lawful origin in grant to a
 predecessor in title or dedication to the public at large. As the reign of
 Richard I slipped further into the remote past, that presumption had to be
 supplemented by the judicial invention of others. In the case of claims to
 private easements such as rights of way, juries were told that user since time
 C immemorial could be inferred from evidence of user for a long time, but that
 this could be rebutted by evidence that the easement could not have existed
 in 1189. As that was often quite easy to prove, the presumption had to be
 further supplemented by directions that the jury could in such a case infer the
 existence of a more recent grant which had been lost. This remained the law
 until it was reformed by the Prescription Act 1832 (2 & 3 Will 4, c 71), to
 which I shall return later.

D 5 In the case of a public right of way, a lawful origin had to be found in
 dedication by the landowner at some unknown date in the past. Such
 dedication was analogous to the lost modern grant of a private easement.
 Juries were told that they could find such a dedication on evidence of user
 openly and as of right by members of the public and were often encouraged
 to do so. The reason for juries and judges being willing to make and accept
 E findings that there had been a dedication or a lost modern grant was of
 course the unfairness of disturbing rights which had been exercised without
 objection for a long time. In Scottish law, this policy was given effect by
 the more logical method of allowing such user to create the right. But in
 England the policy of the law was not openly acknowledged. Instead, juries
 were told that in order to uphold the public right, they had to find as a fact
 that there had been an act of dedication accompanied by the necessary
 F animus dedicandi on the part of the landowner: see *Poole v Huskinson*
 (1843) 11 M & W 827.

6 As a matter of experience and common sense, however, dedication is
 not usually the most likely explanation for long user by the public, any more
 than a lost modern grant is the most likely explanation for long user of
 a private right of way. People do dedicate land as public highways,
 G particularly in laying out building schemes. It is however hard to believe
 that many of the cartways, bridle paths and footpaths in rural areas owe
 their origin to a conscious act of dedication. Tolerance, good nature,
 ignorance or inertia on the part of landowners over many years are more
 likely explanations. In *Jones v Bates* [1938] 2 All ER 237, 244 Scott LJ said
 that actual dedication was “often a pure legal fiction [which] put on the
 H affirmant of the public right an artificial onus which was often fatal to his
 success”. In *Jaques v Secretary of State for the Environment* [1995]
 JPL 1031, 1037 Laws J called it an “Alice in Wonderland requirement”.

7 Nevertheless, juries and other tribunals of fact did frequently find that
 such acts of dedication had taken place, no doubt for the reason I have
 suggested. So much so that in *Folkestone Corp'n v Brockman* [1914] AC 338

it was argued that, in the absence of evidence of facts inconsistent with such a dedication, they were obliged to make such a finding. But this submission was rejected by the House of Lords and it became settled that user was no more than evidence from which dedication could be inferred. It was open to the jury to ascribe the user to toleration or some other cause. Since, as I have said, some other cause was in real life more likely, it became difficult to predict when or for what reason a jury would have sufficient sympathy with the users of the highway to find that there had been a dedication.

8 English judges were embarrassed by the fictions of lost modern grant, animus dedicandi and the like (“a bad and mischievous law, and one which is discreditable to us as a civilized and enlightened people”, said Cockburn CJ in *Bryant v Foot* (1867) LR 2 QB 161, 179) and looked enviously north of the border: see per Lord Blackburn in *Mann v Brodie* (1885) 10 App Cas 378, 386. The law of private rights of way and certain other easements was reformed by the 1832 Act and since this provided a model for the 1932 Act, it is helpful to see how it worked. Starting from the common law, namely that user since 1189 would establish the easement, it provided in section 2 that a claim to such an easement which had been “actually enjoyed by any person claiming right thereto without interruption for the full period of 20 years” should not be defeated by evidence which showed that it had arisen at some earlier date. This meant that it could no longer be defeated by showing that it had arisen after 1189.

9 Section 4 provided that the “full period of 20 years” should be taken to be the period next before the proceedings in which the claim shall have been “brought into question”. If the statute had said no more, it would have been possible for a landowner to defeat a claim under the Act by the simple expedient of interrupting the enjoyment of the easement. The time which had necessarily to elapse between the interruption and the commencement of proceedings by the dominant owner to vindicate his right would automatically have prevented the latter from proving enjoyment without interruption for the 20 years “next before” the proceedings. Section 4 therefore went on to provide that “no act or other matter shall be deemed to be an interruption” unless it had been submitted to or acquiesced in for one year after the party interrupted had had notice thereof. That meant that if the servient owner barred the way, the dominant owner had a year within which to commence proceedings and claim the benefit of the statute.

10 The 1932 Act followed the same pattern, but with two important variations. First, section 1(1) contained the proviso which allowed the presumption of dedication to be rebutted by “sufficient evidence that there was no intention during that period to dedicate such way”. There was no such proviso in the 1832 Act. Other subsections in section 1 of the 1932 Act provided that specific acts would be treated as sufficient evidence to negative the intention to dedicate. By section 1(3) (now section 31(3)(5) of the 1980 Act), a notice inconsistent with dedication, placed and maintained “in such a manner as to be visible to those using the way” will be sufficient. If the notice is torn down, notice in writing to the county, metropolitan district or London borough council that the way is not dedicated to the public will be sufficient. By section 1(4) (now section 31(6) of the 1980 Act) a landowner may deposit with the county council, metropolitan district or London borough councils a map of his land and a statement indicating which ways he admits to have been dedicated as highways. He may then at any time

A within the next 10 years make a statutory declaration that he has not dedicated any additional ways and that will be sufficient evidence to negative his intention to have dedicated any such ways. The process may be repeated by further statutory declarations at intervals of not more than ten years.

B 11 The other difference was that the 20-year retrospective period did not, as in the 1832 Act, run from the commencement of the proceedings contesting the highway, with a year's grace period which did not count as an interruption. Instead, it ran from when the right to the way was "brought into question", without any grace period. That suggests that the draftsman, with the example of section 4 of the 1832 Act before him, thought that if he ran the period back from the date when the right was brought into question, no grace period would be needed.

C 12 That, my Lords, is the common law and statutory background against which the dispute over the meaning of the term "sufficient evidence that there was no intention . . . to dedicate" in section 31(1) must be resolved. The help which may be obtained from the pre-1932 cases is limited. As the onus was on the claimant to prove dedication and there was no need for the landowner to prove facts inconsistent with dedication, the courts were not concerned to pin down very precisely what would be sufficient to show inconsistency. There are, however, some indications that the judges were looking at how the matter would have appeared to users of the way.

D 13 In *Trustees of the British Museum v Finnis* (1833) 5 C & P 460, 465, Patteson J told a jury:

E "If a man opens his land, so that the public pass over it continually, the public, after a user of very few years, would be entitled to pass over it, and use it as a way; and if the party does not mean to dedicate it as a way, but only to give a licence, he should do some act to show that he gives a licence only. The common course is, to shut it up one day in every year, which I believe is the case at Lincoln's Inn."

F 14 This suggests that what matters is the impression given to members of the public. Likewise in *Barraclough v Johnson* (1838) 8 A & E 99, 105, Littledale J said:

G "A man may say that he does not mean to dedicate a way to the public, and yet, if he had allowed them to pass every day for a length of time, his declaration alone would not be regarded, but it would be for a jury to say whether he had intended to dedicate it or not. The facts may warrant them in believing that the way was dedicated, though he has said that he did not so intend: and, if his intention be insisted upon, it may be answered that he should have shown it by putting up a gate, or by some other act."

H 15 In *R v Broke* (1859) 1 F & F 514, 515, a trial on indictment for stopping up a highway, the landowner claimed to have instructed his servants to allow only seafaring men and pilots to use the path and to turn back anyone else. Pollock CB said:

"Even supposing these instructions to have been given and acted on, yet, unless it can be proved that they were communicated to the persons

who used the path, and that they did so by virtue thereof, and not of right, their user was a user by the public, and the right of way has been gained, if the user has been continued long enough.”

16 It is true that there is no express statement that intention had to be negated by overt and notorious acts. But then, as I have said, intention did not have to be negated at all. And there is no case in which a jury was directed to have regard to an act which one might call private, in the sense of something which would not have come to the attention of users of the way.

17 The first consideration of the matter after 1932 was the decision of the Court of Appeal in *Fairey v Southampton County Council* [1956] 2 QB 439. This was an application to quarter sessions (under section 31 of the National Parks and Access to the Countryside Act 1949) by the owner of Bossington House in Hampshire for a declaration that a footpath over his land was not a public highway. The evidence was that it had been used uninterruptedly from 1885 to 1931 by inhabitants of the nearby villages of Bossington, Houghton and Horsebridge. As from that date, a new owner of the estate had challenged users who were not near neighbours and turned them back. Quarter sessions found that the challenges had brought the public right to use the path into question and that the relevant 20-year period for the purposes of the Act was therefore 1911 to 1931. As there had been qualifying user during this period, the public right of way was established.

18 The landowner appealed by case stated to the Divisional Court. One ground of appeal, which is not relevant to this case, was that if quarter sessions were right about the relevant 20-year period, the Act could not apply because it was not retrospective. The other ground was that the challenges did not bring the right to use the path into question. The landowner said that it was not brought into question until he objected in 1953 to the inclusion of the path in the definitive map. But he relied on the challenges as evidence to negative an intention to dedicate during the 20 years ending in 1953.

19 The Divisional Court rejected both arguments and the landowner appealed to the Court of Appeal. The leading judgment was given by Denning LJ. He dealt first with what amounted to bringing the right into question. Although the passage, at pp 456–458, is a long one, I think that it should (with one or two excisions) be quoted in full:

“... I think that in order for the right of the public to have been ‘brought into question’, the landowner must challenge it by some means sufficient to bring it home to the public that he is challenging their right to use the way, so that they may be apprised of the challenge and have a reasonable opportunity of meeting it. The landowner can challenge their right, for instance, by putting a barrier across the path or putting up a notice forbidding the public to use the path. When he does so, the public may meet the challenge. Some village Hampden may push down the barrier or tear down the notice: the local council may bring an action in the name of the Attorney General against the landowner in the courts claiming that there is a public right of way: or no one may do anything, in which case the acquiescence of the public tends to show that they have no right of way. But whatever the public do, whether they oppose the landowner’s action or not, their right is ‘brought into question’ as soon

A as the landowner puts up a notice or in some other way makes it clear to the public that he is challenging their right to use the way. Applying this test, I ask myself: when did the landowner here make it clear to the public that he was challenging their right to use the way? Quarter sessions held that he did so in 1931, when he objected to the use of the path by persons who were not local residents. We do not know what evidence was before them on that point. If the landowner merely turned back one stranger on an isolated occasion, that would not, I think, be sufficient to make it clear to 'the public' that they had no right to use it. He ought at least to make it clear to the villagers of Bossington, Houghton and Horsebridge. They were the members of the public most concerned to assert the right, because they were the persons who used the path. They knew—better than the landowner himself—how long they had used it. They were the persons to tell. It was no good the landowner speaking to a stranger who would know nothing of the public right and would not be concerned to assert it . . . I think we ought to assume that quarter sessions had sufficient evidence before them to support their finding. We ought to assume that in 1931 when the landowner turned back strangers, he did it in so open and notorious a fashion that it was made clear, not only to strangers, that they had no right to use the path, but also to local residents, that they only used it by tolerance of the owner."

20 That was sufficient to dispose of the case, since there was no dispute that there had been qualifying user in the 20 years before 1931. As a statement of what amounts to bringing the right into question, it has always been treated as authoritative and was applied by the inspectors and the Court of Appeal in these cases. But Denning LJ then went on to consider the finding of quarter sessions that the landowner's conduct in 1931 and thereafter had demonstrated an intention not to dedicate the path as a highway:

F "In this connection I would also mention the finding of quarter sessions that in and from 1931 the landowner, by turning off strangers, showed an intention not to dedicate the path as a highway for the use of members of the public at large. This raises the same point. In my opinion a landowner cannot escape the effect of 20 years' prescription by saying that, locked in his own mind, he had no intention to dedicate . . . In order for there to be 'sufficient evidence that there was no intention' to dedicate the way, there must be evidence of some overt acts on the part of the landowner such as to show the public at large—the public who used the path, in this case the villagers—that he had no intention to dedicate. He must, in Lord Blackburn's words, take steps to disabuse those persons of any belief that there was a public right: see *Mann v Brodie* 10 App Cas 378, 386. Such evidence may consist, as in the leading case of *Poole v Huskinson* 11 M & W 827, of notices or a barrier: or the common method of closing the way one day a year. That was not done here; but we must assume that the landowner turned off strangers in so open and notorious a fashion that it was clear to everyone that he was asserting that the public had no right to use it. On that footing there was sufficient evidence to show that there was no intention to dedicate."

21 These observations on the meaning of “evidence that there was no intention to dedicate” were obiter dicta. They were not necessary for the decision and the other two members of the court (Birkett and Parker LJ) did not mention the point. But there are obiter dicta and obiter dicta. These were no throw-away lines. This was a learned and carefully prepared reserved judgment (including reference to authorities which had not been cited by counsel) by one of the greatest English judges on a matter close to his heart: a village dispute in his own county of Hampshire.

22 For over 40 years, Denning LJ’s statement of the law remained unchallenged. It was cited in text books and applied in judgments of lower courts (see, for example, per Walton J in *R v Secretary of State for the Environment, Ex p Blake* [1984] JPL 101, 102, Pill J in *O’Keefe v Secretary of State for the Environment* [1996] JPL 42, 58–59 and Laws J in *Jaques v Secretary of State for the Environment* [1995] JPL 1031, 1035–1037). This last case, although following the *Fairey* case, contains some puzzling dicta. Laws J said that the effect of the proviso was that “even if use of the required quality was proved, the status of right of way would not be established if the landowner demonstrated an intention not to dedicate”.

23 That is plainly true. But the judge then went on:

“The logical relationship between the two parts of the subsection entailed that proof of an intention not to dedicate could be constituted by something less than proof of facts which had to have made it clear to the public that they had *no* right to use the way: otherwise, once the interested public had established their case under the first part of the subsection, there would be no room for the operation of the second part.”

24 This, I am afraid, I do not follow at all. The evidence which will satisfy the proviso is not something less than enjoyment as of right but something different. For example, there may be a notice which says “No right of way. Trespassers will be prosecuted”. Nevertheless, for upwards of 20 years members of the public may have ignored the notice and used the way, openly and apparently in the assertion of a right to do so. Their user will satisfy section 31(1) but the landowner, even on the most objective test, will have satisfied the proviso. (It may be that putting up the notice also brought the right to use the way into question, in which case, as in the *Fairey* case, the public would succeed if they could prove another 20 years’ user before the notice went up. But that is another matter.) The potential contradiction imagined by Laws J may be due to the view held, at the time of his judgment, that enjoyment as of right required a subjective belief by the users that they had the relevant right—a view which was rejected in *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335. Even so, there need not be any contradiction. The users and the landowner may simply differ in their opinions as to whether the right exists or not.

25 In *R v Secretary of State for the Environment, Ex p Cowell* [1993] JPL 851, 857 Staughton LJ, after noting that Denning LJ’s requirements of overt and notorious acts were dicta, went on to say that although “that was not said in the section itself”, it “seemed a sensible rule”. If that might seem less than wholehearted assent, Staughton LJ’s view had become firmer three years later when he presided in the Court of Appeal in *Secretary of State for the Environment v Beresford Trustees* (unreported) 31 July 1996; Court of

A Appeal (Civil Division) Transcript No 1031 of 1996 and concurred in the judgment of Hobhouse LJ. With characteristic precision, Hobhouse LJ said of the phrase “sufficient evidence that there was no intention during that period to dedicate it”: “This is not a subjective test. The absence of intention must be objectively established by overt acts of the landowner.”

B 26 He went on to cite the passage in the *Fairey* case as authority. This time, the application of the objective test was undoubtedly ratio decidendi. The issue was whether the proviso had been satisfied and the inspector who conducted the inquiry had found that there was not “sufficient evidence of overt acts by the owners to show the public at large that there was no intention to dedicate”. This finding had been set aside by the judge but was restored by the Court of Appeal. The case was not reported, presumably because the law reporters thought that it laid down no new principle.

C 27 The first sign of dissent was in *R v Secretary of State for the Environment, Ex p Billson* [1999] QB 374, 395, where Sullivan J said that the dicta of Denning LJ went too far. In his opinion, all that was required was that evidence of the owner’s intention be “overt and contemporaneous”. But he was not required to “publicise his intention to users of the way”. A purely private act would do. Writing a letter to oneself and putting it in a locked drawer was described as a “far-fetched hypothetical example” but
D there is no suggestion that it would not in principle be sufficient. The judge was not referred to the *Beresford* case, no doubt because it had not been reported.

E 28 In *R v Secretary of State for the Environment, Transport and the Regions, Ex p Dorset County Council* [2000] JPL 396, Dyson J took the new doctrine to its logical conclusion. After examining the authorities (again, without citation of the unreported *Beresford* case) he said, at p 406:

F “On the face of it, the language of the proviso is straightforward. All that is required is that there be sufficient evidence of lack of intention to dedicate. Coming to the matter untutored by previous authority, one may be forgiven for thinking that what Parliament intended was that the tribunal of fact simply decide as a matter of fact whether there is or is not sufficient evidence of intention to dedicate . . . I accept that as a matter of fact the tribunal of fact will rarely, if ever, find that there is sufficient evidence of lack of intention to dedicate in the absence of overt and contemporaneous acts on the part of the owner. I do not, however, think that such a requirement can be spelled out of section 31(1) as a matter of construction.”

G 29 I do not understand why, if Dyson J is right in saying that “intention” in section 31(1) refers to the landowner’s actual state of mind, it would be rare for a tribunal of fact to find evidence of lack of intention unless there was proof of overt and contemporaneous acts. Who better to give evidence of the owner’s state of mind than the owner himself? It is true that if he was asserting some improbable state of mind, one might look for corroboration. But there is nothing improbable in not having an intention to dedicate. It is
H the conclusion that the owner did intend to dedicate which is improbable: a “pure legal fiction”, an “Alice in Wonderland requirement”.

30 In these appeals, the Divisional Court and Court of Appeal followed the construction given to section 31(1) by Dyson J in *R v Secretary of State for the Environment, Transport and the Regions, Ex p Dorset County*

Council [2000] JPL 396 and disapproved of Denning LJ's statement of the law in the *Fairey* case. This time, the unreported *Beresford* case was cited, but Auld LJ [2006] QB 727, 740, para 26, said that it was "not a reasoned decision as to the meaning of the proviso so as to bind this court". Like Dyson J, Auld LJ, at p 753, para 64 thought that in practice overt and contemporaneous acts evidencing lack of intention to dedicate would be required:

"In most cases, no doubt, the fact-finder will look for overt, in the sense of objectively identifiable, contemporaneous acts or declarations, if only to guard against any risk of abuse by landowners who might seek to rely on retrospective acts or declarations after the expiration of the relevant 20-year period."

31 Again, I cannot see why it should be an abuse for a landowner to say, after the expiry of the 20-year period, that although he did nothing to stop the public from using the way, this was due to tolerance, ignorance or inertia and without any intention to dedicate it as a highway. Such evidence would be an inherently plausible account of his state of mind. The only objection is that allowing the presumption to be defeated by such evidence would make nonsense of the Act.

32 My Lords, in my opinion the law as stated by Denning LJ in the *Fairey* case and by Hobhouse LJ in the *Beresford* case was correct and the Court of Appeal was wrong. I think that upon the true construction of section 31(1), "intention" means what the relevant audience, namely the users of the way, would reasonably have understood the landowner's intention to be. The test is, as Hobhouse LJ said, objective: not what the owner subjectively intended nor what particular users of the way subjectively assumed, but whether a reasonable user would have understood that the owner was intending, as Lord Blackburn put it in *Mann v Brodie* 10 App Cas 378, 386, to "disabuse [him]" of the notion that the way was a public highway. The Court of Appeal said that this would involve reading words into the Act; placing a gloss on the statute. But, outside the criminal law and parts of the law of torts, it is common to use the word intention in an objective sense, as in the intention of Parliament, the intention of the parties to a contract and, even in Latin, the *animus possidendi* which a squatter must have to acquire a title by limitation.

33 It should first be noted that section 31(1) does not require the tribunal of fact simply to be satisfied that there was no intention to dedicate. As I have said, there would seldom be any difficulty in satisfying such a requirement without any evidence at all. It requires "sufficient evidence" that there was no such intention. In other words, the evidence must be inconsistent with an intention to dedicate. That seems to me to contemplate evidence of objective acts, existing and perceptible outside the landowner's consciousness, rather than simply proof of a state of mind. And once one introduces that element of objectivity (which was the position favoured by Sullivan J in *R v Secretary of State for the Environment, Ex p Billson* [1999] QB 374) it is an easy step to say that, in the context, the objective acts must be perceptible by the relevant audience.

34 Such a construction is in my view supported by reading section 31 as a whole. The primary example of an act which would negative an intention to dedicate is the erection and maintenance of a notice inconsistent with

- A dedication “in such manner as to be visible to persons using the way”: section 31(3). If the notice is torn down or defaced, notice to “the appropriate council” will have the same effect: section 31(5). If any overt act would do, why should the notice have to be given to “the appropriate council”? A notice to an inappropriate council, or to the landowner’s solicitor or friend, would be just as good. In the Court of Appeal, Auld LJ said that a notice to the appropriate council would be unlikely to come to the attention of the public using the way and this was an indication that, in general, the landowner’s intention did not have to be communicated to users of the way. I disagree. A notice to the council under section 31(5) is plainly regarded as second best and is only allowed when the original notice has been torn down or defaced, just as substituted service is allowed only when there is good reason to dispense with personal service. It is true that users of the way are not very likely to call at the county council offices to ask whether any notices under section 31(5) have been lodged, but a well-advised defender of rights of way, such as the Ramblers’ Association, will know where to look and be able to draw such notices to the attention of users. The fact that in certain defined circumstances one can resort to a method less likely to come to the attention of users of the way is no basis for concluding that in general it does not matter whether the landowner’s intention can come to their attention or not.

- 35 The same point may be made about the elaborate provision for maps, statements and statutory declarations in section 31(6). What would be the point of all this if Parliament was using the word “intention” in a subjective sense which could be proved by any relevant evidence? And why did Parliament, by section 57 of and Schedule 6, Part I, paragraph 4 to the Countryside and Rights of Way Act 2000, insert a new section 31A (not yet in force in England) into the 1980 Act to establish a register of the maps and statements deposited under section 31(6) and require that it should be available for inspection free of charge? Surely to make such alternative methods of rebutting the presumption available to the public, so as to approximate as far as possible to the primary method of rebuttal.

- 36 Then there is the problem of the interruption of continuous user before the commencement of proceedings which, as we saw, the 1832 Act for private rights of way solved by providing a year’s grace in which to bring the proceedings. The 1932 Act dispensed with a grace period by calculating the 20 years back from the date on which the right was called into question. The scheme contemplated by Parliament was that once users of the way were made aware that their right to use the way was challenged, they should not be able to gain an advantage from subsequent use of the way and the landowner should not be able to gain an advantage by subsequent prevention of use. What happened after the way was called into question was irrelevant to the operation of the Act. On the Court of Appeal’s construction, however, the well-advised landowner, facing the possibility of a claim to a right of way based on many years’ enjoyment, will make a private declaration that he has no intention to dedicate and will lodge it in a safe place. Only afterwards will he close the way or otherwise call the right into question. The effect will be to make it impossible for the claimants to prove the full 20 years’ user ending when the way was closed, because the owner will be able to satisfy the proviso in respect of the final period after he made his declaration.

37 My Lords, I think it is most unlikely that Parliament intended that the 1932 Act could be capable of being defeated by so simple a device, leaving the claimants to the arbitrary and illogical rules of common law, preserved by section 31(9). In the *Fairey* case [1956] 2 QB 439, 458 Denning LJ, turning to the proviso after his discussion of bringing the right into question, said that it raised the same point. In general, that seems to me to be right. I do not say that all acts which count as negating an intention to dedicate will also inevitably bring the right into question. For example, I would leave open the question of whether notices or declarations under section 31(5) or (6) will always have this effect. I should think that they probably would, because their purpose is to give notice to the public that no right of way is acknowledged. But we need not decide the point. I do not even say that acts which would indicate to reasonable users of the way that the owner did not intend to dedicate will inevitably bring the right into question, because one cannot foresee all cases. But the Act clearly contemplates that there will ordinarily be symmetry between the two concepts. Thus section 31(3) provides that an appropriate notice will be sufficient evidence to negative the intention to dedicate and section 31(2) provides that the right may be brought into question “by a notice such as is mentioned in subsection (3) below or otherwise”. The notice will therefore both negative intention to dedicate and bring the right into question, while the words “or otherwise” contemplate other ways of bringing the right into question (like barring the way, permanently or once a year) which would also in my view be sufficient to negative an intention to dedicate.

38 I am not particularly troubled by the thought that this would leave little scope for the operation of the proviso. It is true that acts negating an intention to dedicate would also, by calling the right into question, throw the inquiry back into an earlier period. If there was no rebutting evidence during that period, the right would be established (as in the *Fairey* case) and the proviso would not apply. But the 1932 Act began as a private member’s bill in the House of Commons which underwent considerable amendment in the House of Lords, including the insertion of the provision for calculating time backwards. I would not expect such an Act to be particularly elegant in the way its parts meshed together, but the general purpose seems to me clear enough and was given effect by the construction adopted by Denning LJ in the *Fairey* case.

39 My Lords, that leaves two alternative submissions put forward by Mr Laurence for the appellant claimants, with which I can deal very shortly. The first was that “during that period” in the proviso meant during the whole of that period. The intention not to dedicate had to be continuously manifested. There is authority against this construction (see, for example, per Walton J in *R v Secretary of State for the Environment, Ex p Blake* [1984] JPL 101, 104, saying that proof of lack of intention to dedicate for 17 of the 20 years would be “fatal to the applicant’s case”) and I do not think that it can possibly be right. The proviso negatives the effect of the enjoyment of the right for the period during which there was no intention to dedicate. If that leaves less than 20 years of unrebutted enjoyment, the claim fails.

40 The other submission was that notices under section 31(3)(5)(6) are an exhaustive statement of the way in which an intention to dedicate may be rebutted. But section 31(2) speaks of the right being called into

A question by a notice “or otherwise” and it is hard to imagine an act which called the right into question and did not also evidence an intention not to dedicate.

B 41 That brings me to the facts of the two appeals. Both arise out of applications to the surveying authority under section 53 of the Wildlife and Countryside Act 1981 to modify the definitive map and statement by adding a right of way not shown on the map. One application was by Godmanchester Town Council to add a public footpath around three sides of the perimeter of Monk’s Pit, Godmanchester. This was a former gravel pit, rectangular in form, which had become a small lake. The map already showed a footpath along one of its sides and the application was to add a path which completed a circuit round the lake. The other was to add a footpath across land belonging to the Yattendon estate at Aldworth in Berkshire. In both cases an inspector appointed under Schedule 15 to the 1981 Act found that there had been qualifying user for upwards of 20 years before the right had been called into question. The chief issue in each case was whether the proviso had been satisfied.

D 42 In the Godmanchester case, the Church Commissioners, as landowners, relied upon the erection of a sign and works done on the footpath as evidence of lack of intention to dedicate. The inspector rejected these as ambiguous or insufficient. But the owners also produced a letter to the local planning authority, written during the 20-year period, in which they complained of pedestrian trespass “around those parts of the pit which are not designated as a public footpath”. Such a letter would not have come to the attention of users of the path or satisfied any of the alternative methods of negating intention to dedicate in section 31. The inspector, following Dyson J in *R v Secretary of State for the Environment, Ex p Billson* [1999] QB 374 and Sullivan J in *R v Secretary of State for the Environment, Transport and the Regions v Dorset County Council* [2000] JPL 396, nevertheless held that the letter was sufficient and her decision was upheld by the Court of Appeal. For the reasons I have given, I think that this was wrong and the decision must be quashed.

F 43 In the Yattendon case there were two inquiries. The first inspector found that the right of way was brought into question by the erection of signs in 1992. The estate owner relied upon three kinds of evidence as negating an intention to dedicate before that date. They were, first, an earlier sign nailed to a beech tree, secondly, challenges by estate employees to people using the way and thirdly, a clause in an agreement granting an agricultural tenancy of the relevant land, by which the tenant covenanted to warn and keep off unauthorised persons from trespassing, to give notice to the owner of any continued acts or trespass and not to allow any footpaths to be created. The inspector accepted the first two categories as sufficient evidence of lack of intention to dedicate and said nothing about the effect of the tenancy agreement. He therefore refused to confirm the county council’s order adding the footpath to the map.

H 44 The claimant then applied for judicial review to quash the inspector’s decision on the ground that he did not address his mind to the question of whether the notices and challenges, which he had treated as evidence of lack of intention to dedicate, had also brought the right into question, requiring an investigation of an earlier 20-year period. The

Secretary of State conceded that the decision could not stand and by consent it was quashed and a new inquiry ordered. A

45 At the second inquiry, another inspector also found that the right of way was brought into question by the erection of signs in 1992. The earlier notice or notices had been insufficient for this purpose. The same was true of the challenges.

46 When she came to consider whether there was lack of intention to dedicate, she rejected the signs as insufficient and said nothing about the challenges. This may be because she took the view that if they were insufficient to bring the right into question, they would also be insufficient to be sufficient evidence of lack of an intention to dedicate. That would, in my opinion, be a consistent view to take. But, again following the *Billson* and *Dorset* cases, she said that the clause in the tenancy agreement was sufficient. B

47 I rather doubt whether, even on the principle applied by the Court of Appeal, the clause could be regarded as sufficient. The fact that landlord and tenant have signed a common form agreement containing such a clause says very little about their actual states of mind. But I think that it was wrong in principle to take the tenancy agreement into account, because it would not have been available to users of the right of way. The Yattendon decision must therefore also be quashed. C

48 The claimants ask that both cases be remitted to the Secretary of State with a direction to confirm the orders adding the footpaths. In each case, the only ground upon which the inspector held the presumption under section 31(1) to be rebutted was inadmissible. But I do not think that this would be fair. In the Yattendon case the first inspector held the presumption rebutted on other, admissible grounds and both landowners may have conducted their cases on the assumption that little other rebutting evidence was needed because, on the law stated by Dyson J and Sullivan J, their private declarations were sufficient. The Secretary of State, or an inspector appointed by him, is the statutory decision-making authority and I do not think that the House should substitute its own decision. D

49 Nevertheless, the landowners may consider, in the light of the opinions of your Lordships and the evidence which they have adduced at the earlier inquiries, that it would serve no purpose to demand a further inquiry and I draw attention to the power of the inspector under section 250(5) of the Local Government Act 1972 (as applied by section 53 of the 1981 Act and paragraph 10A of Schedule 15 inserted by section 51 of and Schedule 5, Part I, paragraph 11(1)(8) to the 2000 Act) to award costs. E

50 In the result, I would quash both decisions and remit the cases to the Secretary of State to decide in accordance with the opinions of the House. Since writing this opinion, I have had the opportunity of reading in draft the opinion to be delivered by my noble and learned friend, Lord Hope of Craighead, and I entirely agree with his observations on the public dialogue by which users and landowners may respectively assert and deny the existence of a right of way. F

LORD HOPE OF CRAIGHEAD

51 My Lords, commenting on the history and meaning of the Rights of Way Act 1932, Sir Lawrence Chubb, who was an environmental campaigner all his life and was knighted for his services to the English countryside, observed that in legal theory all highways, including public footpaths and H

- A bridleways, must have originated by one of two methods. They must either have been created under some statutory authority or have been dedicated by some owner. He conceded however that relatively few footpaths or bridleways have ever been deliberately or expressly granted by any definite act or deed on the part of a landowner: "The Rights of Way Act 1932. Its History and Meaning", Journal of the Commons, Open Spaces and Footpaths Preservation Society, vol II, no 8 (October 1932), p 244, 247.
- B Such altruistic acts are not unknown. But, almost without exception, English landowners are jealous of their right to exclude the public from their private property. Given the numbers a public way may attract, and the tendency of some members of the public to drop litter wherever they go, who can blame them? For completeness, it should be added that a public way may be acquired by prescription. But in *Mann v Brodie* 10 App Cas 378, 386, Lord Blackburn said that in England it is in practice never necessary to rely on prescription since time immemorial. Deemed dedication is all that is needed to achieve this.

- 52 Deemed dedication may be relied upon at common law where there has been evidence of a user by the public for so long and in such a manner that the owner of the fee, whoever he is, must have been aware that the public were acting under the belief that the way has been dedicated, and the owner has taken no steps to disabuse them of that belief. The 1932 Act, which the Highways Act 1980 replaced, was enacted to clarify the law. No definite time was required at common law for a dedication to be inferred. In *Mann v Brodie*, at p 386, Lord Blackburn observed that a very short period of public user would often satisfy a jury. For the statutory presumption to apply, however, a full period of 20 years is required: section 31(1). Unlike the period which is needed for prescription, which can be measured between any dates however long ago for which evidence is available, this period must be calculated retrospectively from the date when the right of the public is brought into question: section 31(2).

- 53 The common law has not laid down fixed rules as to what the owner may do to disabuse the public of the belief that the way has been dedicated for use by the public. The statute clarifies the law in this respect too. The erection and maintenance of a notice which is inconsistent with the dedication of the way as a highway which is visible to persons using it will, in the absence of proof of a contrary intention, be sufficient evidence: section 31(3). If it is torn down or defaced, a notice to the appropriate council that the way is not dedicated as a highway will have the same effect: section 31(5). So too will the deposit with the council by the owner of a map and a statement indicating which ways, if any, he admits to have been dedicated as highways, so long as this is backed up every 10 years by a declaration that no additional way has been dedicated in the meantime: section 31(6). The appropriate council is, in effect, the guardian of the public interest in these matters. In country areas, it is the council of the county in which the way or the land is situated: section 31(7).

- 54 Thus a balance is struck between the interests of the public and those of the landowner. The landowner knows that he can resist claims that a way across his land is a public way so long as he takes the steps that are mentioned in these subsections. But erecting a notice or lodging the relevant documents with the council may come too late if there is sufficient evidence of inaction on the landowner's part for a period of 20 years,

calculated retrospectively from the date when he takes this step, to bring about the public right by presumed dedication. This is because the date as from which the calculation is to be made is the date when the right of the public is brought into question. If no one seeks to assert that the way is a public way, *cadit quaestio*. But if there is a challenge, the right of the public to use the way will be taken to have been brought into question as soon as the landowner seeks in the ways the statute mentions to negative the intention to dedicate. The same will be true of other acts, or of some other course of conduct, by which the landowner seeks to exclude the public. The steps which the statute mentions are not to be taken as exhaustive of those that may be taken for this purpose: see the words “or otherwise” at the end of section 31(2). Whatever he does, time will have begun to run against the landowner from the beginning of the period of 20 years calculated backwards from the first such act or from the start of that course of conduct.

55 On the other hand, for so long as the landowner takes his first step to exclude the public within the 20-year period and keeps doing this in a way that continues to negative his intention to do so, he will be protected from presumed dedication under the statute. There will, in terms of the proviso to section 31(1), be “sufficient evidence that there was no intention during that period to dedicate it”. It will be sufficient for this purpose that the situation which the proviso contemplates has arisen at any time within the 20-year period. Time ceases to run against the landowner as from that point. Irrespective of when this occurs, the period that the statutory presumption requires will have been interrupted. If it starts running again, a full 20 years will be needed thereafter before the requirement will be satisfied. So all the landowner need do is ensure that no 20-year period goes by without his taking overt acts to challenge the use of the way by the public.

56 The central question in these appeals is how that intention is to be demonstrated. Mr Simpson said that the words of the statute should be taken literally. An absence of intention was enough. So it was not necessary for the landowner to reveal his intention to anybody. In other words, contrary to what Denning LJ said in *Fairey v Southampton County Council* [1956] 2 QB 439, 458, he could keep his intention locked up in his own mind. I do not think that this extreme view finds any support in the authorities. But in *R v Secretary of State for the Environment, Ex p Billson* [1999] QB 374, 395, Sullivan J said that the proviso did not require the landowner to publicise his intention to users of the way (my emphasis). In *R v Secretary of State for the Environment, Transport and the Regions, Ex p Dorset County Council* [2000] JPL 396, 407, Dyson J went further. He said that he would not place any gloss on the proviso at all and that, in disproving an intention to dedicate, the owner need not bring home to the users that there was no right to use the way. Their approach was adopted in this case by both the Divisional Court and the Court of Appeal. In the Court of Appeal [2006] QB 727, 752, para 63, Auld LJ said that the proviso is concerned with intention and its proof, not with communication of that intention to members of the public. He added this explanation:

“To construe it as requiring the latter or even proof of overt and contemporaneous acts falling short of such communication would be to

- A read words into it which would have been clearly included if that had been intended, and which would run counter to the operation of section 31 read as a whole.”

In paragraph 64 he said that there was no statutory threshold as to sufficiency of evidence for the purpose of the proviso.

- B 57 In my opinion this is to take too narrow a view of the purpose and effect of the proviso. Like the whole of the subsection of which it forms part, it was drafted against the background of the common law. The express exclusion of a way “of such a character that use of it by the public could not give rise at common law to any presumption of dedication” demonstrates this point. So too does the use of the phrase “actually enjoyed by the public as of right and without interruption”, which can only be understood by referring to what is required for this purpose by the common law. As for the proviso, the essential point is that the presumption of dedication at common law involves a dialogue between the landowner and the public. It is conducted by acts on the part of the public which indicate an assertion of its right to use the way and, if he wishes to deny the public that right, by acts on the part of the landowner to indicate the contrary. As Lord Blackburn said in *Mann v Brodie* 10 App Cas 378, 386, he must take steps to disabuse the public of the belief that the way has been dedicated to public use. Whether the steps that he has taken to communicate this fact to the public are sufficient for that purpose is, of course, a question of fact for the inspector. But the landowner must communicate his intention to the public in some way if he is to satisfy the requirements of the proviso. That was the position prior to the 1932 Act, and I can find nothing in that Act or in the 1980 Act to indicate that it was Parliament’s intention that such a fundamental rule should be departed from.

- E 58 Scott LJ in *Jones v Bates* [1938] 2 All ER 237, 247, saw this point, as did Denning LJ in *Fairey v Southampton County Council* [1956] 2 QB 439, 457. Scott LJ said that the main object of the 1932 Act was to get rid of the onerous fiction of proving an actual dedication. There is no indication in his opinion that he thought that it was its intention to alter the nature of the evidence that would be relevant to show whether there was an intention to dedicate or not to dedicate, as the case may be. Denning LJ said that the landowner must make his position clear to the members of the public most concerned to assert the right: “They were the persons to tell. It was no good the landowner speaking to a stranger who would know nothing of the public right and would not be concerned to assert it.” There are indications elsewhere in section 31 that support this view. The notice referred to in section 31(3) must be “visible to persons using the way”: paragraph (a). A notice which is put up somewhere else, or which remains in the landowner’s workshop, will not do. This is because it will not be effective to communicate the landowner’s intention to those who wish to assert the right to use the way unless they can see it. The elaborate process of depositing a map and other documents with the appropriate authority that section 31(6) describes would be a pointless exercise if all that was needed was for the landowner to send a letter which gave expression to his intention to his estate agent or his solicitor.

- H 59 For these reasons, as well as those given by my noble and learned friend, Lord Hoffmann, whose speech I have had the advantage of reading in

draft and with which I am in full agreement, I would allow the appeals and make the orders that he proposes. A

LORD SCOTT OF FOSCOTE

60 My Lords, the issue in these two appeals, as my noble and learned friend, Lord Hoffmann, has said, is whether the respective landowners, respondents in the two appeals, have shown “sufficient evidence” (section 31(1) of the Highways Act 1980) that they had no intention during the relevant 20-year period to dedicate as public footpaths the paths over their land claimed by the appellants to have achieved that status by 20 years’ public user. Section 31(1) speaks of a “deemed” dedication brought about by the requisite 20 years’ user unless there is “sufficient evidence” that there was “no intention during that period to dedicate.” The emphasis in section 31(1), regarding the means whereby a path may achieve the status of a public path, is on dedication. Dedication by the landowner was the common law means whereby a public right of way could be created. Scott LJ in *Jones v Bates* [1938] 2 All ER 237, 244–245, was very scornful about common law dedication. He described dedication as “usually quite imaginary”, “often a pure legal fiction”, and expressed a clear preference for prescription on the Scottish model where public user of the requisite quality for the requisite period would impel the legal conclusion that the path was public whatever the landowner might say or prove about his intention. He was not, however, joined in these strictures by his Court of Appeal colleagues and, for good or ill, dedication by the landowner remains the basis on which paths used by the public can attain the status of public paths. What section 1(1) of the Rights of Way Act 1932, now section 31(1) of the 1980 Act, did was to provide a means whereby the insufficiency of positive evidence of the intention of the landowner to dedicate a path as a public way could be sidestepped. If the path had been used by the public as of right and without interruption for 20 years before the right of the public to use the path had been “brought into question”, it was to be “deemed” to have been dedicated unless the landowner could show “sufficient evidence that there was no intention” to dedicate. The onus was shifted to the landowner. But the basis of the public status bestowed on a path by public user remained after 1932, and remains, dedication. Prescriptive user alone is not necessarily enough. B
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61 The particular issue in each of these appeals, where there has been the requisite quality of public user of the path in question for the requisite period, concerns the nature of the evidence about his intentions that the landowner must show in order to displace the deemed dedication brought about by the 20 years’ user. Section 31(1) simply speaks of “sufficient evidence” and the Act contains no guide as to what might be sufficient. There are two questions. First, can an intention held in pectore by the landowner and disclosed to no one ever constitute “sufficient evidence” for section 31(1) purposes? If the answer is “no”, must “sufficient evidence” (other than evidence made sufficient by subsections (3), (5) or (6) of section 31) consist of acts which, objectively viewed from the standpoint of the users of the path, demonstrate the intention of the landowner that they should not use the path? G
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62 To answer these questions one must, in my opinion, start with the law about dedication of highways as it stood immediately before the

- A enactment of the 1932 Act. It is said that the Prescription Act 1832 provided a model for the 1932 Act. This is no doubt correct but analogies drawn from the rules about prescription of private easements can, if applied to dedication of paths as public rights of way, go astray. For example, private easements, under common law, are private rights in rem and can only be created by grant. Hence the need, until statutory intervention came to assist, for the fiction of a lost modern grant to be invented. The creation of a public right of way, by contrast, is brought about by dedication of the way as a public way by the landowner. The dedication need not be formal. Sufficiently unequivocal conduct by the landowner evincing his intention to dedicate will suffice. There must also be acceptance of the dedication by the public, evidenced by their use of the path. So long user of the path by the public with the owner standing by and acquiescing in the user is consistent with there having been a dedication and its acceptance by the public. It can be taken, in the absence of evidence to the contrary, to justify the inference of the requisite dedication.

- 63 These very different approaches to the creation of private rights of way on the one hand and public rights of way on the other hand lead, post the advent of the 1832 Act enabling private easements to be acquired by 20 years' use as of right, to two important differences between them. First, user for the acquisition by prescription of private rights of way has to be, among other things, *nec precario*, i.e. as of right, not by permission of the landowner. User to justify the inference of dedication of a public right of way, on the other hand, has to be user of such a character and in such circumstances as to justify the inference that the landowner *had* given permission, not merely temporarily but on a permanent basis, for the user. Second, the inference of dedication brought about by long public user is not conclusive. Where private rights are concerned, however, sufficiently long user of a sufficient quality creates, by prescription, the right. Where public rights are concerned, the user is no more than evidence from which the dedication can be, but does not always have to be, inferred.

- 64 The merely evidential character of long public use was emphatically confirmed by this House in *Folkestone Corpn v Brockman* [1914] AC 338. The issue was whether a particular roadway had been dedicated as a public highway. The evidence was that from 1827 or thereabouts the roadway had been used by members of the public on foot without interruption, openly and to the knowledge of the landowner or his agents. But the justices, dealing with objections by local householders to being required to meet the expenses of certain street works—objections based on their contention that a dedication of the roadway should be inferred, in which case the costs would fall on the inhabitants at large—had held that there had been no dedication. The decision had been upheld by the Divisional Court but reversed in the Court of Appeal. Lord Kinnear, giving the first speech in the House, cited, at p 352, a passage from Lord Blackburn's speech in *Mann v Brodie* 10 App Cas 378, 386:

- H “where there has been evidence of a user by the public so long and in such manner that the owner of the fee, whoever he was, must have been aware that the public were acting under the belief that the way had been dedicated, and has taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence on which those who have to

find that fact may find that there was a dedication by the owner, A
whoever he was.”

Lord Kinnear then continued:

“The points to be noted are, first, that the thing to be proved is
intention to dedicate, and secondly, that while public user may be
evidence tending to instruct dedication, it will be good for that purpose B
only when it is exercised under such conditions as to imply the assertion
of a right, within the knowledge and with the acquiescence of the owner
of the fee.”

After emphasising that “the question is whether the facts are sufficient to
raise the presumption”, he said, at p 354:

“I think it fallacious to assume dedication on a partial view of the C
evidence, and only after that has been done to inquire whether conflicting
facts are strong enough to dislodge a conclusion already reached.”

And, at p 355: “the presumption cannot be held to be established in law at
any intermediate stage of the proof, or until the whole facts and
circumstances have been fully considered.” And, at p 356: “The question is
one of fact, turning upon probabilities of conduct.” D

65 Lord Atkinson, at p 361, summed up the argument for a dedication
that had been put forward by counsel for the respondent owners and
occupiers thus:

“Proof of open, uninterrupted, and continuous user raises a
praesumptio juris in favour of dedication. If evidence be not produced to
rebut this presumption, it must prevail . . . In the present case there was E
such evidence of user, no rebutting evidence was produced, the justices
were therefore bound in law to find that this way was dedicated to the
public, and their decision to the contrary was a decision made without
any evidence to support it, and consequently invalid in point of law.”

This argument was rejected. The House held that the inference of intention
to dedicate drawn from long and uninterrupted user as of right was an F
inference of fact and that the justices were not bound to draw the affirmative
inference. The House allowed the appeal.

66 My Lords, the state of the law as explained by the House in
Folkestone Corpn v Brockman was the law addressed by the 1932 Act and
I do not believe that the remedial provisions introduced by that Act can be
properly understood otherwise than against the background of the pre-Act G
state of the law.

67 Section 1(1) of the 1932 Act seems to me to have set itself firmly to
reverse *Folkestone Corpn v Brockman*. The Act, in effect, accepted the
arguments of counsel for the owners and occupiers, as recorded by Lord
Atkinson, that the House had rejected. Under section 1(1), and now its
successor, section 31(1) of the 1980 Act, there are two questions of fact, not, H
as the House held in 1914, only one. The first question is whether the way
has been “actually enjoyed by the public as of right and without interruption
for a full period of 20 years”. The language was plainly borrowed from
section 2 of the 1832 Act but the meaning of “as of right” must be
interpreted in the context of dedication, not prescription. If the first

- A question can be given the answer “yes”, there will be a “deemed” dedication, something more, in my opinion, than the pre-1932 evidentiary presumption of an intention to dedicate referred to by Lord Kinneer and Lord Atkinson in the *Folkestone Corp'n* case. The statutory conclusion, the “deemed” dedication, stands unless the specified statutory condition of escape, “sufficient evidence that there was no intention to dedicate”, is satisfied. That is the second question of fact.
- B 68 Evidence merely that the landowner lacked any intention to dedicate, e.g. that he had never given dedication a moment’s thought, will not suffice. Counsel on both sides accepted that that was so and that the statutory requirement was not simply for evidence of the absence of an intention to dedicate but was for evidence of a positive intention not to dedicate. I think that must be right. Evidence “sufficient” to displace the statutory deemed conclusion of dedication should at least establish a positive intention. Lord Kinneer in the *Folkestone Corp'n* case had referred, at p 356, to “the probabilities of conduct” on which the question would turn. If that was so in the pre-1932 Act days—and counsel accepted that there was no pre-1932 case that suggested the contrary—a fortiori it must have remained a requirement under the Act.
- C 69 The issue on which these appeals turn, therefore, is whether evidence of an intention not to dedicate can ever (unless it be evidence made sufficient under subsections (3), (5) or (6) of section 31) be sufficient unless it demonstrates the intention to the public at large or, at least, to the users of the path in question. Acts blocking passage along the path by, for example, the padlocking of gates would be likely to be sufficient. Regular challenges to users of the path might suffice. But expressions of intention never disclosed or circulated privately would not, in my opinion, be “sufficient”. The reason they would not is that they would do nothing to curb the public user of the path, or to disabuse users of the path of any belief that they had a right to use it, or to make clear to those users who did not care or give a thought to whether or not they had a right to use the path that they were trespassers. In *Fairey v Southampton County Council* [1956] 2 QB 439 Lord Goddard CJ in the Divisional Court and Denning LJ in the Court of Appeal referred to various ways in which a landowner might demonstrate his opposition to the use by the public of the path over his land. Denning LJ referred, at p 458, to “evidence of some overt acts on the part of the landowner such as to show the public at large—the public who used the path, in this case the villagers—that he had no intention to dedicate”. This requirement of overt acts such as to demonstrate to the public that the landowner had no intention to dedicate seems to me consistent with the nature and quality of the “sufficient evidence” required by the Act to rebut a deemed dedication brought about by 20 years’ uninterrupted public user.
- D 70 Lord Hoffmann has discussed in his opinion what, for section 31(2) purposes, would constitute bringing the right of the public into question. I am in respectful agreement with what he has said and would only add that the bringing of the public right into question could, in my opinion, be done not only by the landowner but also by a member of the public or by the local authority. A member of the public might apply to the court for relief of some sort that would bring the right into question, or a prosecution brought by a local authority against the landowner for, e.g. allowing a stile to fall into
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disrepair, might, if the landowner disputed that there was any public right of way, be similarly regarded. There is, in my opinion, no necessary symmetry between acts that bring the public right into question and acts of the landowner to demonstrate that he does not intend dedication.

71 For these reasons, supplemental to those of Lord Hoffmann with which I am in full agreement, I would allow these appeals and make the orders that he proposes. Having had the advantage of reading the opinions of my noble and learned friends, Lord Hope of Craighead and Lord Neuberger of Abbotsbury, I want to express also my agreement with the reasons they have given for coming to the same conclusions.

BARONESS HALE OF RICHMOND

72 My Lords, I have had the advantage of reading in draft the opinion prepared by Lord Hoffmann. I agree with it so completely that it is a work of supererogation for me to add anything more. On the main issue, two points have weighed most heavily with me.

73 One is the wording of the so-called proviso itself: “unless there is sufficient evidence that there was no intention during that period to dedicate it”. If the private thoughts of the landowner were enough, the section need only have read “unless there was no intention”. The section is calling for sufficient manifestation of the landowner’s intention during the relevant time.

74 The other point is that the section tells us what the landowner’s intention is deemed to have been unless he shows us to the contrary. There are many contexts in which references to the intentions of the parties are to their intentions as objectively understood by an informed but impartial outsider. If the public enjoy the way as of right and without interruption for 20 years, the statute tells us what an objective outsider is to assume—that the landowner intends to dedicate it as a highway. To rebut that, the landowner has to do something which the objective outsider would understand to mean that he had no such intention. I agree that (leaving aside the specific means provided for in the section) the objective outsider would not so understand unless the landowner did something to bring his intention to the notice of the public who might use the way. But I also agree that it is what the public should reasonably understand from the landowner’s actions which count, rather than their subjective wishful thinking or belief.

75 In agreeing that both these cases should be remitted to the Secretary of State to decide, I am remembering only too well that the reasons given when one is reaching one result on the facts may be quite different from the reasons given when one is reaching another. Points which have been discarded in the former case may assume more importance in the latter and vice versa. Facts which were not considered in one context, because they did not have to be, may deserve further and better consideration in the light of the law as it has now been explained. Much of the evidence in these cases is relevant to more than one point—to whether the user is “as of right”, to whether it was “without interruption”, to whether the right has been “brought into question” and to whether there is “sufficient evidence that there was no intention”. All the relevant evidence should be considered as a whole, rather than allocated to one issue or another. I would not myself feel confident that there can be only one answer in either of these cases.

- A 76 I agree, therefore, that these appeals should be allowed, the decisions quashed and the cases remitted to the Secretary of State for him to decide. This will, of course, include deciding in accordance with the statutory procedures as well as with the opinions of the House.

LORD NEUBERGER OF ABBOTSBURY

- B 77 My Lords, I have had the benefit of reading in draft the opinions of Lord Hoffmann and Lord Hope of Craighead. For the reasons they give, I too would allow these appeals and remit the cases to the Secretary of State. The issues raised are of some significance, and I will therefore briefly explain my reasons.

The main issue: the meaning of “intention”

- C 78 The main issue in these appeals is whether, as the claimants contend, the intention referred to in what I will call the proviso to section 31(1) of the Highways Act 1980 has to be communicated contemporaneously (i.e. during the 20 years referred to in the section) to members of the public using the way. For a combination of reasons, I am clearly of the view that the answer is yes.

- D 79 First, the whole tenor of section 31, whether it is dealing with establishing presumed dedication (enjoyment “as of right”), or rebutting presumed dedication (“without interruption” and the provisions of subsections (3) to (6)) is directed towards observable actions from which presumptions may be made or rebutted. It is true that communications with the local authority under sections 31(5) and (6) are not with members of the public, but a local authority would be obliged to retain the documents there referred to, and to permit members of the public to inspect them.

- E 80 Secondly, one of the purposes of section 1 of the Rights of Way Act 1932 (the original ancestor of section 31 of the 1980 Act) was to get rid of a landowner’s ability to rely on the argument that he treated the users of the way as “tolerated trespassers” to defeat a claim of presumed dedication based on long user: see *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335, 353B–E. In my opinion, if a landowner can say, after 20 years’ public use of a way as of right, that he had no subjective intention to dedicate, although there was no contemporaneous communication of that intention, this purpose would be effectively neutralised.

- G 81 Thirdly, as Lord Hoffmann’s analysis of the cases prior to the 1932 Act shows, the common law appears to have required some form of act or statement communicated to users of the way, so that evidence of the subjective uncommunicated intention of the landowner would not have been enough (or even admissible) to rebut a presumption of dedication. It would be surprising if section 31(1) of the 1980 Act, which uses the language and concepts of the common law relating to highways, changed the law radically, and in a direction inconsistent with its purpose, so as to enable a landowner to rely on an intention of which the users of the way were not merely unaware, but could have no means of becoming aware.

- H 82 Fourthly, the notion that a subjective intention is enough to defeat a presumed dedication under section 31(1) leads to difficulties. Despite the submission of Mr Simpson, for the interveners, Yattendon Estates Ltd, to the contrary, it would be unattractive and surprising, as Mr Mould, for

the Secretary of State, accepted, if a landowner could simply rely, after the expiry of the 20 years, on his statement (e.g. at an inquiry such as those held in the present cases) that he had no intention to dedicate. To meet that point, the courts have developed a theory which appears to me to be unjustified, whether it is a principle of law or a practical rule. That theory is that, in the absence of some contemporary overt act or statement, a fact-finding tribunal cannot, or is unlikely to, find a sufficient intention not to dedicate merely on the basis of the landowner's subsequent statement to that effect: see e.g., per Auld LJ in this case in the Court of Appeal [2006] QB 727, para 64. Why should that be so? It would not be justified by the statutory wording, even if it had the meaning that the Secretary of State alleges. In many, I suspect most, cases it would be easy to believe that a landowner would not want to have a highway, even if it is only a public footpath, over his land. Further, in the light of the way the proviso to section 31(1) is expressed ("sufficient evidence that there was no intention"), it appears to me that, on the Secretary of State's case, a landowner could defeat a claim simply on the basis that he was unaware of the effect of the main part of section 31(1).

83 Fifthly, the cogent and clear analysis of Denning LJ in *Fairey v Southampton County Council* [1956] 2 QB 439, 458, quoted by Lord Hoffmann, clearly indicates that the intention referred to in the proviso to section 1(1) of the 1932 Act was intended to be a communicated intention. That analysis was accepted and recorded in textbooks, and it was followed and applied in cases identified by Lord Hoffmann by High Court judges and by the Court of Appeal for the subsequent 40 years. Further, it appears to have been an analysis which was acceptable to the legislature, given that section 1(1) of the 1932 Act was re-enacted in section 34(1) of the Highways Act 1959 and again in section 31(1) of the 1980 Act.

84 Sixthly, I turn to the crucial question of the effect of the words of the proviso to section 31(1). I do not agree with the Court of Appeal that construing the word "intention" in the section as carrying with it the notion of communication involves placing an unjustifiable gloss on the statutory wording. At least outside the criminal law, the word is often used by lawyers in a way which carries with it a requirement to communicate, as well as to possess, the relevant intention. Indeed, sometimes, an uncommunicated intention is irrelevant, as when one speaks of the intention of the parties when construing a contract. Further, the proviso does not require "no intention" but "sufficient evidence that there was no intention". If the Secretary of State were correct, there would have been no need for that longer phrase. The notion that the "evidence" referred to in the proviso must be contemporaneous and communicated is further supported by the fact that a very similar phrase (including both "evidence" and "intention") is used at the end of section 31(3) to describe the effect of a notice erected on the way.

85 Seventhly, the provisions of section 31(3) to 31(6) seem pretty extraordinary if an uncommunicated intention suffices to satisfy the proviso. Why bother with such potentially time-consuming and expensive procedures if, for instance, a simple and clear letter from the landowner to his solicitor, confirming that he has no intention to dedicate, will do?

86 Eighthly, Mr Laurence, for the claimants, raised the spectre of a landowner being able to defeat a claim under section 31(1), if the Secretary of State is correct, by sending such a letter, and only some time thereafter

A calling the right into question by challenging its use. If such a device worked, it would be another reason for allowing this appeal. It may be that the point can be answered by the letter being treated as an act calling the right into question under section 31(2). However, to treat such a private declaration as having that effect seems to me to fly in the face of the natural meaning of the expression “brought into question”.

B *Other issues: the meaning of “during”, and manifesting the intention*

87 The second question is whether the phrase “during that period” in the proviso to section 31(1) means “during the whole of that period”, as the claimants argued, or “at some point during that period”, as was contended by the Secretary of State. As a matter of ordinary language, it is clear that the phrase could easily bear either meaning. In the present context, it appears to me clear that it has the latter meaning.

C 88 First, the former interpretation would lead to wholly unrealistic results. It would mean that signs referred to in section 31(3) (combined, where appropriate, with the documents referred to in section 31(5)), and the documents referred to in section 31(6), would be ineffective unless they were in place for the whole of the 20-year period. Mr Laurence was forced to concede that it would therefore be necessary to imply some sort of period of grace, based on reasonableness, but that is not warranted by the wording of the section, and it would be a recipe for uncertainty and dispute.

D 89 Secondly, it is clear that an interruption of the user at some point during the relevant 20-year period, such as the landowner locking a gate and preventing access, will defeat an argument based on user “as of right” under section 31(1) during that period. Traditionally, one day a year is the norm: see for instance *Merstham Manor Ltd v Coulsdon and Purley Urban District Council* [1937] 2 KB 77, 85. However, it may depend on the facts of the particular case whether this is enough to amount to a sufficient interruption; that was the view taken by the Court of Appeal in *Lewis v Thomas* [1950] 1 KB 438. Whatever the position, it is clear that, to be effective, the interruption need not last long in the context of 20 years in order to defeat user as of right. It would be inconsistent if the sign contemplated by section 31(3), or any other action or communication invoked as evidence of lack of intention, had to be in place for the whole of the 20 years.

E 90 This is not the occasion to discuss how long a sign would have to be present, or when the documents referred to in sections 31(5) and (6) would have to be lodged, during the 20 years relied on in any particular case. It is conceivable that one day in 20 years would be enough in a particular case, and it even may be the case, I suppose, that it would be enough as a matter of principle, but it may well be that what constitutes a sufficient period will depend on the facts of the particular case: see the discussion in *Lewis v Thomas*.

G 91 It is fair to add that this conclusion can, at any rate at first sight, be said to sit a little uneasily with the procedures set out in sections 31(5) and (6). They appear to contain somewhat elaborate requirements if all that is needed is, for instance, the erection of a notice for a relatively short period under section 31(3). The answer, I think, is this. A landowner who wishes to protect his position over many decades may be concerned that he or his successors will forget to keep checking that a section 31(3) notice remains intact, and that, following a defacing of a notice, he may let 20 years’

uninterrupted use occur. Such a landowner may be glad to be able to protect his position by taking advantage of section 31(5). As to section 31(6), it appears to be aimed primarily at large estates, and enables a landowner to protect himself, inter alia, in relation to potential rights of way which he may not even know are in the process of being acquired under section 31(1).

92 Finally, there is the claimants’ argument that the only means by which a landowner can bring himself within the proviso are those contained in section 31(3) to (6). That is simply not what section 31 provides as a matter of language, it is inconsistent with the words “or otherwise” in section 31(2), and it does not seem to me to lead to a sensible result. I can see no reason why a landowner who has made his objections sufficiently clear orally to those using the way should be debarred from contending that he has thereby sufficiently manifested his lack of intention to dedicate to bring himself within the proviso. Again, this is not the occasion to consider how often or to how many people or with what words the objection would have to be made to bring the case within the proviso.

*Appeals allowed.
Question of costs adjourned for
written submissions within 14 days.*

*Solicitors: Winckworth Sherwood for Zermansky & Partners, Leeds;
Treasury Solicitor; Blandy & Blandy, Reading.*

MG

Supreme Court

A

**Regina (Lewis) v Redcar and Cleveland
Borough Council (No 2)**

[2010] UKSC 11

2010 Jan 18, 19, 20;
March 3

Lord Hope of Craighead DPSC, Lord Rodger of
Earlsferry, Lord Walker of Gestingthorpe, Lord Brown of
Eaton-under Heywood, Lord Kerr of Tonaghmore JJSC

B

Commons — Town or village green — Registration — Land used by local inhabitants for sport and recreation for more than 20 years — Conflicting uses of land by inhabitants and landowner — Whether inhabitants' user sufficient assertion of right so to use land — Whether claim to user "as of right" defeated by inhabitants deferring to landowner's use — Whether registration enlarging inhabitants' rights to detriment of landowner — Commons Act 2006 (c 26), s 15

C

The claimant, a resident of an area where the local authority owned land, sought registration of part of that land as a town green within the meaning of section 15 of the Commons Act 2006¹, on the ground that the inhabitants of the locality had indulged as of right in lawful sports and pastimes on the land for at least 20 years. Until 2002 the disputed land had formed part of a golf course which was regularly used by members of a private golf club. However, the local inhabitants had continued to use the land for informal recreation without interfering with or interrupting play by the golfers, and would wait until the play had passed or until they were waved across by golfers, so that there had generally been a cordial relationship between the golfers and the local inhabitants. The local authority appointed an inspector to hold a non-statutory public inquiry and provide a report and recommendation as to whether the application for registration should succeed. The inspector found that local inhabitants' use of the land was "not as of right" because, first, the fact that certain signs had been erected on the land had that effect, and, secondly, the local inhabitants had "overwhelmingly deferred" to the extensive use of the land by the golfers. He accordingly recommended that the land should not be registered as a town or village green, and the local authority accepted that recommendation. The claimant sought judicial review of the local authority's decision. The judge upheld the challenge to the first of the inspector's reasons but rejected the challenge to the second, and accordingly dismissed the claim for judicial review. The Court of Appeal dismissed the claimant's appeal on the ground that in order for user to be as of right, it had to be not merely nec vi, nec clam, nec precario, but had also such as to lead a reasonable landowner to conclude that a right to use the land was being asserted by the local inhabitants, and that the judge had been right to hold that the inspector's finding that the local inhabitants had "overwhelmingly deferred" to the golfers undermined the local inhabitants' assertion of a right, so that the claim for registration was not established.

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On the claimant's appeal—

Held, allowing the appeal, that, although "sports and pastimes" in section 15 of the 2006 Act denoted a single composite class and land registered as a town or village green could be used generally for sports and pastimes, registration neither enlarged the inhabitants' rights nor diminished those of the landowner, who retained the right to use the land as he had done before, and in practice it was possible for the respective rights of the owner and of the local inhabitants to coexist with give and take on both sides; that, although the English theory of prescription was concerned with how matters would have appeared to the landowner, the tripartite test of nec vi, nec clam,

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¹ Commons Act 2006, s 15: see post, para 1.

- A nec precario, was sufficient to establish whether local inhabitants' use of land for lawful sports and pastimes was "as of right" for the purposes of section 15, and it was unnecessary to superimpose a further test as to whether it would appear to a reasonable landowner that they were asserting a right so to use the land or deferring to his rights; that, if the user by the local inhabitants for at least 20 years were of such amount and in such manner as would reasonably be regarded as the assertion of a public right so that it was reasonable to expect the landowner to resist or restrict the use if he wished to avoid the possibility of registration, the landowner would be taken to have acquiesced in it unless he could show that one of the three vitiating circumstances applied; that, in any event, a reasonably alert landowner could not have failed to recognise in the present case that the user by the local inhabitants, who had regularly and in large numbers continued to cross the area covered by the golf course in order to pursue their lawful sports and pastimes, was the assertion of a right to use the land which would mature into an established right unless he took action to stop it, and he would not have concluded that they were not doing so merely because they showed civility or deference towards members of the golf club when play was in progress; that, therefore, the inspector's assessment constituted an error of law in that he had misdirected himself as to the significance of perfectly natural behaviour by the local inhabitants; and that, accordingly, the local authority was required to register the disputed land as a town green (post, paras 20, 36–38, 47–49, 67–78, 79, 85, 93, 95–97, 100–102, 105, 108, 109, 113–116).
- B
- C
- D *Gardner v Hodgson's Kingston Brewery Co Ltd* [1903] AC 229, HL(E) applied.
Fitch v Fitch (1797) 2 Esp 543, *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335, HL(E), *R (Beresford) v Sunderland City Council* [2004] 1 AC 889, HL(E) and *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674, HL(E) considered.
R (Laing Homes Ltd) v Buckinghamshire County Council [2004] 1 P & CR 573 not followed.
- E *Per* Lord Hope of Craighead DPSC. In the proposed consultation as to whether changes are needed to the existing framework for the registration of new town and village greens, the opportunity should be taken by the Government to look at the consequences of registration as revealed by the developing case law as well as how the registration system itself is working (post, para 56).
 Decision of the Court of Appeal [2009] EWCA Civ 3; [2009] 1 WLR 1461; [2009] 4 All ER 1232 reversed.
- F The following cases are referred to in the judgments:
Bridle v Ruby [1989] QB 169; [1988] 3 WLR 191; [1988] 3 All ER 64, CA
Bright v Walker (1834) 1 Cr M & R 211
Costagliola v English (1969) 210 EG 1425
Cumbernauld and Kilsyth District Council v Dollar Land (Cumbernauld) Ltd 1992 SC 357; 1992 SLT 1035, Ct of Sess; 1993 SC (HL) 44, HL(Sc)
- G *Dalton v Henry Angus & Co* (1881) 6 App Cas 740, HL(E)
Fitch v Fitch (1797) 2 Esp 543
Gardner v Hodgson's Kingston Brewery Co Ltd [1903] AC 229, HL(E)
Henderson v Volk (1982) 35 OR (2d) 379
Hollins v Verney (1883) 11 QBD 715, DC; (1884) 13 QBD 304, CA
Humphreys v Rochdale Metropolitan Borough Council (unreported) 18 June 2004, Judge Howarth
- H *Mercer v Woodgate* (1869) LR 5 QB 26
New Windsor Corp'n v Mellor [1975] Ch 380; [1975] 3 WLR 25; [1975] 3 All ER 44, CA
Oxfordshire County Council v Oxford City Council [2004] EWHC 12 (Ch); [2004] Ch 253; [2004] 2 WLR 1291; [2006] UKHL 25; [2006] 2 AC 674; [2006] 2 WLR 1235; [2006] 4 All ER 817, HL(E)

Argument

- Pye (JA) (Oxford) Ltd v United Kingdom* [2005] 3 EGLR 1 A
R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335;
 [1999] 3 WLR 160; [1999] 3 All ER 385, HL(E)
R v Suffolk County Council, Ex p Steed (1995) 70 P & CR 487; (1996) 75 P & C R
 102, CA
R (Beresford) v Sunderland City Council [2003] UKHL 60; [2004] 1 AC 889; [2003]
 3 WLR 1306; [2004] 1 All ER 160, HL(E)
R (Godmanchester Town Council) v Secretary of State for the Environment, Food B
and Rural Affairs [2007] UKHL 28; [2008] AC 221; [2007] 3 WLR 85; [2007]
 4 All ER 273, HL(E)
R (Laing Homes Ltd) v Buckinghamshire County Council [2003] EWHC 1578
 (Admin); [2004] 1 P & CR 573
Rhins District Committee of Wigtownshire County Council v Cuninghame 1917
 2 SLT 169
Sturges v Bridgman (1879) 11 Ch D 852
White v Taylor (No 2) [1969] 1 Ch 160; [1968] 2 WLR 1402; [1968] 1 All ER 1015 C

The following additional cases were cited in argument:

- Field Common Ltd v Elmbridge Borough Council* [2005] EWHC 2933 (Ch)
Hall v Beckenham Corpn [1949] 1 KB 716; [1949] 1 All ER 423
Mann v Brodie (1885) 10 App Cas 378, HL(Sc)
Mills v Silver [1991] Ch 271; [1991] 2 WLR 324; [1991] 1 All ER 449, CA D
Simpson v Attorney General [1904] AC 476, HL(E)

APPEAL from the Court of Appeal

By leave of the Supreme Court (Lord Hope of Craighead DPSC, Lord Kerr of Tonaghmore and Lord Clarke of Stone-cum-Ebony JJSC) granted on 7 December 2009, the claimant, Kevin Paul Lewis, appealed from a decision of the Court of Appeal (Laws, Rix and Dyson LJ) on 15 January 2009, dismissing the claimant's appeal from a decision of Sullivan J [2008] EWHC 1813 (Admin); [2008] NPC 97 who on 18 July 2008 had dismissed the claimant's claim for judicial review of a decision of the General Purposes and Village Greens Committee of the defendant local authority, Redcar and Cleveland Borough Council, on 19 October 2007 to reject an application to register part of the land known as Coatham Common as a town or village green under the Commons Act 2006. Persimmon Homes (Teesside) Ltd appeared as an interested party in support of the local authority's case. E

The facts are stated in the judgments. F

Charles George QC, Jeremy Pike and Cain Ormondroyd (instructed by *Irwin Mitchell*) for the claimants.

The real issue is whether the use was "as of right". The Commons Act 2006 is solely concerned with rights where there is de facto public use of private land and the landowner does not take steps to stop it. G

The tests under section 15 of the Act are whether there was 20 years' use of the land by a sufficient number of local inhabitants and whether that use fulfils the tripartite test of nec vi, nec clam, nec precario. Where there is recreational use which is nec vi and nec clam it will always be known to the owner who can bring it to an end or permit it or acquiesce. Where the use is precario the owner will know that it can never develop into a prescriptive right. The only exception to the tripartite test is where the users expressly say to the owner that they would never claim a prescriptive right. In that case there would be estoppel by representation. H

- A As of right means as if of right and therefore any use which was by right can be disregarded. Where land has been extensively used by local inhabitants for lawful sports and pastimes for 20 years and the tripartite test is satisfied, it is not necessary under section 15(4) of the 2006 Act to ask the further question whether it would have appeared to a reasonable landowner that the users were asserting a right to use the land for that purpose.
- B It would be wrong to add a further test. The activities of the owner are not relevant unless they are activities which asserted the rights of the owner or excluded the inhabitants. The law presumes that a reasonable landowner with knowledge of what is taking place on his land will either resist it or license it.

- C If the local inhabitants have asserted the tripartite test the right is established. All that the court is concerned with is whether the land was used for the requisite purpose for 20 years. The key principle is that of acquiescence and the governing concept is that of reasonableness.

- [Reference was made to *Dalton v Henry Angus & Co* (1881) 6 App Cas 740; *Mann v Brodie* (1885) 10 App Cas 378; *Gardner v Hodgson's Kingston Brewery Co Ltd* [1903] AC 229; *Simpson v Attorney General* [1904] AC 476; *Cumbernauld and Kilsyth District Council v Dollar Land (Cumbernauld) Ltd* 1993 SC (HL) 44; *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335; *R (Beresford) v Sunderland City Council* [2004] 1 AC 889; *R (Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs* [2008] AC 221; *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674; *Mills v Silver* [1991] Ch 271; *Hollins v Verney* (1884) 13 QBD 304; *Sturges v Bridgman* (1879) 11 ChD 852; *Field Common Ltd v Elmbridge Borough Council* [2005] EWHC 2933 (Ch) and *R (Laing Homes Ltd) v Buckinghamshire County Council* [2004] 1 P & CR 573.]
- D
- E

The Court of Appeal erroneously added an additional factor to the conventional test of “as of right” and rejected the appeal in circumstances where the user had been *nec vi nec clam nec precario*.

- F The mere fact that the local inhabitants did not prevent the playing of golf by walking in front of the ball or seeking to prevent the playing of strokes by golfers did not preclude the use by local inhabitants from being as of right. The conduct of the local inhabitants was capable of being regarded as other than one of deference or submission to a greater right. They were merely exercising their right in a way that a reasonable person with a right would do, namely, in a manner which was consistent with the rights of the landowner. The inhabitants’ behaviour which the inspector described as “deference” could equally consistently be described as a good neighbourly, courteous and safety conscious assertion of a right. The role of reasonableness and give and take between dominant and servient tenants pervades the law of easements. The inspector’s finding of deference could not properly be looked at in isolation and had to be looked at in the context of all the circumstances and the local inhabitants’ relationship with the golf club.
- G
- H It was not conduct which demonstrated the lack of assertion of a right. The inspector approached the matter too narrowly.

George Laurence QC and Rodney Stewart Smith (instructed by *Head of Legal Services, Redcar and Cleveland Borough Council, Middlesbrough*) for the local authority.

If a landowner acquiesces in an activity which is capable of being recognised as the assertion of a right and does not complain for a sufficiently long time he will lose his right to complain about the activity. There are many circumstances in which the landowner has nothing to fear from not complaining. The unifying element in all those circumstances is reasonableness. If it is not reasonable to expect the owner to resist what the users are doing, no harm can come to the owner by not complaining. [Reference was made to *Sturges v Bridgman* 11 ChD 852; *Bridle v Ruby* [1989] QB 169; *Field Common Ltd v Elmbridge Borough Council* [2005] EWHC 2933; *Hollins v Verney* 13 QBD 304; *White v Taylor (No 2)* [1969] 1 Ch 160 and *R (Laing Homes Ltd) v Buckinghamshire County Council* [2004] 1 P & CR 573.]

In order to be “as of right” the user must be *nec vi nec clam nec precario* and in many situations user which meets those negative conditions will, without more, be “as of right”. However those conditions, while always necessary, will not always be sufficient. It is also necessary to prove that there were circumstances which showed that the landowner acquiesced in the user as in an established right. In order to establish for the purposes of section 15(4) of the 2006 Act that use of the land for lawful sports and pastimes was as of right, it had also to be shown that it would have appeared to a reasonable landowner that the local inhabitants were asserting a right to use the land for the lawful sports and pastimes in which they were indulging.

It is a question of fact and degree whether the local inhabitants did sufficient to bring home to the reasonable landowner that they were asserting a right to use the land. In answering that question the extent to which the local inhabitants deferred to the right of the owner was a relevant factor. The greater the degree of deference, the less likely it would appear to a reasonable landowner that they were asserting any right to use the land.

Stewart Smith following.

Fundamental to the local authority’s case is that the concept of give and take and reasonableness has no place in the law relating to the exercise of customary rights. [Reference was made to *Mercer v Woodgate* (1869) LR 5 QB 26 and *Fitch v Fitch* (1797) 2 Esp 543.]

The inspector found as a fact that the local inhabitants overwhelmingly deferred to the extensive use of the land as a golf course by the golf club. The inspector was entitled to find that in view of that deference by the inhabitants to the golfers it would not have appeared to the reasonable landowner that the inhabitants were asserting a right. The argument that the inspector misdirected himself cannot be sustained. This is a judicial review case and the Court of Appeal was entitled to find that the inspector’s conclusion that there was deference was a conclusion to which he was entitled to come.

Ross Crail (instructed by *Ward Hadaway, Newcastle upon Tyne*) for the interested party.

For use to be “as of right” it is in law necessary, but not sufficient for it to be *nec vi nec clam nec precario*. Use cannot be “as of right” if the users have not conducted themselves in a way in which persons asserting a right would conduct themselves.

If for 20 years users have restricted their activities so as not to interfere with the landowner’s own activities, and have given the appearance of not

- A asserting a right, it would be a perverse outcome if by doing so they acquired a right which entitled them to interfere with the landowner's activities. The essence of prescription is that users acquire a right to act in a way in which they have been acting. By acting as if they had that right already, they acquire the right. That is because the landowner has acquiesced in their acting as if they already had the right. The principle of acquiescence which
- B underlies any acquisition of rights by "as of right" user requires and entails a symmetry between the user acquiesced in and the right of user acquired. That is the theoretical basis on which the Court of Appeal's decision rests, and it is a sound one. Local inhabitants acquire unrestricted rights of recreation over the whole of land registered as a town or village green. A landowner needs express statutory authority to use for some other purpose land which is subject to statutory recreational rights for the benefit
- C of the public. [Reference was made to *Hall v Beckenham Corp'n* [1949] 1 KB 716 and *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674.]

- If it is accepted that users have to give the outward appearance of asserting a right, then whether they do so or not is a matter for the fact-finding tribunal and it is not a matter of law. The inspector who heard
- D and read all the evidence came to the conclusion that the users had not given the appearance of asserting a right. "Deference" means submission to or showing respect for. When the inspector used that word in his reports and opinions there is no reason to think that he was not using it in its proper sense, with those connotations, and simply meant to say that the local inhabitants physically kept out of the way of the golfers. The inspector's reasoning was as full as it needed to be and his conclusions were conclusions
- E which on his findings of fact he was entitled to reach.

George QC in reply.

- There is no injustice in applying section 15 of the 2006 Act. It is a recent provision and reflects Parliament's best efforts. If there is an injustice in applying section 15 it is for Parliament to correct. Village green rights are vested in the local inhabitants and easements are vested in the owner of a
- F particular tenement or piece of land. Once a village green comes into being it has its own statutory code. The rights of the local inhabitants are not unqualified: see *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674, para 51. [Reference was made to *Bridle v Ruby* [1989] QB 169.]

The court took time for consideration.

- G 3 March 2010. LORD WALKER OF GESTINGTHORPE JSC

The issue

1 Section 15 of the Commons Act 2006, so far as relevant to this appeal, provides as follows:

- H "Registration of greens
- "(1) Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies.
- "(2) This subsection applies where— (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality,

have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and (b) they continue to do so at the time of the application.”

“(4) This subsection applies (subject to subsection (5)) where— (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; (b) they ceased to do so before the commencement of this section; and (c) the application is made within the period of five years beginning with the cessation referred to in paragraph (b).”

“(7) For the purposes of subsection (2)(b) in a case where the condition in subsection (2)(a) is satisfied— (a) where persons indulge as of right in lawful sports and pastimes immediately before access to the land is prohibited as specified in subsection (6), those persons are to be regarded as continuing so to indulge; and (b) where permission is granted in respect of use of the land for the purposes of lawful sports and pastimes, the permission is to be disregarded in determining whether persons continue to indulge in lawful sports and pastimes on the land ‘as of right’.”

The application relevant to this appeal was expressed to be made under section 15(4). It was suggested in argument that (because of the “deeming” provision in subsection (7)) it was also, or alternatively, made under subsection (2). In any case it was a valid application, and neither subsection (5) nor subsection (6) is in point.

The issue

2 The general issue for the court is whether a piece of open land next to the sea in Redcar ought to have been registered as a town green under section 15. For at least 80 years before 2002 the land in question (“the disputed land”) formed part of a golf course in regular use by members of the Cleveland Golf Club, whose trustees were tenants of the course. The inspector who held a public inquiry found as a fact that when local residents using the disputed land for recreation encountered members of the golf club playing golf, the former “deferred” to the latter. In these circumstances the legal issue for the court can be more particularly stated as whether the legal consequence of this deference was that the local residents were not indulging in recreation “as of right” within the meaning of the Commons Act 2006.

3 During the last decade there have been three important decisions of the House of Lords dealing with different aspects of the law (as it stood before the Commons Act 2006) as to town and village greens: *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335 (“*Sunningwell*”); *R (Beresford) v Sunderland City Council* [2004] 1 AC 889 (“*Beresford*”) and *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674 (“*Oxfordshire*”). In none of these appeals did the House of Lords have to decide the point now at issue, although both sides have placed reliance on some passages in their Lordships’ opinions. The Commons Act 2006 (which is still not fully in force) makes important changes in the law, but does not directly affect the issue of deference.

A *The facts*

4 The appellant, Mr Kevin Lewis, is one of five local residents who made the application for registration of the disputed land under section 15 of the Commons Act 2006. The first respondent, Redcar and Cleveland Borough Council, has a dual capacity, being both the registration authority and the freehold owner of the disputed land. The second respondent, Persimmon Homes (Teesside) Ltd is an interested party. It has since 2003 been the Borough Council's development partner in the Coatham Links coastal regeneration project. The project is for a mixed development for residential and leisure purposes on a site extending to 14 hectares. The disputed land forms an important, and possibly indispensable, part of the development site. The appeal is therefore of great importance to the parties, as well as raising a point of law of general public interest.

C 5 Redcar is on the south side of the Tees estuary. The disputed land is part of an area known as Coatham Common or Coatham Links (Coatham was originally a separate village but is now part of Redcar). On the south (landward) side of the disputed land there is a mainly residential area. To the east is the site of the former club house and a leisure centre (the club house site is not included in the disputed land but was included in the earlier application mentioned below). To the west is more open land still used as a golf course. To the north is the beach and the North Sea. The disputed land formerly included the tees, fairways and greens of the first and 18th holes, and a small practice area.

D 6 The inspector's report dated 14 March 2006 described the boundaries in more detail and contained, at paras 6 and 7, this further description of the disputed land (referred to as "the report land"):

E "The character of the report land is typical of coastal sand dunes, with irregular sand hills covered in rough grass. The dunes are noticeably higher on the northern side. There is a flatter area along the southern side, particularly west of the Church Street access. The former tees, greens and fairways of the golf course are no longer obvious. The report land is crossed by numerous informal paths of which the most well used run alongside and close to the southern and northern boundaries. A number of photographs show the general nature of the land. There are some fairly new signs erected by [the borough council] on the report land. The gist of the signs is that they give the public temporary permission to use the report land for recreation pending its redevelopment. I call these signs 'the permissive signs'."

G The footpath near the southern boundary is a public footpath.

H 7 Mr Lewis and his fellow applicants applied for registration of the disputed land on 8 June 2007, soon after section 15 of the Commons Act 2006 had come into force on 5 April 2007. It was not the first application that had been made in respect of the disputed land. An earlier application had been made by another group of local residents on 1 March 2005. It was therefore considered under the earlier law, that is the Commons Registration Act 1965 as amended by the Countryside and Rights of Way Act 2000. This earlier application was the subject of a public inquiry held by Mr Vivian Chapman QC as an inspector appointed by the borough council as registration authority. The inquiry was held over several days in December 2005 and January 2006. Mr Chapman produced a lengthy report dated

14 March 2006 recommending that the application should be refused, and the borough council accepted his recommendation. An application for leave for judicial review of that decision was refused on the papers by Collins J on 22 August 2006 and was not renewed.

8 When the second application was made in 2007 it was rightly thought that it was unnecessary, and would be a waste of time and money, to hold a second public inquiry, since it would be directed to the same factual issues. Mr Chapman did however (in connection with the first application) make a second report dated 9 June 2006 addressing the decision of the House of Lords in *Oxfordshire* (he advised that it made no difference to his conclusions, and that in any case it was not open to the borough council to reopen its decision).

9 The relevant findings of fact are therefore in Mr Chapman's report dated 14 March 2006 on the first application. The crucial findings are in paras 171, 172, and 175. These paragraphs are set out in full in the judgment of Dyson LJ in the Court of Appeal [2009] 1 WLR 1461, but they are of such central importance that they need to be set out again. Para 171 dealt with use of the disputed land by golfers:

"I find that, from as far back as living memory goes (at least as far back as the 1920s), the report land was continuously used as part of the Cleveland Golf Club links. The only exception is that the golfing was suspended during World War II. Golfing use ceased in 2002. I find that the club was a popular one and that the golf links were well used nearly every day of the year. In the years before 2002, the report land was used for the club house, the first and 18th holes and for a practice ground. There is some evidence that the precise configuration of the course changed somewhat over the years. The club house, tees, fairways, greens and practice ground did not, however, take up the whole of the report land and there were substantial areas of rough ground beside and between these features."

10 Para 172 dealt with use by non-golfers (that is, local residents):

"I find that from as far back as living memory goes, the open parts of the report land have also been extensively used by non golfers for informal recreation such as dog walking and children's play. Some of the walking has been linear walking in transit. Thus the informal paths running east-west have been used by caravan residents to get access to the centre of Redcar with its shops and public houses. Also, there is evidence of people taking a short cut south-north from Church Street to the gap in the fence in Majuba Road. However I am satisfied that the open parts of the report land have been extensively used by non golfers for general recreational activities apart from linear walking. I prefer the evidence on this point of the applicants' witnesses and of Mr Fletcher to the evidence of the objector's other witnesses that such use was occasional and infrequent."

11 Paras 173 and 174 concluded that the local people who used the land for informal recreation came primarily from the Coatham area of Redcar. Then para 175 dealt with the relationship between the two types of use:

A “I find that the relationship between the golfers and the local recreational users was generally cordial. There was evidence of only a few disputes. Only Squadron Leader Kime seems to have caused problems by actively asserting a right to use the report land and the golf club appears to have tried to avoid any formal dispute with him. In my judgment, the reason why the golfers and the local people generally got on so well was because the local people (with the exception of Squadron Leader Kime) did not materially interfere with the use of the land for playing golf. Many of the applicants’ witnesses emphasised that they would not walk on the playing areas when play was in progress. They would wait until the play had passed or until they were waved across by the golfers. Where local people did inadvertently impede play, a shout of ‘fore’ would be enough to warn them to clear the course. I find that recreational use of the report land by local people overwhelmingly deferred to golfing use.”

B
C
D 12 Para 221 (in the part of the report applying the law to the facts as found) referred to the decisions of Sullivan J in *R (Laing Homes Ltd) v Buckinghamshire County Council* [2004] 1 P & CR 573 (“*Laing Homes*”) and Judge Howarth in *Humphreys v Rochdale Metropolitan Borough Council* (unreported) 18 June 2004:

E “Leaving aside the public footpath, I consider that the reasoning in *Laing Homes Ltd* and *Humphreys* squarely applies to the report land in the present case. Use of the report land as a golf course by the Cleveland Golf Club would have been in breach of Inclosure Act 1857 section 12 and Commons Act 1876 section 29 if the report land had been a town or village green. It was a use which conflicted with the use of the report land as a place for informal recreation by local people. It was not a use which was with a better view to the enjoyment of the report land as a town or village green. The overwhelming evidence was that informal recreational use of the report land deferred to its extensive use as a golf course by the Cleveland Golf Club. Accordingly, use of the report land by local people was not as of right until use as a golf course ceased in 2002.”

F Mr Chapman concluded, at para 223, that (apart from use of the public footpath) recreational user of the disputed land was not as of right before 2002 because it deferred to extensive use of the land by the golf club, and that user as of right was not continuing because of the permissive signs erected in 2003.

G 13 It is convenient, at this point, to dispose of the matter of the signs. They were contentious earlier but are no longer a live issue. There were two sets of signs: warning signs erected by the golf club in 1998 and the permissive signs erected by the borough council in 2003. The warning signs read “Cleveland Golf Club. Warning. It is dangerous to trespass on the golf course”. The inspector found, at para 176:

H “Although these were vandalised several times after which the golf club gave up trying to maintain them, I am satisfied that they were in place long enough for regular users of the report land to know of them. Indeed it seems that they caused a stir locally because of the implication that local people using Coatham Common were trespassers.”

The inspector treated them as material to the outcome of both applications, but on judicial review of the second application Sullivan J [2008] EWHC 1813 (Admin) at [11]–[23] held that the wording was too ambiguous to alter the character of the residents' use of the land, and that conclusion has not been challenged by the respondents. The permissive signs erected in 2003 were fatal to the first application but not to the second application, because of the change in the law made by section 15 of the Commons Act 2006.

The course of the second application

14 Mr Chapman advised the borough council in an opinion dated 12 June 2007 that the application made on 6 June 2007 was bound to fail on two of the same grounds on which the first application failed, that is the deference issue and the 1998 warning notices. He recommended that the application should be summarily dismissed, subject to any new points raised by the applicants. Various points were raised but in three further opinions dated 29 July, 13 October and 18 October 2007 Mr Chapman maintained his advice that the application should be rejected. On 19 October 2007 the borough council, by its General Purposes and Village Greens Committee, accepted Mr Chapman's advice and resolved to reject the application for registration.

15 On 18 July 2008 Sullivan J, at a "rolled up" hearing, granted the applicants permission to apply for judicial review of the borough council's decision, but dismissed the substantive application. He did so on the ground that the local residents' deference to the golfers had prevented their user being "as of right" before 2002. He relied on para 82 of his own judgment in *Laing Homes* [2004] 1 P & CR 573, and on para 57 of Lord Hoffmann's opinion in *Oxfordshire* [2006] 2 AC 674. He granted leave to appeal, commenting, at p 62, "deference is judge-made law, judge-made by me".

16 The Court of Appeal (Laws, Rix and Dyson LJ) [2009] 1 WLR 1461 unanimously dismissed the appeal in reserved judgments handed down on 15 January 2009. Dyson LJ gave the principal judgment, and Rix LJ added a concurring judgment. Both judgments put the decision squarely on the ground of deference excluding user as of right (although Dyson LJ denied that there was any "principle of deference"). The provisions of two Victorian statutes relating to greens (section 12 of the Inclosure Act 1857 (20 & 21 Vict c 31) and section 29 of the Commons Act 1876 (39 & 40 Vict c 56)) which had formed part of the grounds of decision in *Laing Homes*, were not relied on in the Court of Appeal. In short, all the subsidiary issues have disappeared and this court is faced with the single issue of deference. It is not however a simple issue.

As of right

17 The concept of user "as of right" is found (either in precisely those words or in similar terms) in various statutory provisions dealing with the acquisition by prescription of public or private rights. Section 5 of the Prescription Act 1832 (2 & 3 Will 4, c 71) makes it sufficient to plead enjoyment "as of right" (while section 2 refers to a way "actually enjoyed by any person claiming right thereto without interruption for the full period of 20 years"). Section 31(1) of the Highways Act 1980 refers to use of a way

A being “actually enjoyed by the public as of right and without interruption for the full period of 20 years”. Section 22(1A) of the Commons Registration Act 1965, as inserted by section 98(3) of the Countryside and Rights of Way Act 2000, refers simply to inhabitants indulging in lawful sports and pastimes “as of right” for at least 20 years.

B 18 Both *Sunningwell* [2000] 1 AC 335 and *Beresford* [2004] 1 AC 889 were concerned with the meaning of “as of right” in the Commons Registration Act 1965. In *Sunningwell* Lord Hoffmann discussed the rather unprincipled development of the English law of prescription. He explained, at pp 350–351, that by the middle of the 19th century the emphasis shifted from fictions:

C “to the quality of the 20-year user which would justify recognition of a prescriptive right or customary right. It became established that such user had to be, in the Latin phrase, *nec vi, nec clam, nec precario*: not by force, nor stealth, nor the licence of the owner. (For this requirement in the case of custom, see *Mills v Colchester Corp*n (1867) LR 2 CP 476, 486.) The unifying element in these three vitiating circumstances was that each constituted a reason why it would not have been reasonable to expect the owner to resist the exercise of the right—in the first case, because rights

D should not be acquired by the use of force, in the second, because the owner would not have known of the user and in the third, because he had consented to the user, but for a limited period.”

Lord Hoffmann pointed out that for the creation of a highway, there was an additional requirement that an intention to dedicate it must be evinced or inferred (as to that aspect see *R (Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs* [2008] AC 221).

E 19 In *Sunningwell* [2000] 1 AC 335 the villagers had used about ten acres of glebe land for dog-walking, children’s games, and similar activities. This use seems to have coincided with the land being let for grazing by horses, but the report gives little detail about this. The inspector (as it happens, Mr Chapman) advised against acceptance of the registration

F because although the witnesses had said that they thought they had the right to use the glebe, they did not say that they thought the right was confined to villagers (as opposed to the general public). Lord Hoffmann held (and the rest of the Appellate Committee agreed) that this was an error. The decision of the Court of Appeal in *R v Suffolk County Council, Ex p Steed* (1996) 75 P & CR 102 was overruled. That was the context in which Lord Hoffmann stated in a passage, at pp 352–353, relied on by the respondents:

G “My Lords, I pause to observe that Lord Blackburn [in *Mann v Brodie* (1885) 10 App Cas 378, 386, as to dedication of a highway] does not say that there must have been evidence that individual members of the public using the way believed there had been a dedication. He is concerning himself, as the English theory required, with how the matter would have appeared to the owner of the land. The user by the public must have been,

H as Parke B said in relation to private rights of way in *Bright v Walker* 1 Cr M & R 211, 219, ‘openly and in the manner that a person rightfully entitled would have used it’. The presumption arises, as Fry J said of prescription generally in *Dalton v Angus & Co* 6 App Cas 740, 773, from acquiescence.”

20 The proposition that “as of right” is sufficiently described by the tripartite test *nec vi, nec clam, nec precario* (not by force, nor stealth, nor the licence of the owner) is established by high authority. The decision of the House of Lords in *Gardner v Hodgson’s Kingston Brewery Co Ltd* [1903] AC 229 is one of the clearest: see Lord Davey, at p 238, and Lord Lindley, at p 239. Other citations are collected in *Gale on Easements*, 18th ed (2008), paras 4-80 and 4-81. The proposition was described as “clear law” by Lord Bingham of Cornhill in *Beresford* [2004] 1 AC 889, para 3. The opinion of Lord Rodger of Earlsferry, at para 55, is to the same effect. So is that of Lord Scott of Foscote, at para 34, though with a cautionary note as to the difference between the acquisition of public and private rights.

Laing Homes

21 The respondents’ case is that although Sullivan J, in his judgment in *Laing Homes* [2004] 1 P & CR 573, was indeed the first judge to speak in terms of “deference” shown by local residents, he was not striding into entirely unknown and uncharted territory. Earlier authorities (including those mentioned in the passage of Lord Hoffmann’s opinion in *Sunningwell* [2000] 1 AC 335, 350-351 quoted in para 19 above) suggest that although the local residents’ private beliefs as to their rights are irrelevant, the same is not true of their outward behaviour on the land in question, as it would appear to a reasonable owner of the land. It is relevant, on this argument, to look at what might today be called the residents’ attitude or body language (this thought is elaborated in an imaginary example given by J G Riddall, “Miss Tomkins and the Law of Village Greens” [2009] Conveyancer and Property Lawyer 326). I propose to look next at *Laing Homes* [2004] 1 P & CR 573 itself, and then to consider how far the respondents can claim much more long-established roots for the doctrine of deference which *Laing Homes* articulates.

22 *Laing Homes* was concerned with three adjoining fields (“the application area”), extending in all to 38 acres, on the edge of Widmer End in Buckinghamshire. This land, together with three smaller fields not affected by the application for registration, had been acquired by Laing Homes, a house-builder, and held in its “land bank” since 1963. The land was subject to a grazing licence from 1973 to 1979, when the farmer stopped using it for grazing because of repeated troubles with trespassers. In the course of time footpaths were established round the three fields in the application area (cutting some corners) and these were officially recognised as public footpaths in June 2000. An application for registration of the application area was made in August 2000. The registration authority’s decision to register the land as a village green was challenged by way of judicial review on various grounds (including human rights grounds on which Sullivan J did not find it necessary to rule).

23 In his judgment Sullivan J listed, in para 50, the four main grounds on which Laing Homes was attacking the inspector’s report (and the registration based on it). The first ground was that there was insufficient evidence of the use of the whole of the application area for lawful sports and games over the 20-year period. The second was the inspector’s conclusion that the use of the fields for an annual hay crop (from about 1980 until the early 1990s) was not incompatible with the establishment of village green rights. Sullivan J considered the second ground first. He discussed it at some

A length and differed from the inspector. He did so primarily on the view he took of the perception of a reasonable landowner, although he was also influenced by the point (no longer relied on) as to the Victorian statutes, at para 86:

B “Like the inspector, I have not found this an easy question. Section 12 [of the Inclosure Act 1857] acknowledges that animals may be grazed on a village green. Rough grazing is not necessarily incompatible with the use of land for recreational purposes: see *Sunningwell*. If the statutory framework within which section 22(1) [of the Commons Registration Act 1965] was enacted had made provision for low-level agricultural activities to coexist with village green type uses, rather than effectively preventing them once such a use has become established, it would have been easier to adopt the inspector’s approach, but it did not. I do not consider that using the three fields for recreation in such a manner as not to interfere with [the farmer’s] taking of an annual hay crop for over half of the 20-year period, should have suggested to Laings that those using the fields believed that they were exercising a public right, which it would have been reasonable to expect Laings to resist.”

D 24 I have to say that I am rather puzzled by Sullivan J’s summary of the evidence about hay-making, and the discussion of it (both by the inspector at paras 56 and 57, and by the judge himself at paras 59–63). There is a detailed description of the local residents keeping off the fields for a few days in spring when they were harrowed, rolled and fertilized, and again for a few days during hay-making. But there are only the most passing references by the judge (in paras 59 and 111) to the further need for people to keep off the fields for many weeks while the crop was growing, if it was to be worth the farmer’s while to get it in. The length of this period would vary with the quality of the land and the seasonal weather, but would usually, I imagine, be of the order of three months. The evidence was that the farmer generally got well over 2,000 bales of hay from the application area. So it seems that the local residents must, in general, have respected the hay crop.

F 25 The puzzle is partly explained by Sullivan J’s consideration of the first ground (evidence of use of the whole application area) which follows at paras 88–111. In para 111 the judge commented that there was an overlap between the two grounds, because the existence of public footpaths round the three fields (cutting some corners) provided an alternative explanation of the local residents’ use of the fields. It seems likely that they used the perimeter paths and kept off the hay while it was growing, although their dogs may not have done, as the judge discussed at some length, at paras 103–110.

G 26 There are some dicta about *Laing Homes* in Lord Hoffmann’s opinion in *Oxfordshire* [2006] 2 AC 674. Lord Rodger and I expressed general agreement with Lord Hoffmann, but did not comment on this point. H Lord Hoffmann observed, at para 57:

“No doubt the use of the land by the owner may be relevant to the question of whether he would have regarded persons using it for sports and pastimes as doing so ‘as of right’. But, with respect to the judge, I do not agree that the low-level agricultural activities must be regarded as

having been inconsistent with use for sports and pastimes for the purposes of section 22 if in practice they were not.” A

27 There was some discussion in the course of argument of what Lord Hoffmann meant by the first sentence of this passage. In the Court of Appeal [2009] 1 WLR 1461, para 45, Dyson LJ took it to mean inconsistency between competing uses manifested “where the recreational users adjust their behaviour to accommodate the competing activities of the owner (or his lessees or licensees)”. I am rather doubtful about that. I think it just as likely that Lord Hoffmann had in mind, not concurrent competing uses of a piece of land, but successive periods during which recreational users are first excluded and then tolerated as the owner decides. An example would be a fenced field used for intensive grazing for nine months of the year, but left open for three months when the animals were indoors for the worst of the winter. B C

28 Whether that is correct or not, I see great force in the second sentence of the passage quoted. Taking a single hay crop from a meadow is a low-level agricultural activity compatible with recreational use for the late summer and from then until next spring. *Fitch v Fitch* (1797) 2 Esp 543 is venerable authority for that. That is not to say that *Laing Homes* [2004] 1 P & CR 573 was wrongly decided, although I see it as finely-balanced. D The residents of Widmer End had gone to battle on two fronts, with the village green inquiry in 2001 following a footpaths inquiry two or three years earlier, and some of the evidence about their intensive use of the footpaths seems to have weakened their case as to sufficient use of the rest of the application area.

The earlier authorities E

29 I have already referred to *Fitch v Fitch* 2 Esp 543, the case about cricket and hay-making at Steeple Bumpstead in Essex. The report is brief, but what Heath J is reported as having said, at pp 544–545, is a forthright declaration of the need for coexistence between concurrent rights:

“The inhabitants have a right to take their amusement in a lawful way. It is supposed that because they have such a right, the plaintiff should not allow the grass to grow; there is no foundation in law for such a position. The rights of both parties are distinct, and may exist together. If the inhabitants come in an unlawful way, or not fairly, to exercise the right they claim of amusing themselves, or to use it in an improper way, they are not justified under the custom pleaded, which is a right to come into the close to use it in the exercise of any lawful games or pastimes, and are thereby trespassers.” F G

30 Against that Mr Laurence QC relied on the general proposition that if the public (or a section of the public) is to acquire a right by prescription, they must by their conduct bring home to the landowner that a right is being asserted against him, so that the landowner has to choose between warning the trespassers off, or eventually finding that they have established the asserted right against him. That was in line with what Lord Hoffmann (in *Sunningwell* [2000] 1 AC 335, 350–351, quoted at para 18 above) called “the unifying element” in the tripartite test: why it would not have been reasonable to expect the owner to resist the exercise of the right. H

A 31 The first of the old authorities relied on by Mr Laurence was *Bright v Walker* (1834) 1 Cr M & R 211, 219, a case on a private right of way, in which Parke B spoke of use of a way “openly and in the manner that a person rightfully entitled would have used it”. I read that reference to the manner of use as emphasising the importance of open use, rather than as prescribing an additional requirement. On its facts the case raised as much of an issue as to
 B vi as to *clam* since gates had been erected and broken down during the relevant period. The point of law in the case turned on the peculiarity that the freehold owner of the servient tenement was a corporation sole.

32 The next case relied on (another case about a claim to a private way) was *Hollins v Verney* (1884) 13 QBD 304 (there is a fuller statement of the facts in the first instance report (1883) 11 QBD 715). Lindley LJ (giving the judgment of the Court of Appeal) observed 13 QBD 304, 315:

C “No user can be sufficient which does not raise a reasonable inference of such a continuous enjoyment. Moreover, as the enjoyment which is pointed out by the statute is an enjoyment which is open as well as of right, it seems to follow that no actual user can be sufficient to satisfy the statute, unless during the whole of the statutory term (whether acts of user be proved in each year or not) the user is enough at any rate to carry
 D to the mind of a reasonable person who is in possession of the servient tenement, the fact that a continuous right to enjoyment is being asserted, and ought to be resisted if such right is not recognised, and if resistance to it is intended. Can a user which is confined to the rare occasions on which the alleged right is supposed in this instance to have been exercised, satisfy even this test? It seems to us that it cannot: that it is not, and could
 E not reasonably be treated as the assertion of a continuous right to enjoy; and when there is no assertion by conduct of a continuous right to enjoy, it appears to us that there cannot be an actual enjoyment within the meaning of the statute.”

33 The second sentence of this passage begins with “Moreover”, suggesting that Lindley LJ was adding to the requirement that the use should
 F be continuous. But the passage as a whole seems to be emphasising that the use must be openly (or obviously) continuous (the latter word being used three more times in the passage). The emphasis on continuity is understandable since the weight of the evidence was that the way was not used between 1853 and 1866, or between 1868 and 1881. It was used exclusively, or almost exclusively, for carting timber and underwood which was cut on a 15-year rotational system. The use relied on was too sparse for
 G any jury to find section 2 of the Prescription Act 1832 satisfied.

34 In *Bridle v Ruby* [1989] QB 169 the plaintiff established a right of way by prescription despite his personal belief that he had such a right by grant. Ralph Gibson LJ said, at p 178:

H “The requirement that user be ‘as of right’ means that the owner of the land, over which the right is exercised, is given sufficient opportunity of knowing that the claimant by his conduct is asserting the right to do what he is doing without the owner’s permission. If the owner is not going to submit to the claim, he has the opportunity to take advice and to decide whether to question the asserted right. The fact that the claimant mistakenly thinks that he derived the right, which he is openly asserting,

from a particular source, such as the conveyance to him of his property, does not by itself show that the nature of the user was materially different or would be seen by the owner of the land as other than user as of right.”

That the claimant’s private beliefs are generally irrelevant, in the prescription of either private or public rights, was finally confirmed by the House of Lords in *Sunningwell* [2000] 1 AC 335: see paras 18 and 19 above.

35 The last authority calling for mention on this point is *Cumbernauld and Kilsyth District Council v Dollar Land (Cumbernauld) Ltd* 1992 SLT 1035 (Court of Session); 1993 SC (HL) 44 (House of Lords). In the Court of Session the Lord President (Lord Hope), after considering several authorities, observed, at p 1041:

“The significance of these passages for present purposes is that, where the user is of such amount and in such manner as would reasonably be regarded as being the assertion of a public right, the owner cannot stand by and ask that his inaction be ascribed to his good nature or to tolerance.”

Lord Hope’s reference to the manner of use must, I think, be related to the unusual facts of the case (set out in detail at pp 1037–1038). The issue was whether there was a public right of way over an extensive walkway in a new town, designed to separate pedestrian from vehicular traffic. It gave access to the town centre where there were numerous shops (whose tenants no doubt had private rights of way for themselves and their customers). But the walk was also used for access to public places such as the railway station, the church, a health centre and a swimming pool. It was held that the use of the way “had the character of general public use of a town centre pedestrian thoroughfare”, at p 1042. The House of Lords upheld this decision. It is worth noting that Lord Jauncey of Tullichettle stated, at p 47, “There is no principle of law which requires that there be conflict between the interest of users and those of a proprietor”.

Deference or civility?

36 In the light of these and other authorities relied on by Mr Laurence I have no difficulty in accepting that Lord Hoffmann was absolutely right, in *Sunningwell* [2000] 1 AC 335, to say that the English theory of prescription is concerned with “how the matter would have appeared to the owner of the land” (or if there was an absentee owner, to a reasonable owner who was on the spot). But I have great difficulty in seeing how a reasonable owner would have concluded that the residents were not asserting a right to take recreation on the disputed land, simply because they normally showed civility (or, in the inspector’s word, deference) towards members of the golf club who were out playing golf. It is not as if the residents took to their heels and vacated the land whenever they saw a golfer. They simply acted (as all the members of the court agree, in much the same terms) with courtesy and common sense. But courteous and sensible though they were (with occasional exceptions) the fact remains that they were regularly, in large numbers, crossing the fairways as well as walking on the rough, and often (it seems) failing to clear up after their dogs when they defecated. A reasonably alert owner of the land could not have failed to recognise that this user was the assertion of a right and would mature into an established right unless the

A owner took action to stop it (as the golf club tried to do, ineffectually, with the notices erected in 1998).

37 There is in my opinion a significant difference, on this point, between the acquisition of private and public rights. As between neighbours living in close proximity, what I have referred to as “body language” may be relevant. In a Canadian case of that sort, *Henderson v Volk* (1982) 35 OR (2d) 379, 384, Cory JA (delivering the judgment of the Court of Appeal of Ontario) observed:

“It is different when a party seeks to establish a right-of-way for pedestrians over a sidewalk. In those circumstances the user sought to be established may not even be known to the owner of the servient tenement. In addition, the neighbourly acquiescence to its use during inclement weather or in times of emergency such as a last minute attempt to catch a bus, should not too readily be accepted as evidence of submission to the use. It is right and proper for the courts to proceed with caution before finding that title by prescription or by the doctrine of lost modern grant was established in a case such as this. It tends to subject a property owner to a burden without compensation. Its ready invocation may discourage acts of kindness and good neighbourliness; it may punish the kind and thoughtful and reward the aggressor.”

38 That is, if I may say so, obviously good sense. But I do not think it has any application to a situation, such as the court now faces, in which open land owned by a local authority is regularly used, for various different forms of recreation, by a large number of local residents. The inspector’s assessment did in my opinion amount to an error of law. He misdirected himself as to the significance of perfectly natural behaviour by the local residents.

Rights after registration

39 Mr Laurence made some forceful submissions as to what the position would have been on a double hypothesis: that the disputed land had been registered as a town green, and that it had continued to be let to the golf club after its registration. In those circumstances, he said, the fortunes of the golfers and the local residents would be dramatically reversed: instead of being all “give” by the residents it would be all “take”, to the point at which the golf club would no longer be able to function at all. There was, he said, a massive mismatch between what the residents would have done in order to gain the rights, and what they would be in a position to do after the green had been registered. This lack of symmetry was a reason, he argued, for doubting the soundness of the reasoning on which the appellant’s case rested.

40 These submissions raise two distinct questions. The first is a question of law about the effect of registration of a green. The second is a speculative question of predicting the behaviour of a group of people in an eventuality which cannot now arise.

41 I would spend little time on the second question. Like other members of the court, I am sceptical about the notion that the local residents’ attitude towards the golfers, if the green were to be registered in circumstances where it was still being used by the golf club, would suddenly turn from friendly civility to vindictive triumphalism. Many of them must

have friends or neighbours who are members of the golf club; some are even members themselves. But I would accept that the question of law needs to be considered on the footing that it is at least possible that relations between the two groups might become rather more strained.

42 Here it is necessary to come back to *Oxfordshire* [2006] 2 AC 674. The proceedings in that case were not judicial review proceedings. They were initiated by the registration authority, by a claim form under CPR Pt 8, for guidance on a pending application for registration (the first instance judgment is reported [2004] Ch 253). In the House of Lords both Lord Scott of Foscote and Baroness Hale of Richmond regarded some of the questions raised as unnecessary, academic and inappropriate: see Lord Scott, at paras 91–103, and Baroness Hale, at paras 131–137. The questions to which they most strongly objected were (i) whether, when a green was registered, the relevant inhabitants had legal rights to take recreation on it; and (ii) whether land registered as a green fell within the scope of what had been referred to as the Victorian statutes.

43 Lord Hoffmann, while recognising these concerns, thought that it would be appropriate to answer the questions, because Oxford City Council had a real interest in the question, at para 45:

“But the interest of the city council in these questions is concrete in the most literal sense. They wish to build houses on the land. If registration creates no rights and the land does not fall within the Victorian statutes, they will be able to do so.”

So Lord Hoffmann proceeded to answer them, and Lord Rodger and I expressed general agreement with his opinion.

44 Lord Hoffmann noted, at para 46, that registration is conclusive evidence of the matters registered, but “In the case of a town or village green, the registration states simply that the land is a green. No other information is prescribed”. The position under the Commons Act 2006 will be similar once it has come fully into force. The only rights specifically registrable in respect of a town or village green will be rights of common: see section 2(2) and section 3(4). But section 3(5) enables regulations to be made requiring or permitting other information to be included in the register. Regulations have been made (The Commons Registration (England) Regulations 2008 (SI 2008/1961)) but they do not require or permit specific rights of recreation to be registered. The extensive management provisions in Part 2 of the Act apply to town or village greens only if they are subject to rights of common, and deal with the regulation of rights of common. This seems to be in line with what Lord Hoffmann said in *Oxfordshire* [2006] 2 AC 674, para 48, that although the Commons Registration Act 1965 was intended to be followed by further legislation in relation to the management of commons, it was by no means clear that Parliament contemplated further legislation as to rights over greens.

45 I must set out at some length what Lord Hoffmann said about rights after registration, at paras 49–51:

“49. So one has to look at the provisions about greens in the 1965 Act like those of any other legislation, assuming that Parliament legislated for some practical purpose and was not sending commons commissioners round the country on a useless exercise. If the Act conferred no rights,

A then the registration would have been useless, except perhaps to
geographers, because anyone asserting rights of recreation would still
have to prove them in court. There would have been no point in the
conclusive presumption in section 10. Another possibility is that
B registration conferred such rights as had been proved to support the
registration but no more. So, for example, if land had been registered on
the strength of a custom to have a bonfire on Guy Fawkes Day,
registration would confer the right to have a bonfire but no other rights.
But this too would make the registration virtually useless. Although the
Act provides for the registration of rights of common, it makes no
provision for the registration of rights of recreation. One cannot tell from
the register whether the village green was registered on the basis of an
annual bonfire, a weekly cricket match or daily football and rounders. So
C the establishment of an actual right to use a village green would require
the inhabitants to go behind the registration and prove whatever had once
satisfied the Commons Commissioner that the land should be registered.

“50. In my view, the rational construction of section 10 is that land
registered as a town or village green can be used generally for sports and
pastimes. It seems to me that Parliament must have thought that if the
D land had to be kept available for one form of recreation, it would not
matter a great deal to the owner whether it was used for others as well.
This would be in accordance with the common law, under which proof of
a custom to play one kind of game gave rise to a right to use the land for
other games: see the *Sunningwell* case [2000] 1 AC 335, 357A–C.

“51. This does not mean that the owner is altogether excluded from the
land. He still has the right to use it in any way which does not interfere
E with the recreational rights of the inhabitants. There has to be give and
take on both sides.”

Lord Hoffmann then, at paras 54–57, dealt with the Victorian statutes as
I have already mentioned.

46 Lord Scott (thinking it right to express a limited view on this issue)
disagreed, at para 105:

F “But I do not agree that registration can authorise local inhabitants to
enjoy recreative user of the land that is different in kind from the 20 years’
user that has satisfied the statutory criteria for registration or that would
diminish the ability of the landowner to continue to use the land in the
manner in which he has been able to use the land during that 20-year
period. I do not accept that a tolerant landowner who has allowed the
G local inhabitants to use his grass field for an annual 5 November bonfire
for upwards of 20 years must, after registration, suffer his field to be used
throughout the year for all or any lawful sports and pastimes with the
consequential loss of any meaningful residual use that he could continue
to make of the field.”

H 47 Having reconsidered the general agreement that I expressed in
Oxfordshire, I find that I agree with almost all that Lord Hoffmann said in
the paragraphs that I have quoted. He had already, in *Sunningwell* [2000]
1 AC 335, 357, explained that “sport or pastime” denotes a single composite
class, and recognised that “dog walking and playing with children [are], in
modern life, the kind of informal recreation which may be the main function

of a village green". The only point on which I differ from Lord Hoffmann is the point which Lord Scott picked up in para 105: the notion that a custom to have an annual bonfire on Guy Fawkes Day could be a sufficient basis for registration of a green. Such a right might have been established as a stand-alone custom, but would to my mind be far too sporadic to amount to continuous use for lawful sports and pastimes (quite apart from the fact that most bonfires are now illegal on environmental grounds). Once that special case is eliminated, I see little danger, in normal circumstances, of registration of a green leading to a sudden diversification or intensification of use by local residents. The alleged asymmetry between use before and after registration will in most cases prove to be exaggerated. Golfers and local residents can coexist without much friction even when the latter have established legal rights.

Conclusion

48 Disparaging references are sometimes made to the "village green industry" and to applications for registration being used as a weapon of guerrilla warfare against development of open land. The House of Lords has (both in *Beresford* [2004] 1 AC 889 and *Oxfordshire* [2006] 2 AC 674) expressed some doubt about the extension of town or village green protection to land very different (both in size and appearance) from a traditional village green. However, in the Commons Act 2006 Parliament has made it easier, rather than more difficult, to register a green. There is also the prospect (as Lord Hope of Craighead DPSC mentions in para 56 of his judgment) of further legislation, which might possibly make provision for the management of greens on lines comparable to those proposed for commons in Part 2 of the Commons Act 2006. As it is, district councils have power under section 1 of the Commons Act 1899 to make by-laws for the preservation of order on commons, which are defined (in section 15) as including town and village greens. Even without such regulation, conflicts over competing uses (whether as between the owner and the local residents, or between different interest groups among the local residents) are capable of resolution by the "constant refrain in the law of easements that 'between neighbours there must be give as well as take'": *Gray & Gray, Elements of Land Law*, 5th ed (2009), para 5.2.72, citing Megarry J in *Costagliola v English* (1969) 210 EG 1425, 1431.

49 For these reasons I would allow the appeal and order that the borough council should register the disputed land as a town green under section 1 of the Commons Act 2006 (if then in force in Redcar and Cleveland) or under the applicable transitional provisions.

LORD HOPE OF CRAIGHEAD DPSC

50 This appeal relates to an claim by Kevin Paul Lewis for judicial review of a decision of the General Purposes and Village Greens Committee of Redcar and Cleveland Borough Council on 19 October 2007 to reject an application to register part of the land in Redcar known as Coatham Common as a town or village green under the Commons Act 2006. On 18 July 2008 Sullivan J [2008] EWHC 1813 (Admin) dismissed the application but granted permission to appeal. On 15 January 2009, the Court of Appeal (Laws, Rix and Dyson LJJ) [2009] 1 WLR 1461 dismissed the appeal. The claimant now appeals to this court. The interested party,

- A Persimmon Homes (Teesside) Ltd, seeks to develop the land for housing and leisure activities. It supports the case for the local authority, as it did in the courts below.

51 As Lord Walker of Gestingthorpe JSC has explained, the land is owned by the local authority. Until 2002 it was part of the land that formed the links of the Cleveland Golf Club. It comprised the first and eighteenth holes of the golf course and a practice ground. There were also substantial areas of rough ground beside and between these features. It was also used by the local inhabitants for informal recreation such as walking their dogs, children's games and picnics. They did not interfere with or interrupt play by the golfers. They would wait until the play had passed or until they were waved through by the golfers. The relationship between the golfers and the local inhabitants was cordial. The two activities appear to have coexisted quite happily during this period. The details are set out in the report by Mr Vivian Chapman QC ("the inspector"). He was appointed by the local authority to hold an inquiry following an application by Mr Lewis and a number of other local inhabitants to register an area of land which included the club house as a town or village green under the Commons Registration Act 1965. He was asked to provide a further report following a second application to register the area with which this case is concerned which was made after the 2006 Act came into force. His comments in a series of further opinions on the relationship between the golfers and the local inhabitants confirmed his earlier conclusions that the local inhabitants deferred to the golfers, and that the deferral to golfing use precluded use of the land by the local inhabitants as of right for recreational purposes. The relevant findings have been quoted in full by Lord Walker JSC: see paras 9–11 above.

E 52 On 18 January 2008 these judicial review proceedings were commenced. Sullivan J agreed with Mr Chapman's conclusion that the recreational use of the land was not "as of right" because it deferred to the use of the land by the golf club. Asking himself how the matter would have appeared to the golf club, he said that it would not be reasonable to expect the club to resist the recreational use of the land by local users if their use of the land did not in practice interfere with its use by the golf club: para 41.

F The Court of Appeal [2009] 1 WLR 1461 agreed with that approach: Dyson LJ, para 54; Rix LJ, paras 64–65. Rix LJ said that, if it were otherwise, there would be no way of resolving questions that would subsequently arise, given that registration does not confer qualified or limited rights but the unqualified right to use the land generally for sports and pastimes. He envisaged questions as to whether, if a right of registration were to be assumed, the local inhabitants had a right of walking on the golf greens themselves during play or of playing golf as though they were members of the club itself.

The issues

H 53 As Lord Walker JSC has explained, the question is whether the land ought to have been registered. In an attempt to focus their arguments more precisely, the parties were agreed that it raised the following issues. (1) Where land has been extensively used for lawful sports and pastimes nec vi, nec clam, nec precario for 20 years by the local inhabitants, is it necessary under section 15(4) of the 2006 Act to ask the further question whether it would have appeared to a reasonable landowner that users were

asserting a right to use the land for the lawful sports and pastimes in which they were indulging? (2) If the answer to (1) is “yes”, does the mere fact that local inhabitants did not prevent the playing of golf by walking in front of the ball (or seeking to prevent the playing of strokes by golfers) preclude the use from being “as of right” under section 15(4)? (3) If the answer to (2) is “no”, did the local authority (and the inspector) err in law in concluding that the inhabitants’ use was not “as of right”, given what the inspector described as “overwhelming evidence” that recreational use of the land by local people deferred to the golfing use?

54 This presentation was not, as it turned out, particularly helpful. As counsel recognised, issues (2) and (3) fall to be taken together, as they are both directed to the question of deference. And I agree with Lord Brown of Eaton-under-Heywood JSC that the critical question, which none of these issues addresses, is what are the respective rights of the local inhabitants and the owner of the land once it has been registered. It is a remarkable fact that the statute gives no guidance at all on this issue. In *R (Laing Homes Ltd) v Buckinghamshire County Council* [2004] 1 P & C R 573, paras 27–29, referring to what Carnwath J said in *R v Suffolk County Council, Ex p Steed* (1995) 70 P & C R 487, Sullivan J said that this was not the original intention. The 1965 Act was intended to be a two stage legislative process. As a first step the registers would establish the facts and provide a definitive record of what land was, and was not, common land or a town or village green. In the second stage Parliament would deal with the consequences of registration by defining what rights the public had over the land that had been registered.

55 In *New Windsor Corp v Mellor* [1975] Ch 380, 392, Lord Denning MR said that he hoped that the second stage legislation would not be long delayed. But here we are, 45 years after the passing of the 1965 Act. Parliament has still not said what these rights are. In *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674, para 48 Lord Hoffmann said that, while there were indications that further legislation about rights over common land was in prospect, it was by no means clear that Parliament contemplated further legislation about rights over village greens. It has been left to the courts to try to work this out for themselves. As Lord Hoffmann put in para 49, one has to look at the provisions about greens like those of any other legislation and assume that Parliament legislated for some practical purpose. I think that one must assume too that it was Parliament’s intention that practical common sense would be the best guide to the way the public right was to be exercised once the land had entered the register.

56 In answer to a series of written questions by Lord Greaves, the Parliamentary Under-Secretary of State for the Department for the Environment, Food and Rural Affairs, Lord Davies of Oldham, said that the Government proposes to consult in the spring of 2010 as to whether changes are needed to the existing framework: Hansard (HL) written answers, 15 January 2010, cols 961–964. This initiative appears to have been prompted by a research report which was received by DEFRA into the registration of new town and village greens, which has identified particular concerns as to its use in relation to land which is subject to proposals for residential development. I hope that the opportunity will be taken to look at the consequences of registration as revealed by the developing case law as well as how the registration system itself is working.

A *Previous authority*

57 I agree with Lord Walker JSC that in none of the three decisions of the House of Lords to which he refers (see para 3, above) was it necessary for the House to address the question of deference which lies at the heart of this case. *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335 was concerned with the registration of a glebe which was used predominantly by the villagers for informal recreation. The diocesan board had obtained planning permission to build two houses on part of the glebe, and it objected to registration. But the inspector found that it had been tolerant of harmless public use of the land for informal recreation. In *R (Beresford) v Sunderland City Council* [2004] 1 AC 889 the land was an open, flat area of grass which was used by the local inhabitants for ball games and other lawful pastimes. The council cut the grass from time to time, but it did not use it in any other way that might have interfered with its use by the locals. In *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674, para 125 the land was described by Lord Walker of Gestingthorpe as an overgrown, rubble-strewn, semi-submerged area, sandwiched between the canal and the railway in northwest Oxford—hardly the ideal site to focus close attention on the critical issue that is before us in this case.

58 The only passages in these three cases that might be taken as suggesting that the rights acquired by the local inhabitants would be enlarged over those of the owner once the land had been registered, as Rix LJ assumed would happen in this case, are to be found in Lord Hoffmann's speech in the *Oxfordshire* case. In para 51 he said of the effect of registration: "This does not mean that the owner is altogether excluded from the land. He still has the right to use it in any way which does not interfere with the recreational rights of the inhabitants." In para 59, where he distinguished the *Oxfordshire* case from the decision of the European Court of Human Rights in *JA Pye (Oxford) Ltd v United Kingdom* [2005] 3 EGLR 1, there is a subtle change of language. He said:

"In the present case, first, the owner retains his title to the land and his right to use it in any way which does not prevent its use by the inhabitants for recreation and, secondly, the system of registration under the 1965 Act was introduced to preserve open spaces in the public interest."

I think that the first passage, in which Lord Hoffmann uses the words "interfere with", goes some way to supporting the idea that after registration the rights of the local inhabitants predominate. The second passage, on the other hand, does not. "Preventing" the use of the land for recreation would, of course, defeat the point of registration completely.

59 Lord Scott of Foscote was obviously very troubled in the *Oxfordshire* case by the idea that the public would acquire much broader, more intrusive rights over the land after registration and the management problems that this might give rise to: para 85. But his objections were, as I read them, based on an assumption as to the effect of the registration as a town or village green on places such as a dense wood in which people wandered to pick bluebells or look for mushrooms: para 76. His dissent casts some light on what he thought was at issue in that case. But I do not think that it can be used to elevate what Lord Hoffmann said in para 51 to a ruling on the point which, on the facts of that case, did not arise.

60 The only case which directly addresses the question of deference is *R (Laing Homes Ltd) v Buckinghamshire County Council* [2004] 1 P & CR 573, in which Sullivan J quashed the resolution that the land should be registered. As Dyson LJ observed in the Court of Appeal [2009] 1 WLR 1461, para 30, the concept of deference as a bar to the creation of a new town or village green is Sullivan J's creation. The land in that case consisted of three adjacent fields which Laing Homes Ltd held as part of its land bank. It granted a grazing licence to a farmer, Mr Pennington, who for a few years at the start of the 20-year period kept cattle on the fields until he had to give this up because of problems with members of the public, whose use of the perimeters of the fields resulted in the paths that they had established there being registered as public footpaths. For over half of that period Mr Pennington used the land for taking an annual crop of hay. The question was whether this use of the land, or the growing of any other crop, was inconsistent with the right to use the land for recreation that was contended for by the local inhabitants.

61 After referring to passages in Lord Hoffmann's speech in the *Sunningwell* case [2000] 1 AC 335 about the extent of the user by the public that was needed to establish that the land was being used by them as of right, Sullivan J said [2004] 1 P & CR 573, para 82:

"If the starting point is, 'how would the matter have appeared to Laings?' it would not be reasonable to expect Laings to resist the recreational use of their fields so long as such use did not interfere with their licensee, Mr Pennington's, use of them, for taking an annual hay crop."

In para 84 he said that, so long as the local inhabitants' recreational activities did not interfere with the way in which the owner had chosen to use his land, there would be no suggestion to him that they were exercising or asserting a public right to use it for lawful sports and pastimes. In para 85 he said:

"I do not believe that Parliament could have intended that such a user for sports or pastimes would be 'as of right' for the purposes of section 22 [of the 1965 Act]. It would not be 'as of right', not because of interruption or discontinuity, which might be very slight in terms of numbers of days per year, but because the local inhabitants would have appeared to the landowner to be deferring to his right to use his land (even if he chose to do so for only a few days in the year) for his own purposes."

62 In para 86 he added these words:

"Like the inspector, I have not found this an easy question. Section 12 acknowledges that animals may be grazed on a village green. Rough grazing is not necessarily incompatible with the use of the land for recreational purposes: see *Sunningwell*. If the statutory framework within which section 22(1) was enacted had made provision for low-level activities to coexist with village green type uses, rather than effectively preventing them once such a use has become established, it would have been easier to adopt the inspector's approach, but it did not. I do not consider that using the three fields for recreation in such a manner as not to interfere with Mr Pennington's taking of an annual hay crop for over

A half the 20-year period, should have suggested to Laings that those using the fields believed that they were exercising a public right, which it would have been reasonable to expect Laings to resist.”

63 This passage suggests that Sullivan J was approaching the case on the assumption that registration was inconsistent with the continued use of the land by Mr Pennington for taking the annual hay crop. In other words, registration would bring non-interference to an end. The public right to use the fields for recreational purposes would make it impossible for them to be used for growing hay. His approach has also been taken as indicating that in cases where the land has been used by a significant number of inhabitants for 20 years for recreational purposes *nec vi, nec clam, nec precario*, there is an additional question that must be addressed: would it have appeared to a reasonable landowner that the inhabitants were asserting a right to use the land for the recreational activities in which they were indulging? I am not sure that Sullivan J was really saying that there was an additional question that had to be addressed. But if he was, I would respectfully disagree with him on both points.

The section 15 questions

D 64 The application in this case was made under section 15(4) of the 2006 Act, which provides that a person may apply for registration of land as a town or village green where “a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years” if they ceased to do so before the commencement of that subsection, so long as the application is made within a period of five years beginning with the date of the cessation. The words that I have set out in quotation marks appear in each of subsections (2), (3) and (4) of section 15. The definition of the phrase “town or village green” in section 22(1) of the 1965 Act, as amended by section 98 of the Countryside and Rights of Way Act 2000, has been repeated throughout this section, with the addition of the words “a significant number”.

F 65 The theory on which these provisions are based is known to the common law as prescription: see Lord Hoffmann’s explanation in the *Sunningwell* case [2000] 1 AC 335, 350–351, of the background to the definition of “town or village green” in section 22(1) of the 1965 Act. As the law developed in relation to private rights, the emphasis was on the quality of the user for the 20-year period which would justify recognition of a prescriptive right:

G “It became established that such user had to be, in the Latin phrase, *nec vi, nec clam, nec precario*: not by force, nor stealth, nor the licence of the owner . . . The unifying element in these three vitiating circumstances was that each constituted a reason why it would not have been reasonable to expect the owner to resist the exercise of the right—in the first case, because rights should not be acquired by the use of force, in the second, because the owner would not have known of the user and in the third, because he had consented to the user, but for a limited period. So in *Dalton v Henry Angus & Co* (1881) 6 App Cas 740, 773 Fry J (advising the House of Lords) was able to rationalise the law of prescription as follows: ‘the whole law of prescription and the whole law which

governs the presumption or inference of a grant or covenant rest upon acquiescence’.” A

Section 2 of the Prescription Act 1832 (2 & 3 Will 4, c 71) made it clear that what mattered was the quality of the user during the 20-year period. It had to be by a person “claiming right thereto”. It must have been enjoyed openly and in the manner that a person rightfully entitled would have used it, and not by stealth or by licence: *Bright v Walker* (1834) 1 Cr M & R 211, 219 per Parke B. In *Gardner v Hodgson’s Kingston Brewery Co Ltd* [1903] AC 229, 239 Lord Lindley said that the words “as of right” were intended to have the same meaning as the older expression *nec vi, nec clam, nec precario*. B

66 Referring then to section 1(1) of the Rights of Way Act 1932, Lord Hoffmann said in the *Sunningwell* case [2000] 1 AC 335, 353:

“The words ‘actually enjoyed by the public as of right and without interruption for a full period of 20 years’ are clearly an echo of the words ‘actually enjoyed by any person claiming right thereto without interruption for the full period of 20 years’ in section 2 of the 1832 Act. Introducing the Bill into the House of Lords (HL Debates), 7 June 1932, col 637, Lord Buckmaster said that the purpose was to assimilate the law of public rights of way to that of private rights of way. It therefore seems safe to assume that ‘as of right’ in the 1932 Act was intended to have the same meaning as those words in section 5 of the 1832 Act and the words ‘claiming right thereto’ in section 2 of that Act.” C D

He concluded, at p 354, that there was no reason to believe that “as of right” in section 22(1) of the 1965 Act was intended to mean anything different from what those words meant in the 1832 and 1932 Acts. The same can be said of the meaning of those words in section 15 of the 2006 Act. E

67 In the light of that description it is, I think, possible to analyse the structure of section 15(4) in this way. The first question to be addressed is the quality of the user during the 20-year period. It must have been by a significant number of the inhabitants. They must have been indulging in lawful sports and pastimes on the land. The word “lawful” indicates that they must not be such as will be likely to cause injury or damage to the owner’s property: see *Fitch v Fitch* (1797) 2 Esp 543. And they must have been doing so “as of right”: that is to say, openly and in the manner that a person rightfully entitled would have used it. If the user for at least 20 years was of such amount and in such manner as would reasonably be regarded as being the assertion of a public right (see *R (Beresford) v Sunderland City Council* [2004] 1 AC 889, paras 6, 77), the owner will be taken to have acquiesced in it—unless he can claim that one of the three vitiating circumstances applied in his case. If he does, the second question is whether that claim can be made out. Once the second question is out of the way—either because it has not been asked, or because it has been answered against the owner—that is an end of the matter. There is no third question. The answer to the first issue (see para 4, above) is: No. F G

68 Mr Charles George QC for the claimant said that there was only one simple test: was the use caught by any of the three vitiating circumstances? Mr George Laurence QC confirmed that it was common ground that the use of the land for recreation in this case was *nec vi, nec clam, nec precario*, but he said that this did not exhaust the issue. The unifying principle was one of H

A reasonableness. He said that, if it was not reasonable to expect the owner to resist what the users were doing, no harm could come to the owner from his omission to resist or complain. In this case, as the Inspector held, the local inhabitants overwhelmingly deferred to the golfers. As Dyson LJ said in the Court of Appeal [2009] 1 WLR 1461, paras 48–49, the user of the local inhabitants was extensive and frequent, but so too was the use by the golfers: the greater the degree of deference, the less likely it was that it would appear to the reasonable owner that the locals were asserting any right to use the land.

69 I agree with Mr George that all the authorities show that there are only three vitiating circumstances: *Gardner v Hodgson's Kingston Brewery Co Ltd* [1903] AC 229, 238, per Lord Davey, p 239, per Lord Lindley; the *Sunningwell* case [2000] 1 AC 335, p 350, per Lord Hoffmann; the *Beresford* case [2004] 1 AC 889, para 3, per Lord Bingham of Cornhill, para 16, per Lord Scott of Foscote, para 55, per Lord Rodger of Earlsferry; *Riddall & Trevelyan, Rights of Way*, 4th ed (2007), pp 41, 47. There is no support there for the proposition that there is an additional requirement. But that does not answer Mr Laurence's point, which was really and quite properly directed to the first question as to the quality of the user that is relied on. That, as has been said, is the critical question in this case.

Deference

70 In para 175 of his report the inspector said that he found that the relationship between the golfers and the local recreational users was generally cordial. This was because local people (with the exception of Squadron Leader Kime) did not materially interfere with the use of the land for playing golf. They would wait until the play had passed or until they had been waved on by the golfers. When local people did inadvertently impede play, the golfers' shout of "fore" was enough to warn them to clear the course. The Inspector asked himself whether this indicated deference to the golfers. Following what Sullivan J said in the *Laing* case [2004] 1 P & CR 573, para 85, he understood that the use would not be "as of right" if the local inhabitants would have appeared to the owner to be deferring to his right to use his land for his own purposes. That approach is based on the judge's assumption, which the Court of Appeal endorsed, that the effect of registration would be to enlarge the right of the local inhabitants in a way that would effectively prevent the golfers from using the land for their own purposes.

71 I do not find anything in the words used in section 15(4) of the 2006 Act that supports that approach. On the contrary, the theme that runs right through all of the law on private and public rights of way and other similar rights is that of an equivalence between the user that is relied on to establish the right on the one hand and the way the right may be exercised once it has been established on the other. In *Dalton v Henry Angus & Co* (1881) 6 App Cas 740, 774 Fry J, having stated at p 773 that the whole law of prescription rests upon acquiescence, said that it involved among other things the abstinence by the owner from any interference with the act relied on "for such a length of time as renders it reasonable for the courts to say that he shall not afterwards interfere to stop *the act* being done" (my emphasis). In other words, one looks to the acts that have been acquiesced in. It is those acts, and not their enlargement in a way that makes them more

intrusive and objectionable, that he afterwards cannot interfere to stop. This is the basis for the familiar rule that a person who has established by prescriptive use a right to use a way as a footpath cannot, without more, use it as a bridleway or for the passage of vehicles.

72 In *White v Taylor (No 2)* [1969] 1 Ch 160, 192 Buckley LJ said that the user must be shown to have been “of such a character, degree and frequency as to indicate an assertion by the claimant of a continuous right, and of a right of the measure of the right claimed” (again, my emphasis). That was a case in which it was claimed, among other things, that sheep rights had been established by prescription at common law. But I think that this observation is consistent with the approach that is taken to prescriptive rights generally. It has to be recognised, of course, that once the right to use the land for lawful sports and pastimes is established and the land has been registered its use by the local inhabitants for those purposes is not restricted to the sports or pastimes that were indulged in during the 20-year period. Lord Hoffmann said in the *Oxfordshire* case [2006] 2 AC 674, para 50, that the rational construction of section 10 of the 1965 Act, which did not require the rights of recreation as such to be registered, was that land registered as a town or village green can be used generally for sports and pastimes:

“It seems to me that Parliament must have thought that if the land had to be kept available for one form of recreation, it would not matter a great deal to the owner whether it was used for others as well. This would be in accordance with the common law, under which proof of a custom to play one kind of game gave rise to a right to use the land for other games: see the *Sunningwell* case [2000] 1 AC 335, 357A–C.”

As he put in the passage referred to in the *Sunningwell* case [2000] 1 AC 335, as long as the activity can properly be called a sport or pastime, it falls within the composite class. This approach indicates that, while the principle of equivalence tells one in general terms what the land may be used for, there may be some asymmetry as to the manner of its use for that purpose before and after it has been registered. But it does not follow that, where the use for recreation has coexisted with the owner’s use of the land during the 20-year period, the relationship of coexistence is ended when registration takes place.

73 In *Fitch v Fitch* 2 Esp 543, where the inhabitants had the right to play lawful games and pastimes on the plaintiff’s close which he used for growing grass for hay, the jury were told that the rights of both parties were distinct and might coexist together. But the inhabitants could not use the close in the exercise of their right in a way that was not fair or was improper. Referring to that case in the *Oxfordshire* case [2006] 2 AC 674, para 51, Lord Hoffmann said that there had to be give and take on both sides. Mr Stewart Smith, following Mr Laurence, did not agree. He said that it was fundamental to his argument that the concept of give and take had no place in rights of the kind that were established by registration under the 2006 Act. He submitted that these rights were unqualified and unlimited. He said that *Fitch v Fitch* did not support the idea of give and take, and he sought to contrast rights of the kind that follow registration with those of the kind discussed in *Mercer v Woodgate* (1869) LR 5 QB 26, where there was dedication of the right of way to the public subject to the owner’s right to

A plough the soil in the due course of husbandry. Cockburn CJ said, at p 30, that there would be great injustice and hardship to hold that there had been an absolute dedication where the owner had clearly only intended a limited dedication. Blackburn J said, at p 31, that he could see no objection in law to such a partial dedication.

B 74 I agree that care needs to be taken in drawing conclusions from cases about the creation of a right of way by dedication. But the concepts of partial dedication and the coexistence of rights on both sides appear to me to be capable of being applied generally. Lord Hoffmann would not have mentioned give and take in the *Oxfordshire* case [2006] 2 AC 674 if he had thought that it had no application to town and village greens. If it were otherwise it would in practice be very difficult, if not impossible, to obtain registration in cases where the owner is putting his land to some use other than, perhaps, growing and cutting grass for hay or silage. There being no indication in the statute to the contrary, I would apply these concepts to the rights created by registration as a town or village green too.

C 75 Where then does this leave deference? Its origin lies in the idea that, once registration takes place, the landowner cannot prevent use of the land in the exercise of the public right which interferes with his use of it: the *Laing* case [2004] 1 P & CR 573, para 86. So it would be reasonable to expect him to resist use of his land by the local inhabitants if there was reason to believe that his continued use of the land would be interfered with when the right was established. Deference to his use of it during the 20-year period would indicate to the reasonable landowner that there was no reason to resist or object to what was taking place. But once one accepts, as I would do, that the rights on either side can coexist after registration subject to give and take on both sides, the part that deference has to play in determining whether the local inhabitants indulged in lawful sports or pastimes as of right takes on an entirely different aspect. The question is whether the user by the public was of such amount and in such manner as would reasonably be regarded as being the assertion of a public right. Deference by the public to what the owner does on his land may be taken as an indication that the two uses can in practice coexist.

F 76 Of course, the position may be that the two uses cannot sensibly coexist at all. But it would be wrong to assume, as the inspector did in this case, that deference to the owner's activities, even if it is as he put it overwhelming, is inconsistent with the assertion by the public to use of the land as of right for lawful sports and pastimes. It is simply attributable to an acceptance that where two or more rights coexist over the same land there may be occasions when they cannot practically be enjoyed simultaneously: Rowena Meager, "Deference & user as of right: an unholy alliance", *Rights of Way Law Review*, October 2009, section 15.3, pp 147, 152. If any of the local inhabitants were to exercise their rights by way of all take and no give in a way to which legitimate objection could be taken by the landowner they could, no doubt, be restrained by an injunction: Philip Petchey, "*R (Lewis) v Redcar and Cleveland Borough Council*", *Rights of Way Law Review*, March 2009, section 15.3, pp 139, 143. In my opinion the inspector misdirected himself on this point. The question then is whether the council's decision which was based on his recommendation can be allowed to stand if the facts are approached in the right way.

77 The facts of this case, as described by the inspector, show that the local inhabitants (except for Squadron Leader Kime) were behaving when they were using the land for sports and pastimes in the way people normally behave when they are exercising public rights over land that is also used as a golf course. They recognise that golfers have as much right to use the land for playing golf as they do for their sports and pastimes. Courtesy and common sense dictates that they interfere with the golfer's progress over the course as little as possible. There will be periods of the day, such as early in the morning or late in the evening, when the golfers are not yet out or have all gone home. During such periods the locals can go where they like without causing inconvenience to golfers. When golf is being played gaps between one group of players and another provide ample opportunities for crossing the fairway while jogging or dog-walking. Periods of waiting for the opportunity are usually short and rarely inconvenience the casual walker, Rambler or bird-watcher. I cannot find anything in the inspector's description of what happened in this case that was out of the ordinary. Nor do I find anything that was inconsistent with the use of the land as of right for lawful sports and pastimes.

Conclusion

78 For these reasons, and those given by everyone else with which I agree, I would allow the appeal and make the order that has been proposed by Lord Walker JSC.

LORD RODGER OF EARLSFERRY JSC

79 I agree with the judgment of Lord Walker of Gestingthorpe JSC. In view of the importance of the issue, I add some observations of my own.

80 As Lord Walker JSC has explained, until 2002 an area of land ("the disputed land") in the Coatham district of Redcar formed part of a golf course on which members of the Cleveland Golf Club played. The club were tenants of the council, which owned the land. Then, in 2002, the course was reconfigured and the club gave up its tenancy of the disputed land. The following year, the council entered into an agreement with Persimmon Homes (Teesside) Ltd for a mixed residential and leisure development on an area of land of which the disputed land formed an important part.

81 In March 2005 a group of residents applied to have the disputed land registered as a village green. In March 2006 the inspector recommended against registration. In June 2007 Mr Lewis and his fellow applicants put in a fresh application under section 15 of the Commons Act 2006. Again the inspector recommended against registration and the matter has now led to the present appeal.

82 This sequence—a proposal to develop an area of open land, followed by an application to register the land as a village green in order to stop the development—is very familiar. The House of Lords dealt with three such cases in the space of a few years and newspaper articles refer to many other examples. But the fact that the disputed land was used by the golf club during the period of 20 years which the applicants rely on to justify its registration as a village green has prompted much heart-searching as to what the position would have been if the land had been registered as a village green while the club was still in occupation and its members were still wanting to play on the land. Would registration have enabled the dog

A walkers of Redcar to take over and, in effect, extinguish the rights of the golfers to play on that part of their course?

83 However interesting the point of law may be, in a case like this the issue is more than just a little unreal. The fact of the matter is that, if the golf club had remained as tenants after 2002, the golfers would have continued to hack their way over the disputed area and the dog walkers would have continued to make their way across the course. It is a fair bet that in that

B happy state of affairs no one would have dreamed of applying to have the land registered as a village green. It was only the prospect of the development on this open space, when the golf club was no longer using it, which prompted the application for registration with a view to stopping the development in its tracks. So, in the real world, the dog walkers and golfers will never actually have to coexist on the disputed land if it is registered as a

C village green.

84 If, however, in some imaginary parallel universe, the two groups had been required to coexist after registration, then, like Lord Walker JSC, I find it hard to imagine that there would, in practice, have been many problems. The pre-existing situation suited the local inhabitants well enough: doubtless, some of them were themselves members of the club and played on the land; in any event, the golf club must have kept the grass cut and the area looking presentable. If the inhabitants had previously shown no inclination to break out the croquet hoops, or to set up butts or cricket stumps or to dance around a maypole on the disputed land, it seems unlikely that registration would have suddenly brought on the urge. Indeed, too many developments of these kinds would probably have upset the dog walkers almost as much as the golfers. In all likelihood, therefore, things would have gone on much as before, with a bit of give and take on both sides. I would therefore particularly associate myself with what Lord Walker JSC says in para 47 of his judgment.

E

85 Under section 15 of the Commons Act 2006 registration of land as a village green requires that a significant number of the inhabitants of any locality, or of any neighbourhood in a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years. Since

F *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335 it has been settled law that dog walking and playing with children count as lawful sports and pastimes. Since both activities can and do take place on almost any and every open space near centres of population, the scope for applying to register land as a village green is correspondingly wide. Owners of land are taken to be aware of this chapter of the law and of the

G need to take appropriate preventive steps if they see a risk of circumstances arising in which an application could be made and their land become registered as a village green. If they fail to do so, they are treated as having acquiesced in the inhabitants indulging in sports and pastimes on their land “as of right”.

86 Here the evidence shows that, as far back as living memory goes, many local inhabitants used the disputed land for informal recreation such as dog walking and children’s play. But the courts below have held that they were not doing so “as of right”.

H

87 The basic meaning of that phrase is not in doubt. In *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335 Lord Hoffmann showed that the expression “as of right” in the Commons

Registration Act 1965 was to be construed as meaning nec vi, nec clam, nec precario. The parties agree that the position must be the same under the Commons Act 2006. The Latin words need to be interpreted, however. Their sense is perhaps best captured by putting the point more positively: the user must be peaceable, open and not based on any licence from the owner of the land.

88 The opposite of “peaceable” user is user which is, to use the Latin expression, vi. But it would be wrong to suppose that user is “vi” only where it is gained by employing some kind of physical force against the owner. In Roman law, where the expression originated, in the relevant contexts vis was certainly not confined to physical force. It was enough if the person concerned had done something which he was not entitled to do after the owner had told him not to do it. In those circumstances what he did was done vi. See, for instance, D.43.24.1.5-9, Ulpian 70 ad edictum, commenting on the word as used in the interdict quod vi aut clam.

89 English law has interpreted the expression in much the same way. For instance, in *Sturges v Bridgman* (1879) 11 ChD 852, 863, where the defendant claimed to have established an easement to make noise and vibration, Thesiger LJ said:

“Consent or acquiescence of the owner of the servient tenement lies at the root of prescription, and of the fiction of a lost grant, and hence the acts or user, which go to the proof of either the one or the other, must be, in the language of the civil law, nec vi nec clam nec precario; for a man cannot, as a general rule, be said to consent to or acquiesce in the acquisition by his neighbour of an easement through an enjoyment of which he has no knowledge, actual or constructive, or *which he contests and endeavours to interrupt*, or which he temporarily licenses.” (Emphasis added.)

If the use continues despite the neighbour’s protests and attempts to interrupt it, it is treated as being vi and so does not give rise to any right against him. Similarly, in *Dalton v Henry Angus & Co* (1881) 6 App Cas 740, 786, Bowen J equated user nec vi with peaceable user and commented that a neighbour,

“without actual interruption of the user, ought perhaps, on principle, to be enabled by continuous and unmistakeable protests to destroy its peaceable character, and so to annul one of the conditions upon which the presumption of right is raised: *Eaton v Swansea Waterworks Co* (1851) 17 QB 267.”

The contrary view, that the only manner in which enjoyment of window lights could be defeated before the Prescription Act was by physical obstruction of the light, “was not the doctrine of the civil law, nor the interpretation which it placed upon the term ‘non vi’ . . .”

90 In short, as *Gale on Easements*, 18th ed (2008), para 4-84, suggests, user is only peaceable (nec vi) if it is neither violent nor contentious.

91 In *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335, 350-351, Lord Hoffmann found that the unifying element in the three vitiating circumstances was that each constituted a reason why it would not have been reasonable to expect the owner to resist the exercise of the right. In the case of nec vi he said this was “because rights

A should not be acquired by the use of force”. If, by “force”, Lord Hoffmann meant only physical force, then I would respectfully disagree. Moreover, some resistance by the owner is an aspect of many cases where use is vi. Assuming, therefore, that there can be vis where the use is contentious, a perfectly adequate unifying element in the three vitiating circumstances is that they are all situations where it would be unacceptable for someone to acquire rights against the owner.

B 92 If, then, the inhabitants’ use of land is to give rise to the possibility of an application being made for registration of a village green, it must have been peaceable and non-contentious. This is at least part of the reason why, as Lord Jauncey of Tullichettle observed, in the context of a claim to a public right of way, in *Cumbernauld and Kilsyth District Council v Dollar Land (Cumbernauld) Ltd* 1993 SC (HL) 44, 47, “There is no principle of law which requires that there be conflict between the interest of users and those of a proprietor”.

C 93 In this case the local inhabitants’ use of the disputed land for recreation was peaceable, open and not based on any licence from the council or the golf club. So, prima facie, the inhabitants did everything that was necessary to bring home to the council, if they were reasonably alert, that the inhabitants were using the land for recreation “as of right”.

D 94 But the council argue that, since there were competing interests, the inhabitants’ use of the land was peaceable only because they “overwhelmingly” deferred to the golfers’ simultaneous use of the same land. Had they not done so, it would have become contentious. But, because they routinely deferred to the golfers, the inhabitants did not do “sufficient to bring home to the reasonable owner of the application site that they were asserting a right to use it”: Dyson LJ [2009] 1 WLR 1461, para 49. In other words, the reasonable owner of the disputed land would have inferred from the behaviour of the inhabitants that they were not asserting a right over the land—and so would have seen no need to take any steps to prevent such a right accruing.

E 95 On closer examination, the starting point for this argument must be that the owner of the land is entitled to infer from the inhabitants’ behaviour in deferring to the golfers that they are aware of the legal position. But that starting point is inherently implausible. To adapt what Lord Sands said in connexion with a public right of way in *Rhins District Committee of Wigtownshire County Council v Cuninghame* 1917 2 SLT 169, 172, people walk their dogs or play with their children on the disputed land because they have been accustomed to see others doing so without objection. The great majority know nothing about the legal character of their right to do so and never address their minds to the matter. Moreover, to draw an inference based on the premise that the inhabitants are aware of the legal position is hard to reconcile with the decision in *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335, 355–356, that the subjective views of the inhabitants as to their right to indulge in sports and pastimes on the land are irrelevant. It would therefore have been far from reasonable for the council to infer that the inhabitants’ behaviour towards the golfers was based on some understanding of the legal position. It would have been equally unreasonable for the council to go further and conclude that the inhabitants were deferring to the golfers because of a conscious

decision on their part to respect what they perceived to be the superior rights of the owners of the land. A

96 Such a conclusion might, just conceivably, have been plausible and legitimate if there had been no other explanation for the inhabitants' behaviour. But that is far from so. The local inhabitants may well have deferred to the golfers because they enjoyed watching the occasional skilful shot or were amused by the more frequent duff shots, or simply because they were polite and did not wish to disturb the golfers who—experience shows—almost invariably take their game very seriously indeed. A reasonable landowner would realise that any of these motives was a more plausible explanation for the inhabitants' deference to the golfers than some supposed unwillingness to go against a legal right which they acknowledged to be superior. In my view the inspector misdirected himself on this aspect of the case. B

97 I would accordingly allow the appeal and make the order proposed by Lord Walker JSC. I confess that I view the outcome with little enthusiasm. The idea that this land should be classified and registered as a village green, when it was really just an open space that formed part of a golf course, is unattractive, to say the least. It is hard to imagine that those who devised the registration system ever contemplated that it would produce such a result. But, given the established case law and given also that Parliament has not amended the law despite the known problems, the result is unavoidable. C

LORD BROWN OF EATON-UNDER-HEYWOOD JSC

98 I would formulate the critical question for the court's determination on this appeal very differently from any of those identified in the statement of facts and issues. The critical question to my mind is what are the respective rights of the landowner ("the owner") and the local inhabitants ("the locals") over land once it is registered as a town or village green? D

99 Take the facts of this case, as already sufficiently recounted by other members of the court, but assume that the land here in question, instead of becoming vacant in 2002 and subject now to development proposals, remained in use by the owner (as for convenience I shall call the Cleveland Golf Club, the actual owner's licensee) as the first and eighteenth holes (and practice green) of their golf course. Suppose then that the local inhabitants, having themselves made such use of the land as the inspector records, "deferring" to the golfers in the way he describes, successfully applied for its registration as a town green, what then would be the consequences with regard to the owner's own continuing rights? Would the owner remain entitled to use the land for golf with the locals continuing to "defer" to the golfers? Or would the balance shift entirely, the locals' rights being substantially enlarged by registration, the owner's effectively extinguished? E

100 So far from this question begging that as to the right to registration (the ultimate question at issue here), it seems to me one which necessarily should be resolved before it can sensibly be decided what must be established in order to have the land registered. Indeed, I may as well say at once that, were it the law that, upon registration, the owner's continuing right to use his land as he has been doing becomes subordinated to the locals' rights to use the entirety of the land for whatever lawful sports and pastimes they wish, however incompatibly with the owner continuing in his, I would hold F

A that more is required to be established by the locals merely than use of the land for the stipulated period *nec vi nec clam nec precario*. If, however, as I would prefer to conclude, the effect of registration is rather to entrench the previously assumed rights of the locals, precluding the owner from thereafter diminishing or eliminating such rights but not at the expense of the owner's own continuing entitlement to use the land as he has been doing,
 B then I would hold that no more is needed to justify registration than what, by common consent, is agreed to have been established by the locals in the present case.

101 This is not merely because in my opinion no other approach would meet the merits of the case. Also it is because, to my mind, on the proper construction of section 15 of the Commons Act 2006, the only consequence of registration of land as a green is that the locals gain the legal right to
 C continue to "indulge" in lawful sports and pastimes upon it (which previously they have done merely as *if* of right)—no more and no less. To the extent that the owner's own previous use of the land prevented their indulgence in such activities in the past, they remain restricted in their future use of the land. The owner's previous use *ex-hypothesi* would not have been such as to have prevented the locals from satisfying the requirements for
 D registration of the land as a green. No more should the continuance of the owner's use be regarded as incompatible with the land's future use as a green. Of course, in so far as future use by the locals would *not* be incompatible with the owner continuing in his previous use of the land, the locals can change, or indeed increase, their use of the land; they are not confined to the same "lawful sports and pastimes", the same recreational use as they had previously enjoyed. But they cannot disturb the owner so long as
 E he wishes only to continue in his own use of the land.

102 Is there, then, anything in the case law which precludes our deciding, as I have already indicated I would prefer to decide, that registration does not carry with it a right in future to use the land inconsistently with such use as the owner himself has been making and wishes to continue making of it? The respondents here urge that the decision
 F of the House of Lords in *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674 is just such a case. They so submit notwithstanding that the land there was disused scrubland of which the owner made no use whatever so that no question arose there as to possibly conflicting uses or the respective rights of owners and locals following registration. For my part I simply cannot regard the *Oxfordshire* case as having decided the particular
 G question I am addressing here. The respondents rely on passages in Lord Hoffmann's speech such as that, following registration, "[the owner] still has the right to use it in any way which does not interfere with the recreational rights of the inhabitants" (para 51) and "the owner retains his title to the land and his right to use it in any way which does not prevent its use by the inhabitants for recreation": para 59. To my mind, however, these are not
 H inconsistent with the position which I have suggested arises on registration and, indeed, (also at para 51) Lord Hoffmann states: "There has to be give and take on both sides."

103 True it is that, in a partially dissenting opinion, Lord Scott of Foscote, at para 105, himself appears to have understood the other members of the committee to have decided that registration of land as a green

“bring[s] about a diminution of the landowner’s property rights, not simply by establishing the local inhabitants’ right to go on doing what they had been doing for the last 20 years but by depriving the landowner of the right to go on doing what he has been doing for the last 20 years.”

Lord Scott did

“not agree [inferentially, with the majority view] that registration can authorise local inhabitants to enjoy recreative user of the land that is different in kind from the 20 years’ user that has satisfied the statutory criteria for registration or that would diminish the ability of the landowner to continue to use the land in the manner in which he had been able to use the land during that 20-year period . . . [or] that a tolerant landowner who has allowed the local inhabitants to use his grass field for an annual 5 November bonfire for upwards of 20 years must, after registration, suffer his field to be used throughout the year for all or any lawful sports and pastimes with the consequential loss of any meaningful residual use that he could continue to make of the field.”

That, however, was in the context of Lord Scott’s view, at para 106, that registration of the land there in question would (or at least should) entitle the locals only to

“recreative rights of user . . . commensurate with the nature of the user that had led to that result and would not necessarily extend to the right to use the land for all or any lawful sports or pastimes [for instance, clay pigeon shooting or archery contests]”

It is important to note, moreover, that all of this was concerned with the first of the ten issues before the House as to which it was held (per the headnote) that:

“registration gave rise to rights for the relevant inhabitants to indulge in lawful sports and pastimes, such rights extending (Lord Scott of Foscote dissenting) to sports and pastimes generally and not merely that use which had been the basis for registration, the landowner retaining the right to use the land in any way which did not interfere with those rights.”

104 I repeat, the position arising on registration at a time when both the owner and the locals are using land in theoretically conflicting ways but in fact harmoniously simply did not arise in the *Oxfordshire* case and I for my part would decline to treat that case as if it has decided how such an issue should be resolved.

105 I would, therefore, hold that in this different situation the owner remains entitled to continue his use of the land as before. If, of course, as in the *Oxfordshire* case itself, he has done nothing with his land, he cannot complain that upon registration the locals gain full and unqualified recreational rights over it. But that is not the position I am considering here.

106 In short, on the facts of this case, had the use of the land as part of a golf course continued, the locals would in my opinion have had to continue “deferring” to the golfers. By this I understand the inspector to have meant no more than that the locals (with the single exception of Squadron Leader Kime) recognised the golfers’ rights to play (in this sense only the locals “overwhelmingly deferred to golfing use”), both locals and golfers sensibly

- A respecting the use being made of the land by the other, neither being seriously inconvenienced by the other, sometimes the locals waiting for the golfers to play before themselves crossing, sometimes the golfers waiting for the walkers to cross before playing. It is not unique for golf courses to embrace at least some common land and there are innumerable courses crossed by public footpaths. Both walkers and golfers are generally sensible and civilised people and common courtesy dictates how to behave.
- B Harmonious coexistence is in practice easily achievable. For my part, and in the light of my own experience both as a golfer and a walker for over six decades, I do not read the inspector's findings as indicating (to quote Sullivan J) [2008] EWHC 1813 at [40] "that there was overwhelmingly 'give' on the part of the local users and 'take' on the part of the golfers".

- C 107 This being so I see no good reason whatever to superimpose upon the conventional tripartite test for the registration of land which has been extensively used by local inhabitants for recreational purposes a further requirement that it would appear to a reasonable landowner that the users were asserting a right to use the land for the lawful sports and pastimes in which they were indulging. As Lord Walker of Gestingthorpe JSC has explained, there is nothing in the extensive jurisprudence on this subject to compel the imposition of any such additional test. Rather, as Lord Hope of
- D Craighead DPSC, Lord Walker and Lord Kerr of Tonaghmore JJSC make plain, the focus must always be on the way the land has been used by the locals and, above all, the quality of that user.

108 I too, therefore, would allow this appeal.

LORD KERR OF TONAGHMORE JSC

- E 109 For the reasons given by Lord Hope of Craighead DPSC, Lord Rodger of Earlsferry, Lord Walker of Gestingthorpe and Lord Brown of Eaton-under-Heywood JJSC with all of which I agree, I too consider that this appeal should be allowed. I venture to offer a few words of my own because my conclusion that the appeal should be allowed represents a change from the view that I initially held and because I can well understand why the Court of Appeal and Sullivan J dismissed the claim for judicial
- F review.

- 110 The critical question in this case centres on the meaning to be given to the words "as of right" in section 15 of the Commons Act 2006. It is not possible to give a literal interpretation to the words since, clearly, the right cannot vest in the local inhabitants until the period of 20 years has elapsed. They cannot be considered to have indulged in sports and pastimes by dint of
- G a right until the right has come to fruition: see Lord Bingham of Cornhill in *R (Beresford) v Sunderland City Council* [2004] 1 AC 889, para 3. It is also clear that they do not need to believe that they have a right: see below. As Lord Walker of Gestingthorpe said in the *Beresford* case, at para 72, it has sometimes been suggested that the meaning of the statutory formula is closer to "as if of right": see, for instance, Lord Cowie in *Cumbernauld and Kilsyth District Council v Dollar Land (Cumbernauld) Ltd* 1992 SLT 1035, 1043.

- H 111 Using this formulation, the question is what does "as if of right" mean. Does it simply mean openly indulging in the pastimes etc without force or under licence or does it connote something more? Clearly, it cannot be construed to mean "as if they believed they had the right". The House of Lords so held in *R v Oxfordshire County Council, Ex p Sunningwell Parish*

Council [2000] 1 AC 335. Does it mean that they *acted* as if they had the right? If so, how is that to be judged? Does it mean that they gave every indication that they had the right to indulge in the pastimes and sports? According to Mr George QC, the only exception to the tripartite test arises where the users expressly represent that they are not asserting any right at all. In those circumstances, according to him, they are either benefitting from the implied permission of the owner or they are covertly allowing the necessary period to elapse in which case they fall foul of the requirement that the use of the lands should not be secret.

112 The question that has troubled me is, “What if the inhabitants’ engagement in the pastimes and sports is not on foot of an express representation that they are not asserting a right but on the basis of an unspoken understanding by all concerned that they are not doing so?” Is there a reason why, as a matter of principle, there should be any different legal outcome? It appears to me that there is none. If the owner of the lands and those who recreate on them share the appreciation that no right is being asserted, then no right is acquired. Therefore, as Lord Hope DPSC has said (in para 69 of his judgment), one must focus on the manner in which the local inhabitants have used the land or, as he has put it, “the quality of the user that is relied on”.

113 The use of the word “deferring” in the context of the inhabitants’ use of lands is potentially misleading. In common parlance “deferring to an owner’s use of his lands” can easily be understood to mean no more than the ordinary courteous and civilised acknowledgement of the entitlement of the owner to make use of the lands. Such civility does not necessarily import an acceptance of any lack of entitlement on the part of the users to continue to indulge their recreations with a view to the acquisition of a right under section 15. But if deference takes the form of acceptance that the users are not embarked on a process of accumulating the necessary number of years of use of the lands or if it evinces an intention not to embark on such a process, this must surely have significance in relation to the question whether the inhabitants have indulged in the activities “as of right”.

114 It is for this reason in particular that I am in emphatic agreement with Lord Hope DPSC in his view that one must focus on the way in which the lands have been used by the inhabitants. Have they used them as if they had the right to use them? This question does not require any examination of whether they believed that they had the right. That is irrelevant. The question is whether they acted in a way that was comparable to the exercise of an existing right? Posed in that way, one can understand why the Court of Appeal considered that the examination of the relevant question partook of an inquiry as to the outward appearance created by the use of the lands by the inhabitants. On that basis also one can recognise the force of Mr Laurence QC’s argument that it was necessary to show not only that the lands had been used *nec vi*, *nec clam*, *nec precario* but also that it was reasonable to expect the landowner to resist the use of the land by the local inhabitants. The essential underpinning of both these assertions, however, was the view that the registration of the lands as a village or town green had the inexorable effect of enlargement of the inhabitants’ rights and the commensurate diminution of the right of the owner to maintain his pre-registration level of use, if that interfered with the inhabitants’ extended use of the lands.

- A 115 For the reasons that Lord Hope DPSC and Lord Walker JSC have given, the view that this was the effect of the relevant authorities in this area may now be discounted. For my part, I find it unsurprising that this view formerly held sway. Mr Laurence (without direct demur from Mr George) informed us that it was the universal opinion of all who practised in this field that the inevitable consequence of the decision in *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674 was that local inhabitants
- B acquired unrestricted rights of recreation after registration. Passages from the speech of Lord Hoffmann in that case—particularly at para 51—appeared to lend support for the notion that general, unrestricted rights of recreation over the entire extent of the lands followed upon registration. And the speech of Lord Scott of Foscote certainly seemed to imply that he apprehended that this was the outcome of the decision by the majority.
- C Whatever may have been the position previously, however, it is now clear that, where it is feasible, co-operative, mutually respecting uses will endure after the registration of the green. Where the lands have been used by both the inhabitants and the owner over the pre-registration period, the breadth of the historical user will be, if not exactly equivalent to, at least approximate to that which will accrue after registration.
- D 116 On that basis, I am content to accept and agree with the judgments of Lord Hope DPSC, Lord Walker and Lord Brown JJSC that no overarching requirement concerning the outward appearance of the manner in which the local inhabitants used the land is to be imported into the tripartite test. The inhabitants must have used it as if of right but that requirement is satisfied if the use has been open in the sense that they have used it as one would expect those who had the right to do so would have used it; that the use of the lands
- E did not take place in secret; and that it was not on foot of permission from the owner. If the use of the lands has taken place in such circumstances, it is unnecessary to inquire further as to whether it would be reasonable for the owner to resist the local inhabitants' use of the lands. Put simply, if confronted by such use over a period of 20 years, it is ipso facto reasonable to expect an owner to resist or restrict the use if he wishes to avoid the possibility of registration.
- F

Appeal allowed.
Local authority to register disputed
land as town green.
Parties to make written submissions
on costs.

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 Wright and another v Secretary of State for Environment, Food and Rural Affairs

Overview | [2016] EWHC 1053 (Admin), | [2016] All ER (D) 52 (May)

Wright and another v Secretary of State for Environment, Food and Rural Affairs [2016] EWHC 1053 (Admin)

Queen's Bench Division, Planning Court

Ouseley J

6 May 2016

Judgment

George Laurence QC and Claire Staddon (instructed by **JWK Solicitors**) for the **Claimants**

Tim Buley (instructed by **the Government Legal Department**) for the **Defendant**

Hearing dates: 26 April 2016

Approved Judgment

MR JUSTICE OUSELEY :

1. The Claimants, as trustees, own Burntbarrow Plantation, a 100 acre wood on the outskirts of the village of Storth in Cumbria. This plantation is part of the Dallam Tower Estate, the Estate. The definitive rights of way map, maintained by Cumbria County Council under s53 of the Wildlife and Countryside Act 1981, the 1981 Act, showed a footpath running roughly west to east through its northern part. Members of the public in the Storth village area used other footpaths through the woods. They said that they had done so as of right for the period of twenty years ending in 2007. The paths in question ran from three entry points, known as A, G and F, off two local roads, into the southern part of the woods; these met within 50 yards or less at a point, known as C, whence a single path ran north, before forking at D, to meet the northern footpath at points E and I. In 2007, those three entry points were substantially blocked by the Claimants.
2. Cumbria County Council received the statements of the members of the public, in thirty eight "User Evidence Forms", UEFs, a common type of evidence for this purpose. It also considered the objections lodged by the Claimants. It concluded that this was new evidence showing that rights of way were reasonably alleged to subsist which were not shown on the definitive map, satisfying s53 (3)(c)(i) of the 1981 Act. Accordingly, in June 2013, the County Council, pursuant to its duties in s53(2)(b), made an Order modifying the definitive map to show the paths in question as footpaths over which there were public rights of way. This Order, to give it its full title, is the Cumbria County Council (Parish of Beetham: District of South Lakeland) Definitive Map Modification Order (No 6) 2013, which for ease I call the Order.
3. The Claimant objected, and so the County Council had to submit the Order for confirmation to the Defendant Secretary of State, pursuant to paragraph 7 of Schedule 15 to the Act. A public local Inquiry was held by an Inspector, for the most part in March 2015. The applicants at the Inquiry primarily based their application for the modification on the statutory presumption in s31 of the Highways Act 1980, the 1980

Act. This provides that where a way over land has actually been enjoyed “by the public as of right and without interruption for a full period of twenty years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.” By s31(2), the twenty year period is calculated retrospectively from the date when the right of the public to use the way was brought into question. Here, that was in the summer of 2007, and so the primary relevant twenty year period, through which use as of right had to be shown, ran from the summer of 1987 to the summer of 2007.

4. The Inspector heard oral evidence from eight members of the public about user of the paths, and oral evidence called on behalf of the Estate; he also had the UEFs, which had been considered by the County Council, as well as the objection made by the Estate to the County Council. He concluded, in his Interim Decision of 20 May 2015, that the Order should be confirmed, but with this modification to the Order as made by the County Council: the paths from G and F to C should not be confirmed. It was the paths from A to C, D, E and I which should be shown on the definitive map.

5. The Claimants challenge that decision pursuant to paragraph 12 of Schedule 15 to the 1981 Act, and Part 8 CPR, on the familiar grounds for such a challenge.

6. This decision was in fact an interim Decision, since those adversely affected by the proposed modifications, who wished to raise new issues, had the opportunity to object. There were no objections. Although there was a final decision in September 2015, confirming the Order with the modifications as the Inspector proposed, the relevant decision for the purpose of this challenge is the Interim Order Decision, IOD.

7. The challenge is to the confirmation of the Order in relation to the path from A-C, and relates to the lawfulness of the Inspector's reasoning and conclusion about the evidence of user in the period 1987-1990, which Mr Laurence QC, for the Claimants, termed the Early Years of the twenty year period.

The Decision

8. The Inspector summarised the background to the issues. He noted first the agreement that the paths were blocked at points A, G and F bringing the rights of the public into question in the summer of 2007. The Inspector summarised the position of the parties in IOD [11 and 12].

“11. Some 38 rights of way user evidence forms were submitted to the Council in support of public use of the claimed footpaths and 8 witnesses gave evidence of their use of the Order routes at the Inquiry. Witnesses and evidence forms indicate differences in the routes used.

12. The Plantation is part of the Dallam Tower Estate and in their objection to the Order it is submitted that the public use of the Order routes was not as of right, but by force in the sense of contentious user following forced entry. In any event, the Estate contend that, during the 20 year period before 2007 and earlier, the landowner demonstrated sufficient evidence of a lack of intention to dedicate, whilst there is insufficient evidence of public user in the 20 year period before 1993.”

9. [11] is important for its reference to the UEFs. [12] is important because it shows that the thrust of the case made by the Estate did not relate to the sufficiency of user or to sufficiency of user during the Early Years, but was that, through blockage and signs, it had made clear its case that use of all the paths had been contested during the twenty year period. The reference in the last sentence of [12] to the 20 year period before 1993 is relevant only to footpath F-C, where there was scope for a fall back argument by the applicants, ultimately rejected, to the effect that by the time F-C was blocked in 1993, rights at common law had already been established.

10. The Inspector then set out his conclusions on the evidence about footpath A-C:

“13. From Throughs Lane the Order route starts parallel to the road before turning into the Plantation through a small (0.8m wide) gap in the stonewall alongside the edge of the Plantation. The gap in the wall has dressed stone. The route then climbs a steep bank across a rocky outcrop before descending to point C. It is clearly a less commodious route than the near-by alternative of routes F & G. Upon entering the Plantation at Point B witnesses recalled a large laurel bush with no branches. Mr Morris recalled having to 'limbo' under a branch, but no witnesses indicated that their use of the route was prevented. Mr Morris was a regular (daily) user of route A and other routes after 1982 and three other witnesses gave evidence of their regular use of this route throughout or within the 20 year period before 2007.

14. There is no evidence from any of the witnesses at the Inquiry, or otherwise, to indicate that route A was impeded in any way except by the presence of the laurel tree throughout the 20 years before 2007.”

11. In IOD [19], the Inspector concluded that, during the 20 year period, A-C and its onward continuation to the fork at D and the junctions with the northern footpath at E and I were sufficiently used as of right, without interruption and that there was insufficient evidence of a lack of intention to dedicate by the Estate. “The laurel tree at the entrance of route A, whilst hindering the public use, did not prevent public use and is not any indication of a lack of intention to dedicate.” Such challenges as there were, were insufficient to demonstrate a lack of intention to dedicate.

12. I also need to mention what he decided in relation to footpaths F-C and G-C. The applicants had accepted that in 1993 F-C, “a well-defined track [with] the appearance of an accommodation road” for the use of the Estate had been obstructed by the Estate, and that the subsequent user of that route was contentious, and so could not be relied on to establish any rights. This blockage had however led the public to enter the plantation, through a gap in the wall, at point G, very near to F, and to use the path G-C instead. There was a conflict of evidence or of its interpretation as to whether there had been signs prohibiting such access at or near point G, whether there had been repairs to the wall which the public had forcibly breached, or whether the gap had just arisen out of dilapidation. He concluded “that public use of the way before 1993 would not have been sufficient to come to the attention of the landowner and as Mr Townend, [who represented the applicants] indicated significant use of this route by the public only commenced after route F was obstructed.” There was therefore no twenty year period of use, and he also accepted the Estate's evidence that there was no intention to dedicate.

The challenge

13. Mr Laurence submitted that the inspector had to be satisfied, as a statutory pre-condition to the modification, and whether the point was fully raised or not, that there was evidence of public user as of right throughout the whole of the twenty year period. The Inspector had to consider whether the evidence of user throughout the period, and so in the Early Years as well, was of sufficient quantity and quality, in relation to route A-C.

14. The Inspector, in IOD [13], had based his conclusion as to user exclusively on the evidence given at the Inquiry by the eight witnesses. He considered but had given no weight to the content of the UEFs, which was a rational approach to UEFs. Mr Morris was the only witness named by the Inspector, of the four witnesses who gave evidence about route A-C, who had done so in respect of the Early Years. On the Claimants' identification of the other three who gave evidence about route A-C, only one other, Mrs Rocke, had covered the Early Years. As his reference to “throughout or within” showed, the Inspector had wrongly treated the evidence of the four witnesses as all of a piece with that of the two whose evidence did cover the Early Years. Had he examined those witnesses' evidence separately for the Early Years, as he

should have done, he would have been bound rationally to conclude or at the very least could rationally have concluded that it was insufficient. In any event his reasoning on that point was legally inadequate. Relevant to his consideration of that point, would have been the character of the route A-C as he described it in IOD [13], and the availability without impediment until 1993 of the very nearby and much easier route F-C. It was notable that nothing was done by the Estate to stop the use of route A-C when it had taken steps to interdict the other two southern entry points, which also pointed to the insufficiency of the quantity and quality of the public user of that route.

15. Mr Buley for the Secretary of State responded that this was a very narrowly based challenge, unlike the more general objection set out by the Inspector. The Claimants' case to the Inspector had focused, not on sufficiency of actual use, but on whether it had been as of right or interrupted and on whether there was a lack of intention to dedicate.

16. The objection by the Estate to the County Council had accepted that many of the forest tracks were used by the public. The Estate's original statement of case to the Inquiry had not dealt with the quantity or quality of the actual use by the public: the comment at [5] was just a statement of law, not of the issues; at [15] it said that the relevant County Council committee report on making the Order contained a summary of "alleged use. Although suggestive of considerable use, the Estate contend that the use was challenged...as detailed." It said that its objection had set out in detail the basis upon which the Estate contended that user was not as of right but was contentious. Later, the statement said that the Estate had taken all reasonable and proper steps to ensure that it demonstrated to the public that there was no access to the claimed rights of way and that use by the public was challenged. The Estate's final statement of case, submitted in December 2014, after the initial adjournment of the Inquiry, referred to the fact that the applicants acknowledged that the Estate had blocked the entrances at F and G to prevent access before 2007. It contested the suggestion that the adequacy of user was not in dispute, but nonetheless said that the Estate's case was that, aware as they were of some people gaining access to the woods, they had sought to prevent this by blocking and signs.

17. The Inspector was not asked in submission by the Estate to focus on the Early Years or on the particular section of the footpaths, A-C, as a result of the evidence. The way in which a conclusion on routes F-C and G-C might affect any conclusion on A-C was not raised for his consideration. None of the applicants' witnesses were cross-examined about their evidence of user by the rights of way consultant, who appeared on behalf of the Estate, as HHJ Townend, a retired circuit judge, was not slow to point out to the Inspector.

18. The evidence of the two witnesses, if they had been correctly identified by the Claimants, was sufficient in law to warrant the Inspector's conclusion, particularly in the light of the focus of the Estate's case.

19. Mr Buley however also submitted that the Inspector should be taken to have given weight to the UEFs. These contained further evidence of the Early Years' user.

20. Mr Buley drew my attention to the Planning Inspectorate's "Wildlife and Countryside Act 1981, the Definitive Map Orders: Consistency Guidelines". Paragraph 2.23 notes that it is unusual for all contributors of evidence to be able to appear at an Inquiry. UEFs are one form of written evidence which can be presented, and if relevant, must be examined. "The need for critical scrutiny of User Evidence Forms" is addressed in [5.7]. There it says that these are common in s31 1980 Act applications. "Analysis of UEFs will identify omissions, lack of clarity, inconsistencies and possible collusion, although the completion of common parts of the form by someone organising collection of the evidence is not necessarily evidence of collusion. Analysis allows...[a party] to note the questions to raise at inquiry...UEF's are not standardised, and pose differing questions of varying pertinence and precision."

Conclusions

21. The relevant law is not contentious. *Mann v Brodie* (1885) 10 App. Cas. 378 shows that use must be by a sufficient number of people to show that it was use by the public, a number which may vary from case to case. *R (Lewis) v Redcar and Cleveland Borough Council* [2010] UKSC 11, [2010] 2 AC 70, and others cited in it, deal with the quality of the user. The use had to be sufficient to bring home to the mind of the reasonable non-absentee landowner that the public were asserting a continuous right to use each route in question. The user over the twenty year period did not have to be by the same people.

22. I also accept Mr Laurence's submission that the Inspector has to be persuaded on the evidence that the user in question endured through the whole of the twenty year period, and that this has to cover each of the routes in question. Mere silence or lack of evidence on the part of the landowner is not the equivalent of positive evidence satisfying s31. However, general comments by the landowner about what he knew and what steps he took or did not take in consequence and why, his evidence of user or non-user, the extent to which evidence of others to the contrary is challenged, and the submissions made about it, are relevant to the judgment of the Inspector on the sufficiency of user. Relevant too are the character of the path, and where it leads.

23. I accept Mr Buley's submissions as to the way in which the Estate put its case to the County Council and at the Inquiry: the focus was on the interruptions to the use, and on the absence of any intention to dedicate, rather than on sufficiency of use. This was mentioned as part of the law, although there was some evidence about what estate workers and others had not seen. There was no focus specifically on the sufficiency of use of A-C, even in the light of the blockages to F and G to C. There was none on the Early Years as a specific period, even in the light of the evidence as it had developed. I note also that HHJ Townend's closing submissions are focused on the case as I have understood it, since it is very largely about the absence of cross-examination on the user evidence, and the effect of the evidence of interruptions and signs. It does not focus on the Early Years or on A-C. In the absence of clear contrary evidence, I can assume that his submissions covered the case as it developed.

24. The principal issue, assuming for the moment in Mr Laurence's favour that the Inspector did have regard to the UEFs but did not give them any weight, is whether his conclusion on the Early Years in relation to route A-C is irrational, or wrongly treated the evidence of four witnesses as covering a longer period than it did, so that he has not addressed the sufficiency of use on a proper analysis of the only evidence on which he said he relied.

25. The evidence of the two witnesses which Mr Laurence submitted were all that the Inspector had to rely on, once he had excluded the UEFs, goes beyond their own individual use. They were not cross-examined, so their written statements can be taken as their evidence. I shall assume that there was no relevant oral elaboration. Mr Morris, a retired highways engineer, the witness named by the Inspector, lived in the area from 1982. He walked the many paths in the woods daily, including the routes in question at the Inquiry. His wife often went with him. He met many other walkers in his wanderings, and some of these would tell him about the many paths and features of the woods. There is no suggestion that he met other walkers only from 1990 onwards. It is not clear whether his comment that every path was obviously very well trodden "by many years of usage by...walkers" was true only from 1998, which seems unlikely to be what he meant, but in any event it relates back to a period which could readily cover the Early Years. There was no cross-examination or comment by the Estate on this. Mr Buley rightly points out that this evidence goes well beyond use by Mr Morris; it covers use by his wife and many other walkers, including in the period when he was a newcomer in 1982.

26. The other witness who gave oral evidence about the specific period was Mrs Rocke, a District Tribunal Judge and local authority solicitor with experience of representing her authority at Inquiries such as this

one. From 1972, when her parents bought a second home in the area, she visited at weekends and holidays. She walked in these and other woods with her family on a regular basis from that time on. Again she was not cross-examined on the frequency of her user and what she saw of others. It was not suggested to her, therefore, that her evidence did not cover all the routes in question. Mr Wood, the rights of way consultant who represented the Estate at the Inquiry, accepted in his witness statement for this case, that she had given oral evidence which covered the route A-C.

27. Mr Laurence was too dismissive of the relevance to this period of the evidence of HHJ Townend and Mr Roberts, the other two witnesses identified by Mr Wood as having given oral evidence covering A-C. True it is that HHJ Townend did not start using the paths himself until April 1990, but on his arrival in the area, he was told about the paths in the woods, and said that when he started using them "it was obvious to the eye that the said paths and many others were well and long established." It appears that his use of A-C was occasional, but from point C, he would have seen at least part of route A-C. Mr Roberts and his wife, friends of HHJ Townend and his wife, started visiting them in 1991 before moving to the area themselves in 1996. In 1991, the Townends showed them the "many well trodden paths", including those in question. When they moved there, they used the paths other than just as visitors. This is evidence that the route A-C was well used by 1990/1, not very long after the start of the relevant period. The clear implication is that use started well before that time.

28. There is a further point which the Inspector would have understood in his appraisal. Mr Laurence accepted that the Inspector could rationally conclude that, whatever the Estate's witnesses may have said or written about not seeing walkers, or not being aware that point A was being used to reach point C, there was a sufficiency of evidence from mid-1990 or so onwards, when on his analysis the evidence of user of A-C came from 3 and then 4 witnesses, (Mr Roberts and HHJ Townend following on from Mr Morris and Mrs Rocke). He accepted that it followed that that sufficiency of user from 1990 onwards did not result from the closure of the entry to the woods at point F in 1993, though it was the most commodious entry point, and its closure had led to some diversion to point G. It also followed that sufficiency of user in the Early Years was not prevented by the natural obstructions and difficulties to the A-C route. So there was no event or aspect of the character of the route which could account for user becoming sufficient in 1990 onwards though insufficient in the period 1987-1990. That is in my judgment relevant for the Inspector's judgment as to what the whole of the oral evidence considering route A-C showed.

29. Whilst it might seem odd that the Estate should have been thought to have left A-C unobstructed once they had adequately blocked off points F and G to C, unless they, embodying the reasonable landowner, could not have been aware of user sufficient to put them on notice of the assertion of rights between A and C, Mr Laurence's acceptance, which he maintained, that the issue related to the period 1987-1990, and that the evidence was sufficient thereafter, means that there was no material error by the Inspector in not considering that point in the light of his conclusions on the blocking of routes F and G-C. Nor were any contingent submissions addressed to him on it.

30. Taken as a whole, this evidence provides a rational basis for the Inspector's conclusion. But that is properly reinforced by the absence of any specific case that route A-C was different in user from routes F-C or G-C, or that the Early Years were areas he should concentrate on. This is a point which does not just go to the adequacy of reasons; it goes to the extent to which he needed more evidence to satisfy himself that there was sufficiency of user throughout the twenty year period, which there was.

31. I certainly do not consider that the Inspector's conclusion needed more extensive reasoning on this issue in view of the way in which the case was presented to him, as I have set out. The issue raised before me was not a principal issue in the case. Nor did he need to express any separate conclusion on the Early Years in the light of the way the case was presented.

32. I should add that I think that Mr Laurence is probably right that the Inspector had regard to but did not attach weight, or any significant weight to the UEFs. Perhaps this was because of the general reasons which Mr Laurence, who is very experienced in this area, as is the Inspector, gave about the problems with UEFs in general and with these in particular: the absence of plans for many, the lapse of time between the making of the statement and the marking on the plans of the routes in question, the "invitation" to mark all the routes on the maps, the contradictions between the map and form, and uncertainties about which of the various nearby entries, A, G or F, were being talked about. But I think that it is more likely that the Inspector was simply satisfied that on the oral evidence alone, which had not been challenged or explored in cross-examination, and which on sufficiency of user was not the real focus of the case anyway, he could reach the conclusion he did without looking for support from them. He might properly also have come to the conclusion that, whatever the UEFs did show, what the UEFs did not show was any positive evidence at all that there had been no user of A-C between 1987 and 1990. He may have been aware of a general substratum of support for his conclusion in the UEFs rather than even neutrality, but there was nothing in them to counter his conclusion.

33. In the light of those conclusions, it is not necessary for me to consider the UEFs in any further detail.

34. The issue between the parties in relation to the UEFs as evidence before me was the lateness of their introduction by the Secretary of State, who essentially countered that the Claimants, in making the point they did about the evidence, should have placed them before the Court anyway. Mr Laurence submitted that his case was confined to the contention that the Inspector considered them but placed no weight on them, on the proper construction of the IOD, and so they were not necessary. I considered them without ruling on admissibility. I shall only resolve that should it be necessary on any cost point.

35. I was troubled by the fact that, if such evidence were to be admitted, indeed if the events at the Inquiry were to be discussed, as inevitably became the case as the nature of the Claimants' case at the Inquiry became relevant, and their own evidence required conclusions as to what witnesses gave what evidence, the applicants had not been served with the papers, were not parties, yet might need the opportunity to respond. The Secretary of State is often not well placed to respond, and the County Council was not an active participant either at Inquiry or here. Both parties urged that I should reach my conclusions on a provisional basis, and then see where that left the notification of the applicants at the Inquiry. In the light of my conclusions, notification is not necessary. It appears however from CPR Part 8 that the Claimants were not obliged to serve the applicants, and so have breached no rule. In the absence of a Rule change, however, there is an evident risk that the applicants might find that the order which they had obtained, although benefiting the public generally, had been quashed, when there was relevant evidence or submission which they could have placed before the court. All I can say about that is that the parties who are served should consider whether notice needs to be given to the applicants in the light of the case, and serve them with the papers if that is thought necessary in the interest of justice. If in doubt, the parties can also seek the direction of the court, but well before the hearing. The applicants may not wish to attend, or to be represented, and cannot expect costs even if successful. But they should at least know what is going on, and what the issues are so that they can decide what action if any they wish to take. There was a risk that there would have had to be a last minute adjournment part way through the case, which no one wanted.

36. The application is dismissed.

Queen's Bench Division

Regina (Mann) v Somerset County Council

2012 May 11

Judge Robert Owen QC sitting as a High Court
judge

Commons — Town or village green — Registration — Application for registration of land as town or village green — Landowner occasionally holding beer festival and funfair on part of land and charging for entry — Application refused on ground that exclusion of local inhabitants from that part of land on those occasions indicating that entirety of land used with landowner's permission and therefore not "as of right" — Whether implied grant of permission arising in those circumstances — Whether local inhabitants' belief as to nature of their use relevant — Commons Act 2006 (c 26), s 15(2)

The claimant applied to the local authority, as the relevant commons registration authority, to register a certain field as a town or village green pursuant to section 15(2) of the Commons Act 2006¹ on the ground of recreational use by local inhabitants as of right for a period of at least 20 years. The field was in the same ownership as an adjoining hotel and car park and the landowner occasionally held a beer festival and funfair on part of the field. Following a local inquiry convened by the local authority, the appointed inspector concluded that the occasional exclusive use of part of the field by the landowner, in charging for entrance to the beer festival marquee and for the use of the funfair facilities, implied that the use of the entirety of the field by the public on other days was with the landowner's permission and was therefore not "as of right". The local authority accepted the inspector's findings and accordingly refused to register the field. On a claim for judicial review of that decision, the claimant's primary contention was that the holding of beer festivals for a few days per year on a small part of the field did not amount to the implied grant of permission to use the whole field. The landowner raised a further issue as to whether "use as of right" required an actual belief by the local inhabitants that their use involved the exercise of a right.

On the claim—

Held, dismissing the claim, (1) that whether local inhabitants had established a quality of user capable of amounting to use "as of right" depended on whether the user was of such a nature as to make it appear to the reasonable landowner that it was taking place on the basis of the exercise of a right, without permission; and that there was no requirement to show that the inhabitants had an actual belief that they were exercising a right (post, paras 52, 56, 59).

(2) That, where the use of the field by the local inhabitants had the appearance of use as of right, it was for the landowner to raise the vitiating circumstance of permission, although that requirement was not onerous; that to establish overt acts or relevant or demonstrable circumstances sufficient in law to allow an inference of permission, the landowner had to make it clear that the public's use of the land was with the owner's permission, which might be shown by excluding the public on occasional days; that the landowner had to do something on the land to show that it was exercising its rights as owner over the land and that the public's use was by its leave; that there had to be a positive act by the landowner in that capacity, although a notice was not necessary provided the circumstances relied on allowed the inference to be drawn; that implied consent by taking a charge for entry, or a similar overt act communicated to the public, was sufficient without the need for express explanation or notice; that such conduct need only occur from time to time, perhaps only once during the period under scrutiny; that such conduct would be expected to have an impact on the public and show that when they had access to all or part of the land they did so with the leave or permission of the landowner; that the acts of the owner of the field in holding beer festivals was a manifest act of exclusion, albeit affecting only part of the field, which, in the absence of any clear reason to suppose otherwise, could be taken to be referable to the whole of the land; that the exclusion was an unequivocal exercise of the landowner's rights sufficient to bring home to the local inhabitants that their use was with permission and, as such, was inconsistent with use as of right by the local inhabitants;

¹ Commons Act 2006, s 15(2): see post, para 23.

that the inspector had neither misunderstood nor misdirected himself as to the nature of the test to be applied and had reached a correct conclusion; and that, accordingly, the application for registration of the field as a town or village green had been properly refused (post, paras 42, 61, 71, 73, 75, 77, 100).

R (Beresford) v Sunderland City Council [2004] 1 AC 889, HL(E) applied.

R (Lewis) v Redcar and Cleveland Borough Council (No 2) [2010] 2 AC 70, SC(E) considered.

CLAIM for judicial review

By a claim form dated 27 April 2011 the claimant, Alan David Mann, sought judicial review of the decision of the defendant local authority, Somerset County Council, as commons registration authority, refusing the claimant's application to register a field owned by the interested party, Punch Taverns Property Ltd, as a town or village green pursuant to section 15(2) of the Commons Act 2006. The grounds of claim were that the local authority had erred in accepting the finding of an inspector, reached after holding a local inquiry, that the use of the field by local inhabitants was with the permission of the landowner, and therefore not "as of right", in circumstances where the landowner had excluded the local inhabitants from part of the field on certain days of the year by holding a beer festival and funfair for which it charged an entrance fee.

The facts are stated in the judgment, post, paras 1–13.

Vivian Chapman QC (instructed by *Edward Harris, Swansea*) for the claimant.

Leslie Blohm QC (instructed by *Head of Legal Services, Somerset County Council, Taunton*) for the local authority.

George Laurence QC (instructed by *TLT llp*) for the landowner.

The court took time for consideration.

11 May 2012. **JUDGE ROBERT OWEN QC** handed down the following judgment.

1 By a claim form issued on 27 April 2011 the claimant, Alan David Mann, applied to the court for permission to seek judicial review of the decision of the defendant, Somerset County Council, dated 8 April 2011 who, through their Regulation Committee which was convened pursuant to an application made by the claimant under section 15(2) of the Commons Act 2006, rejected the claimant's application to register the land described as "Pen Mill Field", Pen Mill, Yeovil as a town or village green.

2 The decision in question reads:

"The Regulation Committee on behalf of the Somerset County Council as the registration authority has decided to reject the application and make no changes to register of town and village greens for the following reasons: on the basis of all the evidence submitted and having regard to the submissions received the report of the independent inspector, the Regulation Committee considered in denying access to part of the land by holding beer festivals the landowner was asserting his right to exclude the inhabitants, making it clear their use of the land at other times was with his permission. There was no reason to infer that the landowner was asserting the right to exclude only in relation to the areas in which the beer festival took place so that permission to use extended to the whole of the land and not just part."

3 The claimant resides in Lyde Road, Yeovil. The defendant is the relevant commons regulation authority. The land comprises 1.2 hectares of rough grassland bounded on its northeast and northwestern sides by the rear gardens of residential houses on Lyde Road and Camborne Grove. The Pen Mill Hotel and car park bounds the southwestern side while the south eastern side is bounded by former allotments. There is no public right of way leading to the land.

4 The land is and has always been privately owned. Since 1997 it has been owned by the interested party, Punch Taverns Property Ltd, whose predecessor, Bass plc, previously owned the land for some years. The interested party are the freehold owners of the hotel and the car park which in turn is licensed by them to the pub landlord who is in actual occupation of the premises car park and land.

5 The interested party objected to the claimant's application. A local inquiry was convened by the defendants which was held between 10 and 12 March 2009 by the duly appointed inspector Mr A L Roberts who, in his initial report dated 31 March 2009, concluded that the

qualifying criteria for registration under section 15 were satisfied, save that the local inhabitants' user had not been "as of right" within the meaning of the Act.

6 Following the written advice of leading counsel for the defendants, Mr Blohm QC, dated 9 September 2010 and written representations on behalf of the parties, the matter was referred to the inspector for further consideration. Five specific questions were raised for his consideration in light of what appeared to have been a misunderstanding evidenced in his report. By supplemental report dated 20 December 2010 the inspector reviewed the evidence afresh and answered the questions posed to him. Those questions were: 1. Was there public user of the land for informal recreation over the relevant 20-year period? 2. If so, was the user found by the inspector of such amount and in such manner as would reasonably be regarded as being the assertion of a public right? 3. If the answer to 2 is "yes"; it is for the land owner to establish that the user is deficient because it has for all or part of the period been vi clam or precario—forceful or contentious, secretive or furtive or permissive. Has the land owner established this? 4. Was the claimed neighbourhood a neighbourhood in fact within the ordinary English meaning of the word? 5. At the date of the application did the claim to neighbourhood fall wholly within polling districts 2 and 3 of Yeovil East Ward. In each case the inspector is required to give appropriate reasons for his findings.

7 Those questions were specifically addressed and answered in the supplemental report, in particular at para 3 which reads as follows:

"3.1 In answer to the questions posed by Mr Leslie Blohm QC, I find that: (a) there was public user of the application land throughout the relevant 20-year period but that it was interrupted to the south of the ridge running east-west across the land; (b) user was of such amount and in such manner as would reasonably be regarded as an assertion of a public right; (c) however, although user was by neither force nor by stealth, the landowner has established that the user was permissive; (d) the neighbourhood was a neighbourhood within the ordinary English meaning of the word; and e. at the date of the application, the claimed neighbourhood fell wholly within polling districts 2 and 3 of the Yeovil East Ward."

8 In his supplemental report the inspector confirmed his findings that the qualifying criteria as to significant number of local inhabitants who had indulged in lawful sports and pastimes for at least 20 years were established. The inspector again addressed the critical question concerning use "as of right" at para 2.20 of his supplemental report:

"Since I submitted my report, the legal concept of 'deference' has been struck out by the Supreme Court's decision on *Redcar* [see *R (Lewis) v Redcar and Cleveland Borough Council (No 2)* [2010] UKSC 11; [2010] 2 AC 70]. Furthermore, the parties are of the common view that, in assessing whether or not use had been 'as of right', I gave the impression that I had not sufficiently distinguished between the concepts of 'deference', 'licence' and 'interruption'. Although there may be an overlap between the application of each in considering whether the claimed user had been of as of right, there are different considerations and, clearly, they must be analysed separately. I therefore consider below the submissions of the parties on each of these aspects in turn."

9 The inspector's findings and conclusions in respect of the conduct of the owner which evidenced the implied licence or permission to the local inhabitants to use the land was set out in the report, in particular, between paras 2.34 and 2.41, which read as follows:

"Findings and conclusions on licence"

"2.34 The legal issue is whether the landowner, through some overt and contemporaneous act or acts, so conducted himself as to make clear that the inhabitants' use of the land was pursuant to his permission. [Footnote reference: see *R (Beresford) v Sunderland City Council* [2003] UKHL 60; [2004] 1 AC 889, para 5].

"2.35 As can be seen from paras 3.13 and 5.28 of my [original] report, there is a conflict of evidence as to whether the landowner did or did not give his permission for local residents to use the field. However, one witness for the applicant did say (see para 5.27) that he had asked, and was given permission, for children to play football in the field.

"2.36 Turning to events held in Pen Mill Field, one must ask whether the occasional exclusive use of part of the land by the landowner in charging for entrance to the beer

festival marquee and for the use of the funfair facilities gives rise to the implication that use of the remainder of the application land on other days was with his permission.

"2.37 I accept that the fact that local people did not complain about either the beer festivals or the funfairs might have led the landowner to believe that they were not asserting a right to use the land for their recreation. However, for the reasons set out in *Redcar* regarding deference, the landowner's belief is not relevant to whether user was as of right except in so far as it might explain why he took no positive action further to limit their use of the land.

"2.38 Although Mr Houchin's statement suggests that, during the beer festivals, access to the land was denied to anyone who had not paid an entrance fee, I prefer the evidence of those witnesses who say they were able to continue using the land during these events, merely by walking round the facilities. However, of more significance is the fact that access to the marquee was denied to local residents unless in possession of a ticket and that they could not make use of the other facilities without paying a charge.

"2.39 I accept that the local inhabitants' acceptance of the occasional use of the parts of the application land by the landowner without complaint may well have reflected merely their courtesy in a spirit of 'give and take'. However, in my view there is one crucial difference between *Redcar* and this case. In *Redcar*, the landowner did not exclude local residents from using any part of the land for their recreation; walkers merely chose to give way to golfers as a matter of 'give and take' courtesy. In this case, by levying charges the landowner did.

"2.40 The fact that access was denied to only a relatively limited proportion of the total area of the application land and on only on a few occasions while local people continued to use the remainder of the land seems to me to be beside the point. The important point is that, in the context of Lord Bingham of Cornhill's ruling in *Beresford* [footnote reference see para 5], the landowner, even in denying access to only a limited area of the land and only on a few occasions, was asserting his right to exclude. In doing so, he was making it plain that the inhabitants' use on other occasions occurred because he did not choose on those occasions to exclude and so was permitting such use. I see no reason to infer that he was asserting such a right only in respect of the footprints of the facilities.

"2.41 I thus believe that an inference can be drawn from the conduct of the landowner that user was by licence and my findings remains that use of the land by local residents was by licence and not as of right."

10 The inspector concluded:

"3.2 Having considered the submissions made by the parties since my earlier report to the Somerset County Council as the relevant registration authority, I thus still conclude, on a balance of probabilities, that a significant number of the inhabitants of the neighbourhood within the locality did indulge in lawful sports and pastimes on the application land. However, I also conclude that user was by licence and thus not 'as of right' and, although such use continued up to the time of the application, this was interrupted south of the line of the ridge running's east-west across the land during the relevant 20-year period.

"3.3 In the event that the registration authority disagrees with my finding that user was by licence, it should consider whether or not it would be appropriate to register as a TVG that area of the application land lying to the north of the ridge lying east-west across the land. However, if it is minded to do so, it may also wish to consider arranging for the size of the claimed 'locality' to be increased to include the whole of the electoral ward of Yeovil East or even the town of Yeovil. The purpose of this would be to cater for any legal doubt about whether the term 'neighbourhood within a locality' in section 15 of the 2006 Act can be taken to mean 'within a locality or localities.'"

11 In this respect (the meaning of locality for present purposes) the inspector stated:

"2.7 I conclude that polling districts 2 and 3 with the Yeovil East electoral ward can properly be used to define the locality and find that the statutory requirements in terms of 'locality' have been met, although the application could be amended to embrace a suitable wider area should the authority consider this precaution necessary.

"2.8 The objector argues that there was no evidence to suggest that the alleged neighbourhood had any degree of cohesiveness at all and could not lead to a conclusion that the area could be regarded as a 'neighbourhood' for the purposes of section 15 of the 2006 Act.

"2.9 On the other hand, the applicant, referring to my report, argues that extensive evidence on the cohesiveness of the neighbourhood was submitted to the inquiry. Bearing in mind the 'deliberate imprecision' comment by Lord Hoffmann in *Oxfordshire* [footnote reference: *Oxfordshire County Council v Oxford City Council* [2006] UKHL 25; [2006] 2 AC 674, at para 27], there was clearly evidence before the inquiry that could properly support a finding that Pen Mill was a neighbourhood."

12 Accordingly the recommendations were (that the application be rejected on the grounds of implied permission and in the alternative, should that recommendation be declined, none the less consideration should be given to registration in respect of the northern part but not the southern part where the inhabitants' user had been interrupted by reason of the conduct of the owners to which I have already referred. The objection taken by the interested party concerning the ambit of "locality" or "neighbourhood within a locality" within the meaning of section 15(2) was rejected for the reasons given. The defendant accepts that conclusion. The interested party does not.

13 In the result the committee accepted the primary conclusion and recommendation of the inspector. The question which arises is whether the inspector was entitled to come to that conclusion. Was he right, on the facts as found?

14 Mr Blohm submitted that the inspector's conclusion was a factual conclusion and that the grounds of challenge by the claimants are strictly limited. He submitted that in the circumstances the claimant must show that the conclusion complained of was perverse and he relied on *R v Hillingdon London Borough Council, Ex p Puhlhofer* [1986] AC 484, 518, per Lord Brightman.

15 Since there was evidence which was capable of supporting the inspector's conclusion it could not be argued, Mr Blohm submitted, that the evidentiary conclusion was incorrect. He submitted that the court could not substitute its own conclusion for that of an experienced inspector whose conclusion should be respected. In this respect he drew attention to the observation of Ouseley J in *R (Newhaven Port & Properties Ltd) v East Sussex County Council* [2012] EWHC 647 (Admin); [2014] QB 186, at para 73.

16 Mr Chapman QC, for the claimant, submitted that it is open to the court to review whether the inference drawn by the inspector from the primary facts could reasonably have been drawn and if not the conclusion would necessarily stand as being perverse. Alternatively he submitted that it is a question of law whether the conclusion or the inference in question is capable of being drawn from those primary facts. In support of that alternative submission he too cited Ouseley J in *Newhaven* at para 73.

17 In my judgment, the issue before me is whether the inspector was entitled to come to the conclusion in question in light of the evidence and the facts found and which I have summarised from his report(s). In short, whether he misdirected himself as to the significance or effect in law of the owner's conduct in question and which he found to be sufficient to establish the grant of an implied licence or permission. In this respect see, for example, *R (Beresford) v Sunderland City Council* [2003] UKHL 60; [2004] 1 AC 889, para 8 per Lord Bingham of Cornhill; see also *R (Lewis) v Redcar and Cleveland Borough Council (No 2)* [2010] UKSC 11; [2010] 2 AC 70, para 38 per Lord Walker of Gestingthorpe JSC, para 76 per Lord Hope of Craighead DPSC and para 98 per Lord Rodger of Earlsferry JSC.

18 Mr Chapman submitted that in light of the evidence and findings of fact the essential question was: did the holding of the beer festivals for a few days on a small part of the field amount, as a matter of fact, to the implied grant by the land owner to local people of permission to use the whole of the field for lawful sports and pastimes?

19 Mr Blohm agreed that Mr Chapman had posed the correct question (save that he would prefer to have omitted the words "for a few days" and "small"). Mr Blohm emphasised that the issue directly concerned a question of fact and that since there was evidence to support the conclusion the inspector's conclusion is not open to interference.

20 However, that approach begs the question whether the inspector was entitled, on that evidence, to arrive at that conclusion for if he was not and the court was satisfied (that the conclusion was wrong the decision is open to challenge, and correction).

21 Mr Laurence QC, on behalf of the interested party, did not quarrel with the formulation of the question relating to implied licence.

22 Mr Chapman, in opening, summarised the five issues which appeared to be the contentious issues in light of the parties' written submissions:

1. Whether the defendant was right to accept the recommendation from the inspector and thus right to refuse to register the land on the ground that it could be inferred from the holding of beer festivals and funfairs on part of the field that local people were using the whole field for lawful sports and pastimes with the permission of the land owner. He correctly pointed out that this was the only issue taken by the defendant.

2. If not, whether the defendant should have accepted the inspector's alternative recommendation as to registering only the northern part of the field on the ground that the beer festivals and funfairs had interrupted use on the southern part. Mr Chapman noted that the defendant did not seek to argue this point and had not accepted the inspector's alternative recommendation. He also observed that it appeared that the interested party had not formally abandoned reliance upon this alternative recommendation since there was some mention of it in their written submissions. As it transpired Mr Laurence made no mention of this issue in his oral submissions although he did not expressly disavow reliance upon that part of the skeleton argument which related to it. However, the reality was that support for the alternative recommendation was not mentioned or pursued before me.

3. Was the application bound to fail because the locality relied upon were polling districts which were said to be incapable of being a locality within the meaning of the section? This issue was raised only by the interested party. Indeed, the defendant was content to permit an amendment, if necessary, to cure the interested party's objection. The defendant offered no support to the interested party on this issue.

4. Was the application bound to fail because the quality of use of the local people did not meet the minimum threshold for registration as a new green? That is, must the claimant (first) establish something more than, or additional to, use as of right? Again, this issue was not advanced or supported by the defendant. It was advanced only by the interested party.

5. In the event that the decision is to be quashed and the matter be remitted, on what basis should it be remitted?

23 By section 15(2) of the Commons Act 2006 the subsection applies where (a) a significant number of the inhabitants of any locality or of any neighbourhood within a locality have indulged as of right in lawful sports and pastimes on the land for a period of 20 years; and (b) they continue to do so at the time of the application.

24 The principal issue before me is whether the undoubted use of the land for informal recreation, that is lawful sports and pastimes for over 20 years by a significant number of the local inhabitants, has been use as of right or whether such use was (at any time during the period relied on) pursuant to the implied licence or permission of the land owner. The claimant must make it appear that the requisite use was "as of right" within the meaning of the section (that is, *nec vi, nec clam, nec precario*). Having established, *prima facie*, such use as of right the onus would then shift to the owner to show that in fact such use was not as of right and, in this case, that the use was pursuant to implied permission. Upon the claimant having established (ultimately) use as of right it is well established by high authority that there is no additional requirement which must also be established by the claimant (see *Redcar*, at para 20 per Lord Walker; see also *London Tara Hotel Ltd v Kensington Close Hotel Ltd* [2011] EWCA Civ 1356; [2012] 2 All ER 554, para 28 per Lord Neuberger of Abbotsbury MR). That is, for the reasons explained in *Redcar*, once the local inhabitants have shown that their use of the land appeared to satisfy the common law tripartite test it would necessarily follow, in such circumstances, that a reasonable owner would be expected to demonstrate resistance if he wished to avoid the possibility of registration.

25 Save for the "quality of use point" (and the correct interpretation of locality or neighbourhood within a locality (that is, issues 3 and 4 referred to above)) counsel were agreed on the legal principles which applied to this case. The vexed question of use of land as of right (vexed, certainly, in the context of town or country greens) has been considered more than once recently by the House of Lords and the Supreme Court to which all counsel referred: see *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335; *R (Beresford) v Sunderland City Council* [2004] 1 AC 889; *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674; *R (Lewis) v Redcar and Cleveland Borough Council (No 2)* [2010] 2 AC 70.

26 Mr Chapman submitted that the inspector was wrong to conclude that the holding of the beer festivals on part only of the land amounted to the grant of implied permission to local people to use the whole of the land for recreation. He said that the inspector's conclusion was bizarre and that the mistake is explained by an evident misunderstanding on the part of the

inspector of the dictum of Lord Bingham in *Beresford*, at para 5, the decision in *Oxfordshire* and that the inspector also misunderstood the decision in *Redcar*.

27 Mr Chapman drew attention to para 2.32 of the supplementary report in which the inspector, it was submitted, revealed his misunderstanding of the decisions in *Beresford* and *Oxfordshire*. Thus:

“It makes no difference that, when (he exclusions took place, they did not extend to the whole land. Just as *user* of part can be referable to the whole, so *exclusion* from part will often be referable to the whole [see footnote reference *Oxfordshire County Council v Oxford City Council* [2006] UKHL 25]. Even though the activities of the landlord involved exclusion of the public on only three or four day-long occasions, those occasions fell squarely within Lord Bingham’s principle [footnote reference see para 5 in *Beresford*] and fully justified the conclusion in my report that they gave rise to an implied licence, at the very least during those three or four years.”

28 Mr Chapman emphasised the reference to “Lord Bingham’s principle” and to the express lack of a distinction drawn between exclusion from the whole and exclusion from part only. Mr Chapman submitted that the inspector’s conclusion as to an implied licence was simply not open to him on the facts as found. His essential point was that the overt acts which involved partial closure or exclusion occasioned by the beer festivals or fun fairs, viewed objectively, could not give the message to the public that they had no right to use the other land for lawful sports and pastimes. He observed that nowhere had Lord Bingham said that exclusion from part of the land could give rise to an implied permission to use the whole of the land. There was a material difference, he argued, between full and partial closure of the land which the inspector had overlooked. There was no objective reason to think that the public were being excluded from the beer tents or fun fairs to make the point that they had no right to be on the land.

29 Accordingly, he argued, that not only did the inspector elevate Lord Bingham’s comment to a statement of principle (see earlier) the inspector also failed to appreciate the significance of the comments of Lord Walker at para 83 who had in mind (submitted Mr Chapman) admission charges which related to the whole of the land and not part only. (Mr Chapman placed particular emphasis on the reference by Lord Walker to “when they do have access”). He compared the owner’s activities with, say, the (hypothetical) erecting of a temporary tea tent by the golf club (in *Redcar*) and charging for entrance for tea by all comers including the public who happened also to use the land for recreation. In that example, Mr Chapman submitted, there could be no question of an inference of implied permission to use the whole of the land.

30 Mr Chapman also submitted that the inspector misunderstood the decision in *Redcar*. Rather than distinguishing (see para 2.39 of the supplemental report) the present case from *Redcar*, the inspector ought to have seen that the case was on all fours with *Redcar*. That is, he submitted, like *Redcar*, this is a classic case of co-existing uses. Mr Chapman submitted that in such a case use by an owner which co-exists with use by the public could not give rise to an inference of permission. He argued that the owner’s conduct in erecting a marquee for the beer festival with payment for entrance could be compared to the erection of a tent or marquee by the local inhabitants as part of their user for the purpose of holding their own “village green dance”.

31 In summary, the claimant’s case was that the owner’s conduct and activities could not count as an overt act necessary in law to permit the inference or finding of implied permission and that the owner’s activities on the land were wholly compatible with the public’s recreational use being as of right. In this respect *Redcar* was heavily relied on.

32 Mr Blohm, on behalf of the defendant, submitted that the question was whether a licence to use land may as a matter of law be implied from the occasional licensing of part of the land to the public, if so whether there is evidence from which it could be concluded that such an implied licence arose in the present case. He submitted that the starting point was to see whether the evidence was capable of supporting the conclusion or decision complained of. He submitted that the conclusion could not be described as perverse, it was a factual conclusion and in respect of which there was clear evidence to justify that conclusion. Mr Blohm submitted that whilst *Beresford* concerned overt acts necessary to permit the inference of permission ultimately the fact of permission would depend on the facts and circumstances of the particular case. He submitted that it is open to the court to draw the necessary inference from “demonstrable circumstances” as well as overt acts.

33 In this respect Mr Blohm relied on the decision of the Court of Appeal in *Batsford Estates (1983) Co Ltd v Taylor* [2005] EWCA Civ 489; [2006] 2 P & CR 64, paras 22 and 25, per Sir Martin Nourse. This was an adverse possession claim and the question arose whether the occupation of

part of the land was subject to the implied permission of the estate owner. The Court of Appeal cited with approval the test for implied permission formulated by Etherton J in *Lambeth London Borough Council v Rumbelow* (unreported) 25 January 2001, at p 25:

“In order to establish permission in the circumstances of any case two matters must be established. Firstly, there must have been some overt act by the land owner or some demonstrable circumstances from which the inference can be drawn that permission was in fact given. It is, however, irrelevant whether the users were aware of those matters ... Secondly [it must be established that] a reasonable person would have appreciated that the user was with the permission of the land owner.”

34 The facts of that claim were of course very different to those in the present case. Sir Martin Nourse, with whose judgment Gage and Pill LJ agreed, observed (see para 25) that whilst it was not possible to point to some overt act by the estate owner in that case from which permission could be inferred, the matters relied on by them, certainly constituted demonstrable circumstances from which that inference could be made. The reasonable person, who must be assumed to have knowledge of the material facts would have appreciated that the occupation in fact was with the permission of the estate owner.

35 Mr Chapman, in reply to Mr Blohm’s submission on this point, observed that in the present case there were no other “demonstrable circumstances” beyond the facts as found by the inspector. Mr Chapman submitted that *Batsford* had been overtaken in any event by the recent decision of the Court of Appeal in *Zarb v Parry* [2011] EWCA Civ 1306; [2012] 1 WLR 1240 in which it was emphasised that the acts of the owner relied on to show permission had to be probative of, and not merely consistent with, the giving of permission (see paras 26–27, per Arden LJ). It was submitted on behalf of the claimant that the holding of a beer festival or fun fair on part of the land was not probative of a grant of permission to the public to use the land.

36 In my judgment, it is clear that whilst overt acts were specifically referred to in *Beresford* there is no real distinction between overt acts or demonstrable circumstances for present purposes. They mean the same thing in the context of this case. The decision in *Batsford* is wholly consistent with *Zarb v Parry*. Ultimately, it is necessary to scrutinise all the circumstances of the particular case to determine whether the grant of permission or implied licence is made out, whether by reason of “overt acts” or “demonstrable circumstances or, indeed, ‘relevant circumstances’ (see *Beresford*, para 59 per Lord Rodger JSC).”

37 Mr Blohm submitted that an overt act which might permit the inference of permission was authoritatively discussed in *Beresford*. That is, by the owner so conducting himself as to make clear that the inhabitants’ use is pursuant to his permission, for example, by excluding the inhabitants when he wishes to use the land for his own purposes or on occasional days (para 5); such conduct which is unequivocal, as excluding (not necessarily from the whole of the land) (see para 7); making a charge for entry to the land (see para 74); communication by overt act or non-verbal means by the owner—such as an act of exclusion, albeit in relation to part of the land (see para 75); overt conduct, such as exclusion or charging or otherwise asserting, as owner, title which might reasonably be expected to have an impact on the public using his land (see para 83).

38 In relation to Lord Walker’s observation at para 83, specifically relied on by the claimant, Mr Blohm submitted that Lord Walker could not be taken to have had in mind a distinction between the whole of the land and part of the land for he was merely giving factual examples. I agree. Moreover, this case is concerned with wholly different facts. Mr Blohm submitted that it is a question of fact whether the exclusion in question and the circumstances in which it took place made it plain to the (objective or reasonable) member of the public going onto the land that their use of the land was permissive and the mere fact that the owner’s activities did not involve the physical inclusion of the whole of their land is not material.

39 Mr Blohm submitted that the inspector’s conclusion as to implied licence followed an impeccable analysis of the facts and was a conclusion which he was entitled to draw. He submitted that the inspector plainly did not misunderstand the decisions in *Beresford*, *Oxfordshire* or *Redcar*. It was simply a question of fact whether the exclusion and the holding of beer festivals and fun fairs gave rise to the inference or implication that use of the whole or remainder of the land was by permission.

40 Mr Blohm challenged whether there was any assistance to be derived from Mr Chapman’s examples given in the course of his submissions. He pointed out that Mr Chapman did not seek to challenge the fact that the owner had excluded all comers, albeit from part only of the land. Moreover, he noted that Mr Chapman’s submissions in part were based on the assertion that if and when the local inhabitants attended the festivals by payment of an entrance fee, they would,

submitted Mr Chapman, merely be continuing their recreational use. Mr Blohm submitted with force that making payment to the owner to continue the recreational use was inconsistent with assertion that such use was “as of right”.

41 As for the *Redcar* decision (and the argument that the inspector had misunderstood it or that it is on all fours with the present case) Mr Blohm submitted that in *Redcar* the focus was on the nature of the use of the local inhabitants and how that might appear to the reasonable owner whereas in the present case the focus was necessarily on the activities and behaviour of the owner and how that behaviour might impact upon or appear to the reasonable local inhabitants. He submitted that this distinction was correctly appreciated by the inspector at, for example, para 2.39 and that Mr Chapman’s criticism of the inspector is misplaced.

42 Mr Blohm submitted, correctly in my judgment, that whilst the public use must be established for over 20 years (uninterrupted) the establishment by the owner of a vitiating circumstance is less onerous; that is, for example, permission need only be established on one occasion during that period, in order to arrest the accrual of any asserted right.

43 Mr Laurence adopted the arguments of Mr Blohm in relation to implied permission. Mr Laurence emphasised the fact that any material overt act involving exclusion, of part only of the land, would reasonably be expected to have an impact on the local inhabitants and make it plain that their recreational use of the owner’s land was pursuant to his permission. Mr Laurence emphasised that this is a case concerning exclusion and that the owners might at any time wish to impose such exclusions more frequently or regularly in which case, he submitted, the claimant could hardly expect to establish any use as of right. In those circumstances, he asked, where would the line be drawn? That is, what degree or frequency of exclusion would count and defeat the claimants’ assertion, if not that degree and frequency as found by the inspector?

44 Mr Laurence’s additional ground, the “quality of use” point, was less straightforward, or convincing. Essentially, Mr Laurence submitted that where, as here, the local inhabitants accepted without demur occasional exclusion, the owner might reasonably be expected to believe that they had accepted his right to exclude and that the reasonable landowner in those circumstances could hardly be taken to recognise that the local inhabitants’ use was being asserted as of right. Thus, he argued, the claim as to use as of right would fall at the first of the two hurdles identified by Lord Hope DPSC in *Redcar* (see para 67).

45 Mr Laurence developed his additional ground before me in his oral submissions. Central to his submission was the proposition that the (subjective) belief of the local inhabitant was not irrelevant. He submitted that their use had to be such as to suggest to a reasonable owner that they believed they were, in fact, exercising a right by such user. Mr Laurence sought support for this proposition from *Sunningwell*, at pp 352 and 354. That is, the inhabitants’ use must be such as to convey to the reasonable owner that they believed they were exercising a right. If such belief was absent, so the argument went, even if such use was without force, secrecy or permission it could not trigger a claim for registration under the Act. Further support for this proposition was sought from Lord Hope DPSC’s approach in *Redcar* (see paras 67–69). Mr Laurence recognised that to put that argument on its feet he would need to overcome apparently (but not, in my judgment, real) conflicting observations in *Redcar*, from Lord Kerr of Tonaghmore JSC (see para 116; and see also para 107 per Lord Brown of Eaton-under Heywood JSC).

46 Mr Laurence drew attention to the recent decision of the Court of Appeal in *London Tara Hotel Ltd v Kensington Close Hotel Ltd* in which *Sunningwell*, *Beresford* and, in particular, *Redcar* were considered in the context of a case concerning a right of way over a roadway by prescription. In that case the claimant had granted a licence to use the roadway personal to the defendant’s predecessors in title from year to year. Many years later unbeknown to the claimant the licensee sold his interest in the hotel to the defendant who continued to use the roadway. When the claimant became aware of the change in ownership a claim was brought for damages and an injunction to restrain the defendants from trespassing upon the roadway. The trial judge found that the defendant had acquired a right of way by prescription. The original licence had terminated in 1980. The roadway had, as it appeared to the world, at all times been used by the defendant “as of right”. On appeal, which was dismissed, the claimant was not permitted to raise a new claim based on licence to be inferred from words or conduct (see paras 38–42 per Lord Neuberger MR). Lewison LJ reviewed *Redcar* (see paras 66–73) and concluded as follows (para 74):

“In my judgment this is clear authority at the highest level that if a use satisfies the tripartite test (not by force, nor stealth, nor the licence of the owner) then a prescriptive right will be established. There is no further criterion that must be satisfied. As Lord

Kerr JSC put it, once those three criteria are established it is ipso facto reasonable to expect the landowner to challenge the use. In other words, once these three criteria are established the owner is taken to have acquiesced in the use. It follows, in my judgment that unless the use by [the defendant] was forcible, stealthy or permissive a right of way will have been established."

47 Mr Laurence invited me not to accept that approach as articulated by Lewison LJ. However, he conceded that if I were to follow that which he described as the approach of Lord Kerr JSC and Lewison LJ the interested party's "quality of use" point could not succeed. Mr Laurence urged me to find that the correct approach is to be found in the combined observations of Lord Hoffmann in *Sunningwell* (see p 354) and Lord Hope DPSC in *Redcar* (see para 67) which, he submitted, made good the "quality of use" point. I am not persuaded by these submissions on this point.

48 It would be convenient, and logical, to deal first with Mr Laurence's quality of use point. That is, the quality of the user relied on by the local inhabitants had to be such as to suggest to a reasonable owner that they, the local inhabitants, believed they were exercising a right. It was submitted that this consideration comes into play with the first question as posed by Lord Hope DPSC (see para 67). Mr Laurence's submission was that as the local inhabitants were from time to time excluded (and they did not object or complain about exclusion) their use in such circumstances could not suggest to the reasonable owner that such use was being exercised as of right.

49 In *Sunningwell* the parish council's application for registration (under section 22(1) of the Commons Registration Act 1965) was rejected by the county council on the ground that the inhabitants' use of the land had not been shown to be as of right since it had not been shown that inhabitants exercised such user in the belief that they had a right to do so. The parish council lost at every stage in the legal and appeal process until the case came before the House of Lords when their appeal was allowed. Lord Hoffmann gave the leading speech and explained authoritatively why the common law did not require subjective belief in the existence of the right.

50 Lord Hoffmann said (at pp 350–351): "The unifying element in these three vitiating circumstances was that each constituted a reason why it would not have been reasonable to expect the owner to resist the exercise of the right ..."

51 He continued (at pp 354–355):

"I rather doubt whether, in explaining this term [per Tomlin J in *Hue v Whiteley* [1929] 1 Ch 440, 445] as involving a belief that they were exercising a public right, Tomlin J meant to say more than Lord Blackburn had said in *Mann v Brodie*, 10 App Cas 378, 386, namely that they must have used it in a way which would suggest to a reasonable landowner that they believed they were exercising a public right. To require an inquiry into the subjective state of mind of the users of the road would be contrary to the whole English theory of prescription ... For this purpose, the actual state of mind of the road user is plainly irrelevant."

52 These comments are not authority for the proposition that the inhabitants' belief, that they were exercising a right, is relevant. Lord Hoffmann explained the dictum of Tomlin J which mentioned the inhabitants' belief and he explained that the focus had to be on the perspective of the reasonable owner. In my judgment the question is:

"Was the nature of the inhabitants' user such as to make it appear to the reasonable owner that the (inhabitants') use is taking place on the basis that it is being carried on in the exercise of a right to use, without permission?"

Whether the inhabitants believed they were exercising a right is irrelevant, for the reasons explained by Lord Hoffmann.

53 Moreover, I do not agree that Lord Hope DPSC provides any such support for Mr Laurence's submission.

54 In *Redcar* Lord Hope DPSC said, at para 67:

"The first question to be addressed is the quality of the user during the 20-year period. It must have been by a significant number of the inhabitants. They must have been indulging in lawful sports and pastimes on the land. The word 'lawful' indicates that they must not be such as will be likely to cause injury or damage to the owner's

property: see *Fitch v Fitch* (1797) 2 Esp 543. And they must have been doing so ‘as of right’: that is to say, openly and in the manner that a person rightfully entitled would have used it. If the user for at least 20 years was of such amount and in such manner as would reasonably be regarded as being the assertion of a public right ... the owner will be taken to have acquiesced in it—unless he can claim that one of the three vitiating circumstances applied in his case. If he does, the second question is whether that claim can be made out. Once the second question is out of the way—either because it has not been asked, or because it has been answered against the owner—that is an end of the matter. There is no third question.”

55 Lord Hope DPSC expressly agreed that there were only three vitiating circumstances (see para 69). Having also agreed that the quality of the user by the local inhabitants must be such as to be reasonably regarded as being the assertion of a public right Lord Hope DPSC’s approach was to analyse and simplify the approach to the problem posed by reference to two questions. Lord Hope DPSC dealt with the relevance and effect, if any, of the owner’s conduct, to the overarching issue (namely, whether the claim was made out) after dealing with the first question (user apparently as of right).

56 If Mr Laurence’s point was simply that the relevance of the owner’s conduct (fact and/or effect of exclusion) must be addressed at the first stage an identical analysis of the material facts would be required and the outcome would necessarily be the same. It seemed to me that there was, in reality, no real difference in approach between Lord Hope DPSC or Lord Kerr JSC. Certainly, in my judgment, Lord Hope DPSC does not provide support for the proposition that it must be shown that the inhabitants believed they were exercising a right.

57 Of course, the issue in the present case (implied permission) was not present in *Redcar*. Both Lord Hope DPSC and Lord Kerr JSC recognised that the merit of an alleged vitiating circumstance would have to be dealt with. Lord Hope DPSC simply, and helpfully, separated for orderly consideration the two factual matters which would need to be addressed before the (ultimate) correct legal answer could be arrived at.

58 As it appears from the final questions posed by the parties to the inspector (see earlier) the two question/stage approach was adopted in any event. It is true that the inspector, understandably in the circumstances, did not expressly deal with the additional ground relied on by the interested party but this omission (or implicit disregard or rejection of the point) is not material in my judgment.

59 Mr Laurence’s submission on the “quality of the user” point fell into error in my judgment. It fell into error in asserting that the local inhabitants’ belief must be shown or inferred. Whilst it is clear that the amount and manner of such user must be such as would reasonably be regarded by the reasonable owner as being the assertion of a public right, there is no such requirement that the belief of the inhabitants must also be shown, for the reasons given by Lord Hoffmann. I prefer the submissions on this issue of Mr Chapman. For the reasons which I have given I reject the “quality of the user” point (issue number 4). Accordingly I now turn to the main issue.

60 The quality of the user by the inhabitants and the owner’s use or conduct are not mutually exclusive and one cannot be considered in a vacuum or without regard to the other, certainly not in this kind of case where there is evidence of dual use and where Lord Hope DPSC’s “second question” arises.

61 For the reasons given by the inspector the local inhabitants’ use of the land appeared to be “as of right”. This appearance shifted the evidential burden to the owner to raise a vitiating circumstance; in this case, permission inferred from conduct. Thus, it is the nature or characteristics of the owner’s conduct which must be examined to ascertain whether, ultimately, the inhabitants’ use was “as of right”. That was the exercise which was undertaken by the inspector and which he answered in the owner’s favour.

62 The question before me is whether there was material before him which entitled him to do so. The answer depends on the facts concerning the local inhabitants’ user of the land and also the owner’s user of the land. The starting point is *Beresford* which dealt directly with the necessary qualities or indicia which may demonstrate implied permission. It is suggested that the inspector misunderstood or misdirected himself on this decision.

63 In *Beresford*, the relevant land was in public ownership. It was council owned land which was regularly used, with the encouragement of the council, by local inhabitants for recreation for decades. The council’s objection to registration was based on the assertion of an implied licence demonstrated by the fact that they mowed the grass as and when necessary and provided seating around parts of the perimeter for the convenience of the public and to encourage them to visit

or use the land. That assertion was upheld at first instance and on appeal. The local inhabitants' appeal to the House of Lords was allowed. The local inhabitants' argument that the acts relied on by the council were equivocal and incapable of supporting the assertion of implied permission was upheld.

64 The question arose as to whether it was possible to imply a licence in such circumstances. Lord Bingham said (at para 5):

"I can see no objection in principle to the implication of a licence where the facts warrant such an implication. To deny this possibility would, I think, be unduly old-fashioned, formalistic and restrictive. A landowner may so conduct himself as to make clear, even in the absence of any express statement, notice or record, that the inhabitants' use of the land is pursuant to his permission. This may be done, for example, by excluding the inhabitants when the landowner wishes to use the land for his own purposes, or by excluding the inhabitants on occasional days: the landowner in this way asserts his right to exclude, and so makes plain that the inhabitants' use on other occasions occurs because he does not choose on those occasions to exercise his right to exclude and so permits such use."

65 He continued (citing as follows the Lord President (Hope) in *Cumbernauld and Kilsyth District Council v Dollar Land (Cumbernauld) Ltd* 1992 SLT 1035, 1041), at para 6:

"where the user [that is by the local inhabitants] is of such amount and in such manner as would reasonably be regarded as being the assertion of a public right, the owner cannot stand by and ask that his inaction be ascribed to his good nature or to tolerance. If his position is to be that the user is by his leave and licence, he must do something to make the public aware of that fact so that they know that the route is being used by them only with his permission and not as of right."

66 Lord Rodger JSC said, at para 59:

"The council were, accordingly, entitled to refuse Mrs Beresford's application for registration of the area as a town or village green only if those who used the sports arena did so by the revocable will of the owners of the land, that is to say, by virtue of a licence which the owners had granted in their favour and could have withdrawn at any time. The grant of such a licence to those using the ground must have comprised a positive act by the owners, as opposed to their mere acquiescence in the use being made of the land. Prudent landowners will often indicate expressly, by a notice in appropriate terms or in some other way, when they are licensing or permitting the public to use their land during their pleasure only. But I see no reason in principle why, in an appropriate case, the implied grant of such a revocable licence or permission could not be established by inference from the relevant circumstances."

67 Lord Walker said, at para 75:

"An entry charge of this sort can aptly be described as carrying with it an implied licence. The entrant who pays and the man on the gate who takes his money both know what the position is without the latter having to speak any words of permission (although he may qualify the permission by saying that no dogs, or bicycles, or radios are allowed). Similarly (especially in a small village community where people know their neighbours' habits) permission to enter land may be given by a nod or a wave, or by leaving open a gate or even a front door. All these acts could be described as amounting to implied consent, though I would prefer (at the risk of pedantry) to describe them as the expression of consent by non-verbal means. In each instance there is a communication by some overt act which is intended to be understood, and is understood, as permission to do something which would otherwise be an act of trespass."

68 He continued, at para 76:

"The authorities contain many references (which can be identified and understood more readily since *Sunningwell*) to the importance of looking at the overt conduct of

those involved, including what the landowner said and did from time to time during the period which the court has to examine ...”

69 He continued, at para 79:

“Acquiescence, by contrast, denotes passive inactivity. The law sometimes treats acquiescence as equivalent in its effect to actual consent. In particular, acquiescence may lead to a person losing his right to complain of something just as if he had agreed to it beforehand. In this area of the law it would be quite wrong, in my opinion, to treat a landowner’s silent passive acquiescence in persons using his land as having the same effect as permission communicated (whether in writing, by spoken words, or by overt and unequivocal conduct) to those persons. To do so would be to reward inactivity; despite his failing to act, and indeed simply by his failure to act, the landowner would change the quality of the use being made of his land from use as of right to use which is (in the sense of the Latin maxim) precarious.”

70 He concluded, at para 83:

“In the Court of Appeal Dyson LJ considered that implied permission could defeat a claim to user as of right, as Smith J had held at first instance. I can agree with that as a general proposition, provided that the permission is implied by (or inferred from) overt conduct of the landowner, such as making a charge for admission, or asserting his title by the occasional closure of the land to all-comers. Such actions have an impact on members of the public and demonstrate that their access to the land, when they do have access, depends on the landowner’s permission. But I cannot agree that there was any evidence of overt acts (on the part of the city council or its predecessors) justifying the conclusion of an implied licence in this case.”

71 From these observations, which I take as authoritative guidance on conduct by an owner which may count as an overt act or as a relevant or demonstrable circumstance sufficient in law to allow an inference of permission, it appears that the owner must make it clear that the public’s use of the land is with his permission and that that may be shown by excluding the public on occasional days (per Lord Bingham, para 5; and see para 79 per Lord Walker); he must do something on his land to show that he is exercising his rights (as owner) over his land and that the public’s use is by his leave (para 6); there must be a positive act by owner qua public though a notice is not necessary provided the circumstances relied on allows the inference to be drawn (para 59); implied consent by taking a charge for entry or similar overt act communicated to the public is sufficient without the need for express explanation or notice (para 75); such conduct need only occur from time to time (I should add, perhaps once only during the period under scrutiny) (para 76); such conduct will be expected to have an impact on the public and show that when the public have access (I should add, to all or part of the land) they do so with the leave or permission of the owner (para 83).

72 It is clear from the terms of the inspector’s report and reasons that this guidance was heeded by him, in my judgment. I do not consider that the inspector misunderstood or misdirected himself as suggested on behalf of the claimant. The reference to “Lord Bingham’s principle”, read in the context of the whole section of the report shows that the correct question is posed, the appropriate evidence relied on is identified and the answer to the question and conclusion is given. The question before me is whether his conclusion was correct.

73 It was common ground that the acts of the owner in question in holding such festivals constituted an act of exclusion albeit the argument concerned the effect of an exclusion which affected part only of the land and not of the whole. None the less, there was a manifest act of exclusion by the owner. In the absence of clear reason to suppose otherwise an act by the owner relating to part of the land, as occurred in this case, may be taken to be referable to the whole of the land.

74 In the present case the land in question was privately owned and was known (or must be taken to have known) to be so by the local inhabitants. There was no act of encouragement to them by the owner to use the land. Nothing was done by the owner which could, or has been suggested did, reinforce any impression which the local inhabitants now assert that their use was as of right. On the contrary, the owners have demonstrated by positive acts from time to time that, as owners, they were exercising and retaining their rights over their land by excluding all comers, subject to payment of an entrance charge. The owners acted in this way without regard

to the local inhabitants views and without consultation or so much as a “by your leave”. They conducted themselves as an active landowner and, as the local inhabitants might reasonably be taken to have appreciated, as though the local inhabitants had no right over the land.

75 It is difficult to see, viewed objectively, how the local inhabitants could not have appreciated that in continuing to use the land they were doing so with the (implied) permission of the owner. The claimant’s arguments seriously undervalue the nature and quality of the owner’s acts and fail to recognise the significance of the exercise of the owner’s right to exclude, albeit expressly over part of the land and on occasions only.

76 I am satisfied that the inspector did not misdirect himself in finding that exclusion from part of the land, or the granting of a licence to enter part of the land did not mean that the owner’s assertion of his right, as owner, to exclude was limited to “the footprints of the facilities”, (see supplemental report, para 2.40).

77 That is, he was right to find that the critical point was that the owner had unequivocally exercised his right a owner to exclude and the owner did not have to do more than they did to bring it home to the reasonable local inhabitant that this right was being exercised and that the use by the local inhabitants was pursuant to permission.

78 Mr Chapman suggested that the nature of these activities or use by the owner is comparable to that which might equally have been enjoyed by the local inhabitants who might have decided erect their own marquee for a village dance which they might have wished to hold on the land (as part of the recreational use). It is difficult to see how the local inhabitants might (or might reasonably be expected to) take it upon themselves, without reference to the owner in the present circumstances, to erect any such tent, let alone demand payment from those attending the owner’s field. The two examples are not, in my judgment, comparable. Moreover, I am unable to accept Mr Chapman’s submission that there is no material difference between the use of the land by local inhabitants who do not pay the entrance fee and those who do. Payment on entrance to gain access to the land and to use the owner’s facilities could not be treated, in my judgment, as if the local inhabitants were merely continuing their recreational use of that land. The significance of the acts of the owner in question is that these acts are wholly consistent with the exercise of the owner’s rights and in particular the owner’s right to exclude and are, in my judgment, inconsistent with use “as of right” as asserted by the local inhabitants.

79 The claimant also submitted that the inspector went wrong in respect of the decision in *Redcar*. The decision in *Redcar* is of relevance and importance because the case, which concerned co-existing uses and whether such apparently harmonious co-existence pre-registration might properly be assumed to continue post-registration, was argued by Mr Chapman as being on all fours with the present case and thus the decision, correctly understood and applied, he argued, provides the answer in the present case. It was argued that the inspector misunderstood the decision, misdirected himself over it and thus came to the wrong conclusion (see earlier).

80 In *Redcar* the land in question was publicly owned, by the local authority and which had been used by members of a private golf club. Local inhabitants continued to use the land for informal recreation without interrupting the play by the golfers. The two uses co-existed in that either the inhabitants would wait for the golfer to complete his shot before carrying on his way across the land or the golfer would wave the inhabitant across before resuming his play. The inspector recommended that registration be refused because the local inhabitants had “overwhelmingly deferred” to the golfers’ use. The sole issue before the Supreme Court was that of “deference” and whether such deference excluded user as of right, (see para 15 per Lord Walker).

81 In *Redcar* the question of implied permission did not arise. The question of use as of right did arise. It was authoritatively confirmed that whilst the English theory of prescription was concerned with how matters would have appeared to the landowner the common law tripartite test (the three vitiating circumstances of force, stealth and licence) was sufficient to establish that recreational use was “as of right” for the purposes of section 15 of the Act. It was unnecessary to superimpose a further (or additional or overarching) test as to whether it would appear to the reasonable landowner that the inhabitants were asserting a right to use the land or deferring to his rights. In that respect Mr Laurence’s submissions for the council in *Redcar* were rejected (see earlier).

82 The critical question on appeal concerned the respective rights of the local inhabitants and the owner following registration. (see para 54 per Lord Hope DPSC). The concern was that upon registration the limited pre-registration use by the local inhabitants might expand to include all possible recreational use which would practically negate any right of use previously enjoyed by the owner or that any use by the owner post registration would have to be such that it would not

interfere with the newly recognised (full or unlimited) recreational rights of the local inhabitants. This understandable concern, that an unintended consequence of registration would strip the owner of any useful enjoyment of his own land in a case where he had made use of it before registration, was at the heart of the critical issue of “deference” in *Redcar*.

83 That concern arose out of the observations of Lord Hoffmann in *Oxfordshire* at paras 51 and 57 which I need not recite for present purposes. Those comments were considered in detail in *Redcar* (see, for example, paras 26–27 and 45 per Lord Walker JSC; see paras 57–58 per Lord Hope DPSC).

84 The claimant’s case is that the local inhabitants’ use existed concurrently (or perhaps simultaneously) with the owner’s use and did so harmoniously over the years as appears from the absence of any dispute or complaint from either side. That is, just as the golfers and recreational users adopted a “give and take” approach to the joint use of the land in *Redcar* so too did, and should, the local inhabitants and the owners in the present case argued Mr Chapman. Hence, he submitted, this is a classic case of co-existing uses of the field (see earlier).

85 In my judgment the flaw in the claimant’s argument is, as I have indicated, that it fails to recognise the nature or effect of the owner’s use and the significance of their act of exclusion. In *Redcar* there was no such overt act (or relevant or demonstrable circumstance). In the present case the inspector was entitled, and right, to distinguish this case from *Redcar* for this reason (see the supplemental report at para 2.39; see earlier).

86 If it were necessary to go further I would agree with the submission of Mr Blohm that given the nature of the owner’s conduct and use of their land whereby the local inhabitants were excluded (and certainly excluded from part of the land in circumstances where no steps were taken to limit by physical marker or otherwise a precise area of exclusion), this is not a case of concurrent competing uses, but consecutive uses in which following exclusion there is, at best, tolerated use by the local inhabitants as permitted by the owner. That is, this is not a case of mere inaction or passive toleration but one involving a period of active exclusion. (see *Redcar*, at para 27 per Lord Walker JSC).

87 Mr Chapman submitted that the clearest example of a qualifying overt act sufficient to show permission is that of, say, the Inns of Court and the exclusion of the public on Ascension Day. In that example, the public use is tolerated following prior exclusion but it is accepted by all concerned that the public’s user following closure is not as of right. The question arises as to whether the exclusion by the owner in the present case is different in kind to the exclusion by the Inn of Court in Mr Chapman’s example and thus incapable of amounting to an implied permission. I do not consider that there is any difference in principle or kind between the exclusion exercised in the present case and in Mr Chapman’s example. Both acts are exercised by the owner without regard to the position of the local inhabitants and both demonstrate to all comers that the right of exclusion by the owner is being exercised. Both allow the inference that the public’s user is by permission.

88 Indeed, in both cases both parties’ user appears to co-exist harmoniously. That fact is not, however, determinative. It is the nature or quality of the owner’s act which counts as a matter of law. In both cases the owner exercises his right as owner to exclude.

89 For the reasons given I prefer the submissions of Mr Blohm, supported by Mr Laurence to those of Mr Chapman. In my judgment, the inspector was entitled to conclude as he did from the material before him.

90 In coming to this conclusion I remind myself, as Lord Bingham did at para 2 in *Beresford* as follows:

“... As Pill LJ rightly pointed out in *R v Suffolk County Council, Ex p Steed* (1996) 75 P & CR 102, 111: ‘it is no trivial matter for a landowner to have land, whether in public or private ownership, registered as a town green ...’ It is accordingly necessary that all ingredients of this definition should be met before land is registered, and decision-makers must consider carefully whether the land in question has been used by the inhabitants of a locality for indulgence in what are properly to be regarded as lawful sports and pastimes and whether the temporal limit of 20 years’ indulgence or more is met ...”

91 It follows that careful consideration must also be given to the nature and effect of the owner’s conduct relating to his use of the land during (any date within) the period in question. This case concerns an owner who evidently maintained a commercial interest in making substantial use of his land as and when he wished. A landowner is not to be lightly deprived of his exclusive right to use his land, especially in a case where it is proved or admitted

that the owner has made use of his land during the period in question and where that use could not reasonably be regarded (or dismissed) as insignificant and involved an act of exclusion. It is universally recognised that the (mere) erecting of notices offers little or no protection to the owner in respect of his maintaining exclusive right to use his land. The law of England and Wales does not expect or require an owner who wishes to maintain his exclusive right to use his own land to erect and maintain barriers or fencing to prevent others from going onto the land. Equally, the law does expect an owner to resist that which appears to be use of his land by others and the assertion of a right to do so. In those circumstances the owner is expected “to do something”. In this case the owner “did something”, as owner, which showed to the reasonable onlooker that the right to exclude was being exercised. The significance of the owner’s use of the land could not reasonably have been mistaken by the local inhabitants at the time. In my judgment, it was not necessary for the owners to do more than they did. The inspector’s conclusion at para 2.40 of the supplemental report was open to him in the circumstances.

92 Mr Chapman’s submissions were attractively presented. It was tempting to adopt them and follow the argument that this is a simple case of co-existing harmonious uses and that occasional limited exclusion during short-lived beer festivals or fun fairs albeit on payment of a small entrance fee is insignificant. However, adopting that approach would as I have indicated fail to recognise the true nature and effect of the act of exclusion by the landowner in this case. It is quite right that in the previous cases the focus has been on the quality of use by the recreational users. In the present case the focus fell squarely on the conduct of the owner as, in light of the inspector’s findings, the evidential onus, which is not onerous, had shifted to the owner. I am satisfied that that evidential onus has been discharged by them in the manner found by the inspector.

93 As for the remaining issues I am able to deal with them much more briefly. The second issue was interruption of user in respect of part only of the land. If the owner’s use does not count as a relevant overt act or a demonstrable or relevant circumstance to defeat the claim of use as of right it is difficult to see how such use by the owner could stand as evidence of interruption of use sufficient to defeat the claim on the basis suggested by the inspector. I agree with the short submissions of Mr Chapman on this issue. It was not challenged by the defendant. The interested party did not address the issue in oral submissions, rightly so in my judgment.

94 As to the third issue, namely, whether the claim was bound to fail on the ground that the locality relied on by the claimant, and as found by the inspector, (two polling districts) were incapable in law of constituting a “locality” within the meaning of section 15(2), I prefer the submissions of Mr Chapman to those of Mr Laurence. In my judgment the inspector was entitled to reach his conclusion on this issue in favour of the claimant and, in any event, the objection taken by the interested party, if valid, is capable of being cured by amendment to allow the substitution suggested by the defendant and endorsed by the inspector without causing any true prejudice to the interested party (see, for example, Lord Hoffmann in *Oxfordshire* at para 61).

95 Mr Laurence placed much reliance upon the recent decision of *Paddico (267) Ltd v Kirklees Metropolitan Council* [2012] EWCA Civ 262; [2012] LGR 617, in particular paras 27–29 per Sullivan LJ and para 62 per Carnwath LJ. Mr Chapman submitted that these passages were indeed obiter and addressed the question whether a conservation area could stand as a locality which, on the facts it could not. He submitted that the suggested additional requirement of a locality, namely, “community” in the first limb of the subsection and did not affect, in any event, the second limb, “neighbourhood within a locality”. He disagreed with Mr Laurence’s submission that “locality” necessarily has the same meaning or effect in both limbs. Mr Chapman’s submission has some support from Carnwath LJ (see para 51).

96 Mr Chapman referred to the history of this issue within these proceedings to show the equivocal stance taken by the interested party on this issue. The history does not, of itself, undermine Mr Laurence’s argument, of course. However, the inspector found on the evidence that the requirement in respect of a significant number of inhabitants of any locality, the polling districts identified in the application form was met and that the inhabitants, in any event, were from a neighbourhood within a locality (which could be more than a single locality as explained by Lord Hoffmann) which met any requirement as to cohesiveness.

97 Finally, Mr Chapman submitted that even if there was merit in the objection taken in respect of the inspector’s finding as to locality such objection could fairly be cured without causing prejudice to the interested party. I recognise Mr Laurence’s point that the locality must have a real or credible relationship with the field in question. For the reasons given by the inspector that criteria was established on the available evidence. I also accept that the locality must be credible in the sense that it is one from which inhabitants might be expected to come to

enjoy the land, It is for that reason that the relevant locality could hardly or credibly be identified as, to use Mr Laurence's example, "the county of Surrey" (or Somerset). As an alternative, to meet the theoretical or technical objection raised (late in the day) by the interested party those who know the area and locality (in the non-technical sense) are content to identify Yeovil which it appeared to the inspector, the defendant and claimant to be a credible and appropriate substitute. Thus, the interested party's objection may be met by amendment.

98 On balance, I prefer the findings and conclusion of the inspector in his report(s) which mirrors the approach taken by the defendant and which Mr Chapman adopts, namely, on the facts of this case, the polling districts in question constitute the relevant locality for the purposes of the section. In so far as that finding is impermissible then the matter may be cured by the proposed amendment.

99 The remaining issue (the correct basis to remit) does not arise for determination in light of my findings.

100 For these reasons I dismiss the application. The refusal to enter the land in question on the register was correct for the reasons given by the inspector.

Claim dismissed.

SALLY DOBSON, Barrister



Overview | **[2017] EWHC 716 (Admin)**

Ramblers Association v Secretary of State for Environment Food and Rural Affairs [2017] EWHC 716 (Admin)

Queen's Bench Division, Planning Court

Dove J

7 April 2017

Judgment

George Laurence QC & Luke Wilcox (instructed by **Bates Wells Braithwaite LLP**) for the **Claimant**

Tim Buley (instructed by **Government Legal Department**) for the **Defendant**

Juan Lopez & Charles Forrest (instructed by **Network Rail Infrastructure LTD**) for the **Second Interested Party**

The first and third interested parties were not represented and did not appear

Hearing dates: 14th & 15th February 2017

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE DOVE

Mr Justice Dove :

Introduction

1. This is an application for judicial review in relation to the decision of an Inspector appointed by the defendant dated 26th October 2015, whereby he refused to confirm the Nottinghamshire County Council (Burton Joyce Footpath No.17 and Stoke Bardolph footpath No.6) Modification Order 2013 ("the Order"). On 1st May 2006 the claimant made an application to the first interested party ("NCC"), who are the highway authority, to add the footpath to the Definitive Map and Statement for which they have responsibility. The application was made under section 53(5) of the Wildlife and Countryside Act 1981. On 5th October 2011 the application was refused and the claimant appealed to the defendant. That appeal was allowed on 21st February 2012 by the defendant's duly appointed Inspector, and NCC were directed to modify the Definitive Map and Statement to include the footpath, leading to NCC (having concluded that they would accept the decision and not seek to challenge it by way of judicial review) to make the Order on

1st February 2013. The second interested party (“NR”) objected to the making of the Order for reasons which are set out below, leading to the convening of a public inquiry in relation to whether or not the Order should be confirmed and the decision under challenge.

The facts

2. The claimant's application related to a claimed footpath passing from Nottingham Road, Burton Joyce in the north-west, passing in a south-easterly direction across country and over a level crossing of the railway line running from Nottingham to Lincoln, until it intersected with the Stoke Bardolph Footpath No.1. The proposed footpath passed over land belonging to the third interested party (“STW”), and also, obviously, railway land operated by NR. The footpath was claimed on the basis of 20 years' usage, and evidence of user forms were submitted from people who had used the route to establish that the requirements of section 31 of the Highways Act 1980 (as set out below) were met. In all, 33 evidence forms were ultimately provided to NCC describing use of the way. In the analysis of the forms provided by the Inspector who considered the appeal against the refusal of NCC to grant the application for modification she describes the evidence as follows:

“14. A total of 33 user evidence forms...provide evidence of claimed use, the earliest use dating from 1956. Fifteen forms indicate for the full 20 year period 1986-2006, with 13 people claiming use weekly and 15 people claiming use monthly, mostly for recreational purposes. Of the 19 forms relating to the 20 year period 1970 to 1990, 3 people claim use for the full 20 year period with a further 16 claiming use for periods of 5 to 15 years. Frequency of use during this earlier period varies from 2 or 3 times a year to daily, with 6 claiming monthly use, 3 claiming use twice a month, and 4 claiming use more than twice a week. None of the users refer to notices or challenges to their use prior to 2006, suggesting that the use was as of right...Some mention warning signs carrying instructions, but these were directed at those crossing the railway with vehicles or animals.”

3. The objections raised by NR were both legal and factual. Dealing firstly with the factual points, an analysis was presented of the private Act of Parliament, the Midland Railway (Nottingham and Lincoln) Act 1845 and its accompanying material in the form of the Deposited Plan and Book of Reference detailing the survey of affected land interests at the time of the Act receiving assent. This material did not show the existence of any public right of way at that time. It showed that the land either side of the present level crossing was in the same ownership and at the point of the level crossing there was in existence at that time an “occupation road”. It was therefore concluded that the level crossing was created to enable continued access along this private road for the benefit of the landowner. This reflected the position of STW, who owned the land either side of the railway lines at the point of the level crossing and who had the benefit of a right of way across it over the level crossing. In addition to this point, NR's witness gave evidence of a photograph from 1993 showing that the gates at the level crossing were chained and locked at that time. NR also relied upon the evidence of STW, and in particular Mr Jackson (one of their estate managers for the land either side of the level crossing over which the proposed footpath ran) that the gates at the level crossing were chained and padlocked, cross-referencing this to evidence from the claimant's user forms which alluded to gates at the level crossing being padlocked.

4. In relation to their legal objections, NR contended that there were three separate reasons in law why the Order should not be confirmed. These arguments are more fully developed below, as they form a significant part of the subject matter of this case. The first reason was that it was contended that NR had no capacity to dedicate a new public right of way on the basis that dedication would be inconsistent with its obligations to operate a safe and efficient railway network.

5. The second reason relied upon was the contention that the Licence under which NR operate the rail network would not permit the creation of new rights over railway land without the consent of the Office of

Rail and Road ("ORR"). The terms of the licence which were in issue were contained in the version of the Licence dated 1 April 2014 as follows:

"7 Land Disposal

7.1 The licence holder shall not dispose of any land otherwise than in accordance with this condition.

7.2 The licence holder may dispose of any land where:

(a) ORR consents to such disposal; or

(b) The disposal is required by or under any enactment...

"disposal" includes any sale, assignment, gift, lease, licence, the grant of any right of possession, loan, security, mortgage, charge or the grant of any other encumbrance to subsist (other than an encumbrance subsisting on the date when the land was acquired by the licence holder or on 15th November 2001) or any other disposition to a third party, and "dispose" shall be construed accordingly;"

6. The third legal issue raised by NR was the contention that since trespass on the railway was rendered a criminal offence by section 55 of the British Transport Commission Act 1949 the footpath could not be the subject of dedication. The claimant sought to refute this argument through reliance upon the case of Bakewell Management Ltd v Brandwood and others [2004] UKHL 14. The claimant submitted that the principle should not be given effect in the present case so as to deprive the public of the benefit of the right of way which would otherwise be established.

7. Having heard the evidence and the arguments at the inquiry, and having conducted a site visit, the Inspector reached conclusions in relation to the merits of confirming the Order. It is necessary in order to understand the arguments raised in this judicial review to set out the Inspector's findings and conclusions at some length. He dealt first with the issues that arose in respect of whether or not the Order should be confirmed in so far as it affected NR's land and the level crossing. At the outset he addressed the arguments about incompatibility with NR's statutory objects and the point about the ORR Licence as follows:

"8. The RA submit that for the purposes of the statutory scheme there is no requirement for the applicants to demonstrate that there was anyone with the legal capacity to dedicate. The RA says that the purpose of section 1(2) of the Rights of Way Act 1932 was to eradicate the need for capacity to be demonstrated once use had been established for a period of 40 years. That specific section was repealed under the National Parks and Access to the Countryside Act 1949 (the 1949 Act) so that since the coming into operation of the 1949 Act a way can be deemed to have been dedicated irrespective of whether there was a person or body with the capacity to dedicate.

9. However, for the statutory scheme to be engaged in the first place, the clause 'whether the way is of such a character that use of it could not give rise at common law to a presumption of dedication' must be addressed. At common law, there remains a requirement for the person or body against whom dedication is inferred to have the capacity to dedicate. Whilst section 1 of the Rights of Way Act 1932 established a statutory framework whereby the capacity to dedicate requirements could be dispensed with following a necessary period of use, the common law principle involving the capacity to dedicate remains relevant in certain circumstances. If Network Rail does not have the capacity to dedicate a public right of way over its operational land either because such a dedication would be inconsistent with its statutory duties or

because it could not authorise use which would otherwise be criminal, a public right of way could not come into being at common law or under the statutory scheme.

10. Network Rail drew support from the case of *British Transport Commission v Westmoreland County Council* [1958] (the *Westmoreland* case). As contested by Network Rail, this case established a number of principles:

(i) A statutory undertaker (such as Network Rail) cannot voluntarily release or otherwise abandon a statutory power that has been conferred upon it by special Act of Parliament and that concerns the manner in which that statutory undertaker may permissibly deal with land acquired for the purposes of that Act;

(ii) A statutory undertaker cannot, in the absence of an express statutory power, grant any easement over land acquired for the purposes of its special Act if the existence of such an easement – in any possible circumstances and at any future time – would undermine the statutory undertaker's satisfaction of the purposes of the special Act;

(iii) a statutory company has no power to grant a public right of way where the enjoyment thereof by the public *is incompatible* with the statutory objects of the company; and

(iv) for the purposes of adjudging *incompatibility*, it is a question of fact whether, at the date when the question is considered by a tribunal of fact, that there is any likelihood that the existence of an alleged right of way would interfere with the adequate and efficient discharge of the undertaker's statutory duty.

11. In the *Westmoreland* case, the route at issue ran over a bridge spanning the railway; the court found that the existence of the bridge did not endanger the running of trains upon the lines. In that case, statutory incompatibility did not arise, nor did the issue of criminal trespass under section 55 of the British Transport Commission Act 1949 (BTCA). The question of incompatibility is therefore a question of fact in each case. The circumstances in the *Westmoreland* case are different from that at Zulus Crossing where it is claimed a public right of way has come into existence crossing the live rails of the railway on the level.

12. Mr Jones's evidence was that an assessment had been made of the risk to users of the crossing using Networks Rail's ALCRM model. The assessment gave the crossing a score of C6, which reflected the number of vehicular traverses by the private rights holder against the number and speed of the trains passing over the crossing. The risk assessment did not take into account public use of the crossing as there was no empirical data for public use of the crossing to insert into the model.

13. A covert camera installed at Zulus Crossing for a period of 9 days in August 2015 had revealed around 60 crossings of the tracks by members of the public. The photographs showed single pedestrians crossing the railway, cyclists, dog walkers and families with small children and / or pushchairs. In Mr Jones' view, those members of the public encumbered with children, dogs or other accompaniments placed themselves at greater risk in crossing the railway as their primary attention may not be upon looking and listening for approaching trains. Factoring in 20 pedestrian crossings per day into the ALCRM model raised the crossing risk assessment to C5. Based on the ALCRM model, it was Mr Jones' view that public use of Zulus Crossing increased the level of risk to crossing users and train passengers with a corresponding reduction in safety at the crossing.

14. Mr Greenwood's evidence was that Network Rail's licence included conditions under which the railway must operate and is the primary tool which the Office of Rail and Road (ORR) has for holding Network Rail to account in respect of safety and operational efficiency. The Licence contained conditions which govern Network Rail's competence to grant new rights which affect operational land; the grant of any such rights

would require the consent of the ORR. Mr Greenwood said that Network Rail would not receive such consent from ORR to grant a new public right of way over the railway as the grant would undermine the business of operating and improving the network. Condition 7 of the licence prevented the disposal of railway land without ORR consent and 'disposal' for the purposes of condition 7 included the 'grant of any other encumbrance or knowingly permitting any encumbrance to subsist'. It was submitted that a change of the status of the crossing from a private vehicular crossing to one which also carried public rights was a 'disposal' of the land which given the implications regarding safety and risk would not be consented to by ORR.

15. Although there had been no fatalities at Zulus Crossing, an increase in pedestrian use of the crossing as a result of the existence of a public right of way is likely to increase the risk of an accident or fatality occurring. Such increase in risk and danger to both crossing users and passengers on the railway is reflected in the revised ALCRM risk assessment. In my view, use by the public of Zulus Crossing would be incompatible with Network Rail's ability to undertake and execute its statutory objectives as set out by the legislation governing the operation of the railway network."

16. Section 55 (1) of the BTCA provides that 'Any person who shall trespass any of the lines of railway or sidings or in any tunnel or upon any railway embankment cutting or similar work now or hereafter belonging or leased to or worked by the Commission or who shall trespass upon any other lands in dangerous proximity to any such lines of railway or other works or to any electrical apparatus used for or in connection with the working of the railway shall on summary conviction be liable to a penalty...'.

17. The claimed footpath crosses the Nottingham – Newark railway on the level and it is clear that the land is part of the operational railway. The crossing therefore satisfies the description of land found in section 55 as being 'the lines of the railway'. Use of Zulus Crossing by the public therefore constitutes an offence under section 55 of the 1949 Act.

18. It was argued by the RA that the principles established in Bakewell Management Ltd v Brandwood [2004] (Bakewell) could be applied to pedestrian use of Zulus Crossing. In Bakewell the House of Lords found that rights could be acquired over land through unlawful long use if that unlawful use could have had been authorised. The RA contended that although section 55 of the 1949 Act makes trespass over '*the lines of the railway*' a criminal offence, it must be within Network Rail's power to authorise what would otherwise be a trespass since customers have to go '*in dangerous proximity to lines of railway*' in the ordinary course of using the railway.

19. At issue in Bakewell was whether the use prohibited by statute could have been authorised and therefore not be a criminal act. In that case the offence of driving across a common was committed when done '*without lawful authority*'. The House of Lords found that authority to drive over the common could have been given and therefore no offence would have been committed. The Road Traffic Act 1988 and the Law of Property Act 1925 both prohibit the driving on a common '*without lawful authority*'. The RA contends that although section 55 of the BTCA does not include the term '*without lawful authority*', the concept of trespass is such that it implies that authority could be given by the landowner. The RA notes that rail passengers are regularly in '*close proximity to lines of railway*' when they stand on platforms waiting for their train; these people must be trespassers under the provisions of section 55 but are permitted to remain by Network Rail.

20. I am not persuaded by the RA's line of argument on this point for a number of reasons. First, Bakewell concerned criminality because the landowner could give, but had not given lawful authority to drive over the common. This is in direct contrast to section 55 of the BTCA which makes trespass on the railway a criminal act and where there is no provision for the network operator to give 'lawful authority' for such acts. Secondly, Network Rail cannot grant such authority as it would be contrary to the terms of the license

under which it operates. Finally, the analogy drawn by the RA regarding passengers standing on a platform as engaging in 'authorised trespass' when they are in 'close proximity of the rails' is incorrect; any passenger present on a platform is an invitee or client of the railway company and is therefore not a trespasser.

21. Furthermore, passengers standing on platforms are presented with a number of safety related messages regarding where not to stand so that they are not placed at risk; notices such as 'keep away from the platform edge' and the line painted on the platform edge to mark out where it is safe to stand prevent passengers from being in 'close proximity of the rails'. Trespass on the railway at railway stations is committed when and if passengers contravene those notices which warn against trespass which are usually located at the ends of the platform.

22. In any event, in Bakewell the House of Lords drew a distinction between those cases where it was possible to authorise use and remove the element of criminality and those in which it was not; *"It allows a clear distinction to be drawn between cases where a grant by the landowner of the right to use the land in the prohibited way would be a lawful grant that would remove the criminality of the user and cases where a grant of the landowner of the right to use the land in the prohibited way would be an unlawful grant and incapable of vesting any right in the grantee. It is easy to see why, in the latter class of case, long and uninterrupted use of the land contrary to a statutory prohibition cannot give rise to the presumed grant of an easement that it would have been unlawful for the owner to grant."* Zulus Crossing falls into this latter category as it is not possible for Network Rail to authorise the use which the public have made of the crossing.

23. There can be no doubt that the action of members of the public walking over Zulus Crossing is a trespass 'over the lines of railway' in contravention of section 55 of the BTCA. The only persons authorised to use Zulus Crossing are Severn Trent Water as successors in title to the owner whose land were bisected by the construction of the railway and for whom the crossing was constructed.

24. For a penalty of trespass to be applicable under section 55 of the 1949 Act it is necessary that notice to not trespass on the railway has been given at the railway station nearest to the point where the trespass is alleged to have taken place and that such notices have been renewed when defaced or destroyed.

25. Network Rail submitted copies of photographs of signs at Burton Joyce and Carlton stations taken in June 2015 and September 2015 respectively. I viewed the signs at Burton Joyce station myself as part of my unaccompanied site visit. The photographs show signs located at the ends of the platform which give warning to pedestrians not to cross the line or pass beyond the sign. It was Miss Bedford's evidence that the signs at Burton Joyce and Carlton stations had always been in place and that although the current signs did not mention the word 'trespass', their meaning was clear and unambiguous. It was Miss Bedford's understanding that the required signs had always been in place and although there was no photographic evidence to that effect from the 1950's to the 1990's, Miss Bedford considered it to be more likely than not that the required signs had been maintained in place at all material times.

26. There is no direct evidence that the relevant signs have been in place at Burton Joyce or Carlton stations since 1949 but equally no evidence has been submitted to demonstrate that such notices had not been present. In the absence of any contrary evidence I attach some weight to Miss Bedford's evidence which was subject to cross-examination and was not demonstrated to be incorrect. Given that the network operator has a statutory duty to prevent trespass on the railway, I consider it more likely than not that the required prohibitory notices have been present at Burton Joyce and Carlton stations to give effect to section 55 of the 1949 Act in respect of pedestrian use of Zulus Crossing.

27. Notices and signage has also been present at Zulus Crossing to advise authorised users on the safe use of a 'user-worked' crossing. A photograph of the site taken in 1993 shows a sign which is headed 'Stop Look Listen'; other words are also present on the sign but the quality of the photograph and the graffiti on the sign makes the remaining wording illegible. The Council stated in its report to the Rights of Way Committee that the additional wording was 'Notify local British Rail Manager before crossing with a vehicle which is unusually long, wide, low, heavy or slow moving. 1. Open both gates quickly and look in both directions before crossing. 2 Cross quickly. 3. Close and secure gates after use. Penalty for not doing so £100'. This same signage appears to have remained in place until at least 2006 and is shown in a photograph taken in July of that year.

28. Currently present at Zulus Crossing is a large sign on each gate which reads 'Private level crossing authorised users only'; further signs on the gates warn of a 'penalty for not closing gates £1000'. There are other signs which give advice on the safe use of the crossing with vehicles and animals and a sign with the legend 'warning do not trespass on the railway penalty £1000'. I accept that the signs currently in place were not present in 2006 when the RA's application was made and that the signs which were present during that period were not as comprehensive as they are today.

29. The witnesses I heard from at the inquiry confirmed that there had been signs present on site although recollections about the precise wording of those signs was mixed. Mrs Wollacott recalled a sign saying '*please close the gate*' but no other signs; Mrs Gretton recalled a sign on the gate which read '*failure to close gate penalty*'; Mr Wright had seen a sign near the gate but he could not recall the wording. Mr Bethell had used the crossing as part of his duties for Severn Trent Water and recalled cast iron signs being present at the crossing prior to the printed steel signs which had been present since at least 1993; he recalled signs along the lines of '*keep gate closed*' or '*close gate after use*'. Mr Parkes recalled the existence of signs but not the wording.

30. The RA submit that to all intents and purposes the signage present during the 20-year period did not convey to the user that the crossing was a private accommodation crossing; the absence of appropriate signage meant that the user had deduce from the physical characteristics of the crossing as to whether it could be used. It was submitted that at many crossings there are signs which say 'do not trespass on the railway' which is likely to be understood by users not to turn left or right to walk along the tracks. In the RAs view, Zulus Crossing was not dissimilar to the other crossings of the Nottingham – Newark line that the public were used to using.

31. It was Network Rail's case that appropriate signage had been erected and maintained at all times at Zulus Crossing and that the signage was directed at the authorised users of the crossing; that is, those who held a private vehicular right of way - the signage which had been present prior to 2006 could not be construed as implying a licence to the public to use the crossing.

32. The photographic evidence demonstrates that signage was present at Zulus Crossing. I agree with Network Rail that the wording of the signs present from at least 1993 until at least 2006 was directed at the private user of the crossing; the public having no rights over the crossing, let alone rights with large, wide, low, heavy or slow vehicles. These signs clearly offer advice to the private rights holder on how to safely cross the railway. There does not appear to have been any signs which specifically warned against trespass on the railway at Zulus Crossing until after 2006. However, the absence of such signage is immaterial given that I have concluded that signs which complied with section 55 (3) of the BTCA were present at Burton Joyce and Carlton stations during the relevant period; in such circumstances any use by the public of Zulus Crossing would have amounted to criminal trespass."

8. The Inspector then went on to consider the factual questions which had been raised as to whether the requirements as to user had been met. His factual findings in relation to the evidence before him were expressed in the following terms:

“33. It is apparent from the images recorded by the covert camera during August 2015 that public use of Zulus Crossing is continuing despite the existence of signs warning against trespass and despite both gates being locked to prevent unauthorised use. Although the RA submits that there are good sight lines at Zulus Crossing which allows pedestrians to cross in safety, the ALCRM methodology employed by Network Rail suggests that there is a high risk of accidents occurring at this crossing; just because there has been no fatality at the crossing does not mean it is safe to use.

34. I only heard from 5 user witnesses as the inquiry and a total of 33 user evidence forms were submitted in support of the application. The user evidence collectively demonstrates that the public has habitually crossed the rails at Zulus Crossing throughout the 20 years prior to 2006, with some users claiming to have walked over the rails on a weekly basis and others on a monthly basis.

35. Some of this use must have involved climbing over a locked gate at the Stoke Bardolph side of the railway prior to 2002 when Mr Jackson replaced the padlock with a hook and eye fastening. The locking of the gate to prevent unauthorised use of the crossing would effectively interrupt the public's enjoyment of the way and the action of climbing over a gate which has been specifically locked to prevent access can be regarded as use with force. In such circumstances, at least some of the claimed use during the 20 years prior to 2006 would have been interrupted and some would have been use which was not 'as of right' if the provisions of section 31 (1) were applicable to this case. However, any of the use by the public after 1949 is negated by the continuing effect of section 55 of the BTCA.”

9. The Inspector drew together all of his conclusions in relation to these issues and whether or not the Order should be confirmed, in so far as it affected the railway land and the level crossing, as follows:

“36. The claimed footpath crosses an operational railway on level and the dedication of a public right of way in such a location would be incompatible with the statutory objectives of Network Rail with regard to the safe and efficient operation of the railway and its duty to ensure the safety of the public and its passengers. Under the provisions of previous and current legislation governing the operation of the railway network, Network Rail and its predecessors lacked the capacity to dedicate new public rights of way over the live rails at Zulus Crossing. As Network Rail lacks the capacity to dedicate a public right of way, the way across the live rails is of a character which could not give rise to a presumption of dedication at common law.

37. As dedication of a public right of way at common law cannot have occurred at Zulus Crossing, it follows that the provisions of section 31 of the 1980 Act are not engaged. Furthermore, at all material times during the relevant 20-year period Zulus Crossing has been subject to the provisions of section 55 of the 1949 Act. Any use of the crossing by the public has been unlawful and it is not possible for Network Rail to grant lawful authority for such use. I conclude that as it is not possible for dedication of a public right of way to have occurred at common law the Order should not be confirmed with regard to Zulus Crossing.”

10. The Inspector then turned to consider the question of whether the Order should be confirmed in relation to the STW land. This aspect of the case involved consideration both of the question of the evidence in relation to use of the parts of the footpath in question on the STW land, and also the question of whether those parts of the footpath should be confirmed when they had the effect of forming two culs-de-sac. The Inspector's conclusions were as follows:

“38. The remainder of the Order route crosses land owned by Severn Trent Water and that land is not subject to the same statutory restrictions as the land owned by Network Rail. The available user evidence is of use of the path throughout the 20 years prior to 2006 and other than the challenges to use said to have been made by Mr Jackson in around 2007, there is little evidence to suggest that use was interrupted or was by stealth, force or with the permission of the owner. In addition, no evidence was presented to demonstrate that Severn Trent Water took active steps to inform the public that there was no intention to dedicate a right of way over what is an internal access road. Mr Jackson spoke of signs being present around the estate at the time when waste treatment took place in large open lagoons, but modern methods meant that the estate now had the appearance of a normal farm estate.

39. Whilst there is nothing to prevent a public right of way being a cul-de-sac at one end, the result of the section over Zulus Crossing not being recorded as a public right of way would be the recording of two culs-de-sac each one ending at the railway. These footpaths would not connect with any other path in the network in the vicinity of the railway and would only lead to the railway at Zulus Crossing. To use the 'missing link' between these two paths would constitute a criminal trespass, and the 'missing link' cannot therefore be regarded as a legitimate point of termination sufficient to justify public rights leading directly to either side of the railway.

40. I consider that as there is no legitimate place of public resort at either cul-de-sac, the remainder of the Order route could not be lawfully established as a public highway at common law. It follows that the Order should not be confirmed to show the residual part of the Order route as two cul-de-sac paths.”

11. In the light of the conclusions that the Inspector had reached his decision was that the Order should not be confirmed.

The issues in the case

12. As originally formulated the judicial review proceeded on 13 Grounds ranged across several forms of allegation that there were errors in the Inspector's decision. As the arguments (both written and oral) emerged, the positions on both sides of the case were clarified and refined. Some issues fell away. In short, in the final analysis the claimant relies upon three reasons why the Inspector erred in law in concluding that the Order should not be confirmed.

13. Firstly, the Inspector was wrong to conclude that the confirmation of the Order would conflict with NR's statutory duties, and therefore that they did not have capacity to give rise to the right of way. In essence, the claimant's arguments are that firstly, the Inspector assessed the issue at the wrong date, secondly, that he assessed it as part of the assessment of the “character” exception under section 31(1) of the Highways Act 1980 and should have assessed it under the “incompatibility” exception in section 31(8) of that Act, and thirdly, that the conclusions which he reached in relation to the assessment of risk were irrational. This latter point, is in my view, not at all evident from the claimant's Statement of Facts and Grounds, and objection was taken to it being raised for the first time at the hearing by both the defendant and NR. The claimant applied for permission to raise this argument at the hearing and I heard submissions from all sides about it. I shall assess those submissions below and in that context conclude whether permission to amend should be granted and express my conclusions on the points raised.

14. The second reason why it is said that the Inspector erred in law relates to his consideration of the issues raised under section 55 of the 1949 Act. The claimant contends that the Inspector was wrong to conclude that the signs which were relied upon in this case could properly give rise to criminal trespass. Furthermore, the claimant submits that in any event the illegality principle was not available in this case and that the Inspector was wrong to dismiss the argument which was raised under Bakewell Management, in particular in the light of the further guidance provided by the Court of Appeal in R(Best) v Chief Land Registrar [2015] EWCA Civ 17. The claimant accepts that it is necessary for them to succeed in relation to

both the first and second reason for the Inspector's decision to be quashed. Either one of the Inspector's conclusions in relation to these issues would be sufficient to lead to the Order not being confirmed, and his decision upheld.

15. The third reason relied upon by the claimant relates to the treatment by the Inspector of the STW land and in particular the conclusion that he could not confirm the footpath in the form of the two culs-de-sac which would remain if he were correct about the inability to confirm the Order over NR's land and the level crossing.

16. It is right that I should record that there are some matters which were originally raised in the case, but which as the matter was finally argued did not need to be pursued, and which it is not necessary for me to form conclusions about. Whilst written submissions were made in detail about the ORR Licence, and whether or not it had the effect of preventing NR through statutory incompatibility from dedicating a footpath, the parties accepted that it is clear from the Inspector's decision that he did not found his conclusions in relation to statutory incompatibility on the terms of the Licence, and therefore this point was not pursued at the hearing. All parties reserved their position in relation to it. Further, the defendant accepted that in so far as the Inspector had only considered the 20-year period from 1986 to 2006, and not other potential alternative periods for which the claimant could have contended, the conclusions reached by the Inspector in paragraphs 35 and 36 were not a complete answer to the claimant's case in the form of an alternative basis upon which the decision not to confirm the Order could be upheld. The claimant's criticisms of that part of the decision related to the reasons given by the Inspector for concluding that on the facts the user was not sufficient were, therefore, not pursued.

17. I propose to examine each of the three reasons, and the arguments advanced on either side of the case, separately before reaching my overall conclusions as to whether or not relief should be granted.

Reason 1: errors of law in relation to the "incompatibility" exception

18. Before examining the arguments in detail it is necessary to set out a little of the statutory history which provides the background to the argument. At common law it was possible to defeat dedication of a public right of way through proof that the landowner was under an incapacity. Such an incapacity could arise from legal obligations such as a mortgage over the land, or that the land was the subject of a settlement, or that the landowner was a public body and dedication would be incompatible with its statutory powers and duties.

19. As the Inspector observed, this position in relation to capacity was revised by statute. The Rights of Way Act 1932 as originally enacted provided as follows at section 1.

"1 (1) Where a way, not being of such a character that user thereof by the public could give rise at common law to any presumption of dedication had been actually enjoyed by the public as of right and without interruption for a full period of twenty years, such a way shall be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period, or unless during such period of twenty years there was not at any time any person in possession of such land capable of dedicating such way.

(2) Where any such way has been enjoyed as aforesaid for a full period of forty years, such a way shall be deemed conclusively to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate such way.

...

(7) Nothing in this section contained shall affect any incapacity of a corporation or other body or person in possession of land for public or statutory purposes to dedicate such way where such way would be incompatible with such public or statutory purposes.”(emphasis added)

20. As can be seen, the statute amended the position at common law in relation to the relevance of capacity as a means of defeating the allegation that there had been dedication of a right of way. The words underlined in the section above were deleted by section 58 of the National Parks and Access to Countryside Act 1949, thereby further amending the position in relation to the role of capacity in the consideration of whether there could be held to have been a dedication of a way. The position at common law in relation to incapacity as a consequence of statutory incompatibility was retained and restated in section 1(7) of the 1932 Act. In due course this section was replaced by section 31 of the Highways Act 1980 as follows:

“31 (1) Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.

(2)The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice such as is mentioned in subsection (3) below or otherwise.

(3)Where the owner of the land over which any such way as aforesaid passes—

(a)has erected in such manner as to be visible to persons using the way a notice inconsistent with the dedication of the way as a highway, and

(b)has maintained the notice after the 1st January 1934, or any later date on which it was erected,

the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway.

...

(8)Nothing in this section affects any incapacity of a corporation or other body or person in possession of land for public or statutory purposes to dedicate a way over that land as a highway if the existence of a highway would be incompatible with those purposes.”

21. The question which arises in the present case is the time at which the issue in relation to section 31(8) is to be determined. That section reiterated the restatement of the common law set out in s1(7) of the 1932 Act. The first case in time to which I was referred was the decision of Farwell J in A-G ex rel Barnes Urban District Council and London and South Western Railway (1905) 69 JP 110. The facts of that case were that in March 1847 an agreement had been made between Mortlake Vestry and the predecessors in title of the plaintiff council and the defendant railway company whereby a path, which had been closed, was to be replaced with a path across the railway with a level crossing with gates and a watchman. In October 1903 the defendant railway company prevented the use of the footpath over the railway line and provided a footbridge which they compelled the public to use to cross the line. The defendant contended that the agreement was ultra vires and void. The report records Farwell J's judgement in the following terms:

"The defendant company has closed the gates and abolished the level crossing, thereby compelling the users of the footway to cross by the bridge, and by that alone. In my opinion the bridge is not convenient for such foot traffic as takes place, with handcarts and perambulators, etc. The defendants contend that the dedication of a footpath under the agreement of March 1847 was ultra vires ab initio, for the reason that it was not compatible with the statutory objects of the company. This contention is not in its entirety supported by authority. In R v Leake (1833) 5 B & Ad 469, cited by Esher MR in Grand Junction Canal v Petty (1888) 21 QBD 273,275, 52 JP 692 it was said by Parke B at p478: "If the land was vested by the Act of Parliament in commissioners, so that they were thereby bound to use it for some special purpose incompatible with its public use as a highway, I should have thought that such trustees would have been incapable in point of law to make a dedication of it; but if such use by the public is not incompatible with the objects prescribed by the Act, then it is clear that the commissioners have that power"...In a case like the present a limited dedication is taken by the public, a responsibility being cast of the users of the path to look out for themselves, and this apart from the common law liability of the railway company for negligence. A statutory company can dedicate a footway so long as its user is not inconsistent with the objects and obligations of the company. This being so, the question is really reduced to one of fact. The evidence has been adduced to two points-the public safety and that of the traffic on the line. I find that no danger has been proved either to the user of the line or to the safety of the public who use the trains; if there is danger to any one, it is to the public who come and take what the company has given them. I think that the public use their rights by virtue of the dedication and subsequent user, subject to any inconvenience and risk arising from the use of the railway; they cannot claim that the railway shall not be used at all. It might, of course, be possible to show such a user by the public-as if streams of people were continually passing over a crossing-as would seriously hamper the railway service, and in such case it might be held that the dedication was of a very limited character; but in the present case the principal user of the level crossing was by the passage of children to and from school, and I cannot say that the possible risk is sufficient ground for allowing the company to avoid the duty that it undertook by the agreement arrived at in 1847. In my opinion no case has been made out by the company..."

22. The next case where the question of statutory incompatibility arose for consideration was South East Railway Company Limited v Warr (1923) 21 LGR 669. This was an action for trespass for climbing over a wicket gate at a level crossing, to which the defence was that a public right of way ran through the crossing. It is a curious case on the facts, since it appears from the judgment that the right of way did not in fact cross the lines of the railway. However, notwithstanding this, the railway company argued that as a railway company it was not possible for a footpath to be dedicated across their land as any such dedication would be ultra vires. The Court of Appeal did not agree. Lord Sterndale MR observed:

But, at the expiration of a very long argument, another point was raised, which is the only point that has given me any difficulty at all, and that is this : There is a decision in Great Central Railway Co. v. Balby with Hexthorpe Urban District Council (1912), 2 Ch. 112; 10 L. G. R. 687 ; 81 L. J. Ch. 596, and I think it must be taken to be the opinion of the learned Judge who gave that decision, that a railway company has not got the power to dedicate a public highway across its lines. I doubt if the learned Judge meant more than this: that if all you know is that the railway company is proposing to dedicate, or is said to have dedicated, a public highway across its lines of metals, and the conclusion is obvious that it must interfere with the working of the railway, then it is beyond the powers of the company to make such a dedication, because, as I have said, nobody disputes that a railway company cannot grant a public or private right in such a way as to interfere with the carrying out of its statutory powers. That being so, it is said that the company here have no power to dedicate this strip, or whatever you call it, this infinitesimal piece of ground, to dedicate that as a public highway, because it would be dedicating a highway across its metals. In the first place, it is not anything of the sort; it does not dedicate anything across the line at all, the highway is there before, and what is more, it is not necessary that the person who comes over this gate, or through this gate at A, should go across the line at all. He is upon another highway, another public footpath going to the westwards, and, therefore, the dedication of a highway over or through that gate is not a dedication of a highway across the lines at all.

A person coming that way need not cross the lines, he may go to the westwards, and not cross the lines at all, but undoubtedly the effect of the dedication is to give access to the public highway which does go across the lines from a direction in which there was not access before that dedication, that is to say, from the eastwards and north wards. The argument before us was this: the result of that is exactly the same as a dedication in the first instance of a footpath or public highway across the line. It does not seem to me that it is anything of the sort. If it could be shown that the result of the dedication which gives access to the footpath across the line by a large number of persons would be such as to interfere with the statutory powers of the company, then the company could not gate that access. That does not seem to me to be doubted. It seems to me that must be shown in some way. I do not care to discuss now of Way stile bad notice to the Judge and it lies with his conduct care elusions. Joint was faulty at Railway, a Ch. be taken that than 'oposieg sross its interfere 5 of the said, iblic or ' out of ny here it, this ghway, In the te any- I what s gate, He is west- trough atpsel. upon whom the onus is, because when you have got evidence on both sides the matter of the question of onus does not become as a rule very important. There must be disclosed by the evidence, such as it is, something which shows that the company cannot dedicate because to do so would be to interfere with its statutory powers. There is here no such evidence given on either side, and I decline entirely to say that, apart from evidence, the giving of access to an unknown number of persons, who may be few or may be many, to cross an existing highway is prima facie doing something that will interfere with the statutory working of the railway. The evidence discloses nothing of the kind."

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23. Warrington LJ delivered a concurring judgment.

"So far as the actual findings of the learned Judge are concerned, I see no reason whatever for disagreeing with the conclusions at which he arrived that a public way had, prior to some year in the nineties which is immaterial, been acquired by the public as far as the northern boundary of the railway company's land. Further than that, I think, so far as the facts are concerned, that the learned Judge was justified in coming to the conclusion that, treating the company for the moment as an individual, under no statutory restrictions, the public way extended over the two or three inches in question. But now it is said that the plaintiffs are not an ordinary individual, but that they are a statutory company, subject to the restrictions which are applicable to any person of that nature, and that that person is incompetent to create a public right of footway, I say nothing about a cart or carriage way, over land which is traversed by its rails, and that this is a case in which it is sought to establish against the railway company such a right of way.

Now this, I think, is really indisputable and established by a long line of authorities, that in the case of a statutory body such as a railway company which has acquired land for the purposes of its undertaking, it is not competent for a company to deal with its land by way of partial alienation in such a way that the result may be in compatible with the use by the company of the land which was so acquired for the purposes for which it was acquired. But the appellants here go further, and they say that in the case of a right of way over the metals it is enough to prove that what is claimed is a public right of way in that place to establish that such a dedication would be ultra vires the railway company and that, therefore, such a public way cannot exist: in the first place, even if that proposition were made out, it would not, in my opinion, apply to the facts of the present case, because at the point of the railway company's property immediately south of the strip of land of two or three inches wide there were, and always have been, two public ways, one running east and west along the northern boundary of the company's property and not crossing the lines, and one running south and crossing the lines. There is, therefore, no question of a fresh dedication of a public way across the line or on any part of the line of the railway company which could, or is even intended to be, used for lines; therefore, strictly, the proposition I have referred to, if it could be supported,

would not be applicable to the present case, but, in my opinion, that proposition in its wide terms is not capable of being supported if it be alleged that it is a presumption of law, quite irrespective of the facts of the present case, that a railway company cannot create a public footpath across its rails. If that is put forward as a proposition of law, I venture, with all respect, to disagree with it."

24. These two cases, decided at common law, were the backdrop to the centrepiece of the authorities in this part of the case: British Transport Commission v Westmorland County Council 1958 AC 126. The facts of that case were that the County Council had prepared a provisional map under the 1949 Act which marked a footpath across a bridge spanning a railway which had been constructed under statutory powers conferred by a private Act of Parliament in 1845. The railway owners applied to the Quarter Sessions under section 31 of the 1949 Act for a declaration that no right of way existed over the bridge. The Quarter Sessions held that although the bridge had not been expressly dedicated to the public as a right of way, its use by the public for a period of over more than 20 years had been such as to raise a presumption that it had been dedicated. They went on to find that the continued existence of the bridge would not endanger the running of the trains nor the operation of the railway and that, thus, a footpath had been dedicated and was properly marked on the provisional map.

25. During the course of argument counsel representing the railway owner submitted that the test of incompatibility with statutory powers was not to be examined solely at the time of the alleged dedication. He submitted that "one must ask whether it is remotely possible that in the future the dedication might interfere with the purposes of the railway, and, if it is even remotely possible there can be no dedication". By contrast counsel on behalf of the County Council submitted that the correct approach to the question of incompatibility, having accepted that the duty of a railway operator to the public was to run its train safely and efficiently, was "whether, at the date when the question is considered by the tribunal of fact, there was any likelihood that the existence of the alleged right of way would interfere with the adequate and efficient discharge of the undertaker's statutory duties".

26. All five members of the Committee provided opinions which concurred in the result that the decision of the Quarter Sessions should be upheld. In order to provide the context for the submissions made by all parties it is necessary to set out relevant extracts from each of the speeches given. The first speech was given by Viscount Simonds and the relevant passages are as follows:

"Any examination of this question must begin with the case of *Rex v. Inhabitants of Leake*, <http://login.westlaw.co.uk/maf/wluk/app/document?&suppsrguid=i0ad6ada60000015accf4a935c0e1b125&docguid=I7B9794C0E42711DA8FC2A0F0355337E9&hitguid=I7B976DB0E42711DA8FC2A0F0355337E9&rank=1&spos=1&epos=1&td=1&crumb-action=append&context=4&resolvein=true> - targetfn83 which has been cited in many cases, some of them in this House, and never disapproved. The decision goes to the root of the matter, and, often as they have been cited, I think I should remind your Lordships of the words of Parke J. in that case. "If," he said, "the land were vested by the Act of Parliament in commissioners, so that they were thereby bound to use it for a special purpose, incompatible with its public use as a highway, I should have thought that such trustees would have been incapable in point of law to make a dedication of it; but if such use by the public be not incompatible with the objects prescribed by the Act, then I think it clear that the commissioners have that power."

Here a principle is laid down which is supported not only by a great weight of succeeding authority but by its inherent reasonableness. For, though, on the one hand, it would be improper that commissioners or other persons having acquired land for a particular statutory purpose should preclude themselves from using it for that purpose, on the other hand, if consistently with its user for that purpose, it can be used for some other purpose also, I see no impropriety in such secondary user. If the usefulness of a parcel of land is not exhausted by its user for its statutory purpose, why should it not be used for some other purpose not incompatible with that purpose?...

If I am right in saying that the principle of *Leake's* case must be applied here, I must next consider what is the test of incompatibility, which, as I have already said, appears to me to be the real difficulty in the case. This is a question of fact. It can be nothing else and it has been so treated, and expressly so treated, in many of the cases to which I have referred. But to say this does not completely solve the problem. For the jury or tribunal of fact must still be properly directed what is the test, and it is to this point that counsel for the appellants directed his attack. He urged that there could only be incompatibility, or, perhaps I should here say, compatibility, if it could be proved that in no conceivable circumstances could the proposed user at any future time and in any way possibly interfere with the statutory purpose for which the land was acquired. If he is right, it is clear that the justices in the present case did not ask themselves the right question or ascertain the relevant facts.

My Lords, I am satisfied that this argument is misconceived. In the first place, in none of the relevant cases, neither in those that I have already mentioned nor in those, far more numerous, that I have examined, has anything of the kind been suggested. Parke J.'s use of the word "never" in *Leake's* case was clearly not intended to have so dramatic an effect. But in the second place, to give to incompatibility such an extended meaning is in effect to reduce the principle to a nullity. For a jury, invited to say that in no conceivable circumstances and at no distance of time could an event possibly happen, could only fold their hands and reply that it was not for them to prophesy what an inscrutable Providence might in all the years to come disclose. I do not disguise from myself that it is difficult to formulate with precision what direction should be given to a jury. But, after all, we live in a world in which our actions are constantly guided by a consideration of reasonable probabilities of risks that can reasonably be foreseen and guarded against, and by a disregard of events of which, even if we think of them as possible, we can fairly say that they are not at all likely to happen. and it is, in my opinion, by such considerations as these, imprecise though they may be, that a tribunal of fact must be guided in determining whether a proposed user of land will interfere with the statutory purpose for which it was acquired...

I should upon this part of the case add that there was some discussion whether a tribunal of fact must look at the facts as they are at the date when the matter arises for determination or, disregarding the present, try to look at them as they existed when the dedication was presumed to be made. It is possible, my Lords, that a case may arise in which it becomes relevant to decide this question, but inasmuch as a presumption of dedication arises after user for a number of years but there is no presumption of the date of dedication and in the present case the justices adopted the course most favourable to the appellants by looking at the facts as they are today and can today reasonably be foreseen, I do not think it necessary to say any more on this question."

27. The next speech came from Lord Morton and he observed as follows

"My Lords, in my opinion, the only rule applicable to the present case is that a statutory company has no power to grant a public right of way the enjoyment whereof by the public is incompatible with the statutory objects of the company. This rule was established as a rule of law by a long series of cases, starting with *Rex v. Inhabitants of Leake* and has been recognized by this House in *Birkdale District Electric Supply Co. Ltd. v. Southport Corporation*.

It is common ground between the parties that the question of incompatibility is a question of fact, but there is a vital difference in the views put forward on behalf of each party as to the proper question to be put to the tribunal of fact. Sir Andrew Clark submitted that the question should be "whether the existence of the alleged right of way might, in any possible circumstances, at any future time, hamper the undertaker in carrying out to the best advantage the purposes of its special Act." Mr. Rowe, for the respondent council, submitted that the question should be "whether at the date when the question is considered by the tribunal

of fact, there is any likelihood that the existence of the alleged right of way would interfere with the adequate and efficient discharge of the undertaker's statutory duties."

My Lords, I can find no decision, in the long line of authority cited in argument, which is clearly in favour of Sir Andrew Clark's version, and I find several cases in which the court appears to have acted upon the view that Mr. Rowe's version is the right one. As examples I would mention *Grand Junction Canal Co. v. Petty* and *In re an Arbitration between Gonty and Manchester, Sheffield and Lincolnshire Railway Co.*"

Having accepted the formulation of the test put forward by the County Council Lord Morton then went on to apply that test to the facts and was satisfied that the conclusions which had been reached by the Quarter Sessions were appropriate.

28. Lord Radcliffe was in particular troubled by how subsequent authorities had treated the decision of Sir George Jessel MR's judgment in *Mulliner v Midland Railway Company* [1879] 11 Ch.D 611. The effect of the proposition laid down by Sir George Jessel is described by Lord Radcliffe as being "to the effect that a railway company, which operates under statutory powers of managing its railway conferred upon it for the furtherance of the public interest, is devoid of legal capacity to grant any easement or right of way over land acquired by it unless expressly authorised by statute so to do". He reviewed the authorities in which the decision in *Mulliner* was considered. In the course of doing so he observed that "few authorities can have been explained so often with such little fidelity to the original source". This concern about the treatment of Sir George Jessel's proposition in subsequent authorities led him to express his opinion in the following terms:

"In my opinion, the root of the trouble lies in the fact that the courts have not truly accepted the validity of Sir George Jessel's proposition that a railway company lacks legal capacity to grant an easement over railway land "except ... with a view to the traffic of their railway." Side by side with this proposition and without explicitly rejecting it they have in fact been accepting and working on a different rule for statutory undertakers, viz., that they can grant easements over their land so long as the exercise of such easements is not inconsistent or incompatible with the fulfilment of the statutory purpose. This rule is regarded as being derived from *Rex v. Inhabitants of Leake*. I do not think it profitable to inquire at this date whether that case, fairly considered, did amount to a decision of the court embodying any such rule. If we were reviewing it for the first time today I should feel much doubt about that. But I think that we are bound to recognize that for very many years and on many occasions courts have taken as their test the words of Parke J. : "... if such use by the public be not incompatible with the objects prescribed by the Act, then I think it clear that the commissioners have that power," and have treated this test as a pragmatic one, to be answered according to the facts ascertainable at the time when the question arises. Some of the cases which recognize this test as the governing rule have been referred to in the speech of the noble and learned Viscount on the Woolsack. As he says, there are others.

Such a rule has many drawbacks. It means that the validity of any easement must depend on the state of facts ascertained or reasonably foreseeable at the time when it is challenged in legal proceedings; and no one can tell in advance upon what occasion a challenge will arise. It is very hard to know what measure of foresight or what extremity of prudence to allow to the judge of fact. It leads to what may well be, I think, misleading comparisons between different statutory undertakers and their works - railway lines, reservoirs, canals, towpaths, drains and bridges. It has led to much confusion between the voluntary grant or dedication of a right de novo, the provision of accommodation ways or works under statutory obligation, and the voluntary enlargement of rights of way existing before the creation of the works and therefore necessarily preserved. Each of these classes may involve different considerations. When the distinctions have all been allowed for, I think that it is accurate to say that, although the test derived from *Rex v. Inhabitants of Leake* has often been accepted and propounded, it has never yet resulted in a finding that the voluntary grant by a railway company of a right of way over its lines on the level of the lines is an

effective grant. A possible exception is the case of *South Eastern Railway Co. v. Cooper*: but the judgments delivered by the Court of Appeal in that case are not so expressed as to enable me to say with any certainty what was the ratio decidendi that formed the ground of their decision.

Nevertheless, I think that the accepted rule, with all its defects, is better than no rule at all. The construction of railways, at any rate, drove steel barriers over many hundred miles of the English countryside. To hold that at no time, at no point, and in no circumstances could a railway company grant de novo even a footway over, across, or under its lines would be a grave impediment to public amenity. In my opinion, therefore, we ought to say that Mulliner cannot stand today as a binding decision in so far as it laid down the proposition that a railway company lacks legal capacity to grant a right of way over or under its railway lands, including the site of the permanent way."

29. In his speech Lord Cohen observed that counsel on behalf of the railway owners had submitted reasons to distinguish the case of *Leake* on the basis that it did not lay down as the test of incompatibility whether there was any likelihood of dedication of a right of way materially hindering the statutory undertaker from an appropriate and efficient discharge of its duties. Addressing that second reason Lord Cohen stated as follows:

"If his second reason were well founded, it is difficult to conceive of a case in which a tribunal of fact could arrive at the conclusion that the dedication of the right of way was compatible with the objects prescribed by the Act. I doubt whether it could ever be said that in no possible circumstances at any future time could a railway company desire, for example, to widen its track. Sir Andrew, however, says that his proposition is supported by the language of Parke J. in *Rex v. Inhabitants of Leake*, where he says: "I think, that if it is quite clear that such works would never be required, the commissioners, whether special or general, might give the right to the public." Sir Andrew stresses the word "never." The sentence, divorced from its context, lends some support to his argument, but reading the judgment as a whole, and having regard in particular to the next following paragraph thereof, I think it is clear that Parke J. regards the question as one of fact, to be determined, no doubt not merely in the light of the position on the date of trial but in the light also of the probable future requirements of the company in the fulfilment of its railway purposes."

30. Lastly, Lord Keith agreed that the appeal by the railway owners should be dismissed and expressed his opinions briefly in the following terms:

"On the facts proved here the assumed inconsistency of the existence of a right of way with the subsidiary powers conferred on the appellants by section 16 of the Railways Clauses Consolidation Act, 1845, seems to me unreal. Whether the appellants could at some future time remove the bridge does not at the moment call for consideration. Even if they could and did, it does not follow that the right of way would disappear, nor has it been shown that the exercise of the right of way would then become incompatible with the running of the railway. Incompatibility is a question of fact, not a question of law, and where the facts are such as would be sufficient to presume dedication to the public of a right of way in all other respects it is, in my opinion, for the statutory undertaker to prove incompatibility, and not for those asserting the right to prove compatibility. The speech of Lord Sumner in *Birkdale District Electric Supply Co. Ltd. v. Southport Corporation*, though given in a somewhat different kind of case, contains passages to the same effect and in this matter I think no distinction can be taken between the two cases."

31. Against the background of these authorities Mr Laurence forged the following submissions. Firstly, he submitted that the question of the date at which statutory incompatibility under section 31(8) of the 1980 Act was not settled by the *British Transport Commission* case. Viscount Simonds expressly left open the date at which the tribunal of fact should make the assessment as to whether or not there was incompatibility. The decision was confined to the evaluation of the competing submissions in relation to the standard of proof of incompatibility with statutory purposes, whether merely a likelihood of interference, or

whether a remote possibility of interference would be sufficient. Mr Laurence submitted, therefore, that this was the first occasion at which the question of the date at which the assessment should occur was in point. He submitted that at common law the presumed dedication was at the start of the period. In Turner v Walsh (1881) 6 App Cas 636 (which was applied in the context of section 31 of the 1980 Act by Lightman J in Oxfordshire County Council v Oxfordshire City Council [2004] Ch 253 at paragraph 98) the following was observed by the court as to the approach to the evidence of dedication:

“Would not the inchoate right run on to maturity rather than be blocked by the intermediate passing of this Act? This language does not accurately express the presumption which arises from long-continued user. It is not correct to say that the early user establishes an inchoate right capable of being subsequently matured. If the right had been inchoate only in 1861, the argument of the Appellant that it could not have been matured or acquired after 1861, except in the mode prescribed by the Act, would have had great force. The proper way of regarding these cases is to look at the whole of the evidence together, to see whether there has been such a continuous and connected user as is sufficient to raise the presumption of dedication; and the presumption, if it can be made, then is of a complete dedication, coeval with the early user. You refer the whole of the user to a lawful origin rather than to a series of trespasses.”

Thus Mr Laurence submitted that the appropriate time for the assessment under section 31(8) to be undertaken is the point at which dedication is deemed to have occurred, namely the start of the 20 year period under section 31(1). He submitted that there is no reason for adopting a different timescale for the assessment of deemed dedication to the assessment of incompatibility. Indeed, he submitted that there is very good reason based upon the deeming of the dedication to take the same date for the assessment of both. As a fall-back, he submitted that at the very least the assessment should be undertaken at the end of the 20-year period, were he wrong in his submissions that the start of the 20-year period is the appropriate point in time to make the appraisal.

32. Bringing these submissions back to the circumstances of the present case, he therefore submitted that the Inspector erred in law when at paragraph 10(4) and paragraph 15 and 36 of the decision the Inspector adopted the date of his decision as being the time at which he undertook the assessment. Mr Laurence's submission was that the assessment should have been made as at the start of the 20-year period. For the purposes of these submissions he contended that the way had been called into question at a time in or around 1990 when there was evidence that a gate had been locked. That would lead to the assessment being made as at 1970. Alternatively, on the facts before the Inspector the relevant date for assessment applying Mr Laurence's contention could not in any event be later than 1986.

33. Mr Laurence made further submissions in relation to the Inspector's treatment of this issue. He submitted that when the Inspector addresses this question in paragraph 9 of his decision he treats the incompatibility point as being an aspect of the “character” exception, namely the exception that “the ways of such a character that use of it could not give rise in common law to a presumption of dedication” which is included within section 31(1). Mr Laurence observed that nowhere does the Inspector allude to section 31(8), which was in truth the exception which he was being encouraged to apply by the objector. Thus Mr Laurence submitted that the Inspector erred in law as he treated the question of incompatibility as being a feature of the “character” exception rather than under the correct limb of section 31, namely the “incompatibility” exception provided by section 31(8).

34. Mr Laurence also submitted that the Inspector erred in that he failed to examine the question of whether or not there was any limitation which could be imposed upon the Order which would respect the statutory duties of the objector, to the extent that it was proper for the Inspector to have held that the objector's statutory duties were incompatible with the Order. During the course of the hearing, and in order to illustrate this limb of his argument, Mr Lawrence produced a draft limitation which provided that the exercise of the right of way should only be limited to occasions when no train was approaching or on the

level crossing. He submitted that it was open to the Inspector to address the concerns of the objector under section 31(8) and resolve them by the creation of such a limitation, which would operate so as to ensure that the right of way could exist alongside the satisfactory discharge of NR's statutory duties. The draft limitation which he proffered was in the following terms:

"The lawful exercise of the right of way over land belonging to Network Rail and lying between the gates which bound Network Rail's operational land on either side of the railway ("the crossing") is limited to occasions when no train is approaching or on the crossing."

35. Finally, and in what was as set out above effectively a fresh Ground, Mr Laurence submitted that it was irrational for the Inspector to have concluded that the existence of the right of way on the level crossing would be incompatible with NR's statutory duties. It was common ground that those statutory duties, as in the British Transport Commission case, were related to the need for NR to ensure public safety whilst operating the railway and also to ensure that the railway operated efficiently. Mr Laurence submitted that the evidence which was before the Inspector could not sustain any conclusion that those objects would be imperilled by the making of the Order.

36. Firstly, he noted that there are a significant number of level crossings which accommodate rights of way across NR's railway network, including in particular a number of crossings of the railway lines in question (of the order of 12 or so) between the level crossing concerned in the present case and Newark. In relation to the evidence which was before the Inspector Mr Laurence noted that the increased volume of pedestrians using the right of way, namely 20 crossings per day, which led to the increase in the crossing risk assessment from C5 to C6 (see paragraph 13 of the decision) was not demonstrated by any of the empirical evidence as to the number of people who were crossing at the height of summer in August 2015 (an average of 6-7 per day). Thus, the conclusion that there would be an increase in the risk assessment score was not founded on the evidence. In any event, he submitted that a mere increase in risk does not equate to statutory incompatibility. Mr Laurence submitted that there had to be a real and material increase in risk for statutory incompatibility to be made out and thus he contended that on the basis of the material before the Inspector it was not open to the Inspector to find that there was statutory incompatibility.

37. In response to these submissions Mr Buley, on behalf of the defendant, contended that the question of the date at which the assessment under section 31(8) of the 1980 Act fell to be determined had been settled in the British Transport Commission case and that whilst Viscount Simonds had left the point open, a proper analysis of the other speeches in the House of Lords demonstrated that Lords Morton, Radcliffe and Cohen all formulated the test as one which had to be assessed at the date at which the question of fact as to whether or not there was incompatibility fell to be determined. He therefore submitted that this question as to the proper date for the appraisal had been settled in the British Transport Commission case. He submitted it formed part of the ratio of that case. In any event, he submitted that the adoption of the date of the fact-finding exercise in three of the five judgments in the House of Lords provided compelling obiter dicta, even if he was wrong as to the ratio of that case, indicating that the right answer was that the date was as at the date of the factual findings. Thus, he submitted that Mr Laurence's concerns about the potential mismatch between the date at which dedication of the way was assumed under section 31(1) and the date at which incompatibility was considered did not arise, in the sense that it was already settled law that the date was the date of the factual assessment. In any event, he submitted that use of the date of the fact-finding exercise for the purpose of assessing the question under section 31(8) was not a strange mismatch on the basis that the question under section 31(8) was a forward looking exercise, and thus it was not appropriate or proper to confine that enquiry to the claim period.

38. As a fall back, he submitted that the proper construction of section 31(1) meant that the date at which dedication should be presumed was at the end of the 20-year period, rather than its beginning. He submitted that Lightman J was wrong in the Oxfordshire County Council case to adopt the common law

position from Turner v Walsh. He submitted that the deemed dedication should be at the end of the 20-year period on the basis of the statutory language of section 31(1) ("has been enjoyed") which made clear that the deeming of the existence of the way was at the end of the 20 year period. Thus it was his fall back submission that in any event the assessment should not occur at the start of the 20 year period which is the basis of the dedication but rather at its conclusion.

39. Dealing with the submissions made in relation to paragraph 9 of the decision letter and the suggestion that the Inspector had erroneously applied the "character" exception, Mr Buley submitted that there was no error at all in anything that the Inspector had stated in paragraph 9. The Inspector's text sets out the requirement at common law to have capacity to dedicate, and then goes on to explain the basis upon which statutory incapacity or incompatibility arose to be considered in the case before him. The absence of mention of section 31(8) was wholly inconsequential when the Inspector accurately set out the relevant principles, observing that section 1 of the 1932 Act preserved "the common law principle involving the capacity to dedicate" with it remaining "relevant in certain circumstances". Thus Mr Buley's submission was firstly there was no error of law in the Inspector's paragraph 9. Even if the Inspector had treated the "incompatibility" exception incorrectly as being part of the "character" exception there was no respect in which it could be said that he had misapplied the appropriate legal test or applied a legal test which was in error. In substance he had applied the test under section 31(8) and therefore there was no reason to consider that the decision would be other than highly likely to be the same and the principles in section 31(2)(a) of the Senior Courts Act 1981 should apply so as to deprive the claimant of relief.

40. Turning to the question of the suggested limitation Mr Buley contended that the limitation could not in truth address the problem raised in relation to incompatibility. The question is not related to the extent of the care used by the public, but rather that the answer should be not to have the right of way at all.

41. In respect of the rationality argument, Mr Buley complained that there was no pleaded Ground on this basis and therefore permission had not been granted to raise the point. In any event, he submitted that the reality was that the only evidence before the Inspector, certainly of any technical character, was that produced by NR. The evidence from August 2015 was of the number of users when there was a locked gate in place, and the existence of a right of access was not advertised on the definitive map and statement. The predicate of NR's case, namely that the existence of the path made it clearly foreseeable that there would be greater public use and therefore greater potential conflict between pedestrian and rail movements, was self-evident and thus the decision which the Inspector reached was entirely rational and based on the evidence before him.

42. The defendant was supported in these submissions by Mr Lopes on behalf of NR. He submitted that there were insurmountable difficulties in drafting a limitation on the Order of the kind posited by Mr Laurence. Quite apart from the fact that there appeared to be no positive invitation to the Inspector to seek to identify any limitation, the drafting proposed by Mr Laurence to illustrate his submission was said by Mr Lopes to effectively make NR's case. It did not deal, for instance, with vulnerable users who would be slower to cross the level crossing. Further, it failed to engage with what might be meant by a train approaching and thus when the limitation might or might not apply. In reality, Mr Lopes submitted, any material increase in the use of the level crossing created a lack of safety which led to the overarching statutory powers being brought into play and the question of incompatibility arising.

43. My conclusions in relation to these competing submissions are as follows. Firstly, I am entirely satisfied that the question of when the assessment of statutory incompatibility under section 31(8) of the 1980 Act falls for determination was settled in the British Transport Commission case. It is clear to me from an analysis of the speeches which I have set out above that whilst Viscount Simonds expressly reserved his position, firstly, there was argument on the point in the case as he observed and secondly, that at least three of the members of the Committee accepted the formulation which was provided by counsel on behalf

of the County Council, namely that the assessment was to be made at the date when the fact finding tribunal was considering the question. Thus, the British Transport Commission case is in my view binding authority at the highest level to the effect that the Inspector in the present case was correct to undertake his determination in relation to section 31(8) at the time when he was reaching his decision on the Order. Even were I wrong in concluding that the British Transport Commission case was binding in relation to this point, nonetheless I would accept and endorse Mr Buley's submission that the adoption of counsel for the County Council's formulation of the test by three of the members of the Committee in that case is very persuasive authority in support of that proposition. I have no difficulty in accepting that persuasive authority and concluding that the correct date for the examination of the issues in respect of section 31(8) is the date on which the fact finding exercise is occurring and the order is being examined.

44. At first sight there is some force in Mr Laurence's submission that this conclusion creates something of a mismatch between the assessment of whether or not dedication is possible under section 31(8), and the assessment of the evidence in relation to the 20-year period relied upon under section 31(1). However, further reflection in my view underlines the good sense and practicality of adopting the date of decision-making in relation to the order as the date when the assessment of statutory incompatibility should occur. As Lord Radcliffe observed, the test itself from the case of Leake is essentially a pragmatic one. There are in my view sound practical reasons why the facts should be assessed at the point in time when the question arises. Firstly, the consideration of whether or not the recognition of the right of way would be incompatible with the statutory undertaker's statutory duties is in large part going to be a forward-looking exercise. It is an examination of the position at the time when the order is being considered, but against facts and forecasts which consider the question not simply at that moment, but also looking forward to consider whether on the balance of probabilities it is likely that in future the statutory undertaker's statutory duties would be compromised and there would be incompatibility between the operator's statutory objects and the existence of the way. The fact that it is a forward-looking exercise would render it peculiar for that test to be applied at some point in the past.

45. Secondly, it would be a curious factual enquiry for an examination to be made as to the safe and efficient operation of the railway, for instance, in the present case either at 1970 or 1986. Such an enquiry would have to be taken on the basis of technical standards and engineering knowledge at that point in time in the past (assuming that could be reliably ascertained). Evidence of accidents or near misses or other difficulties in operating the railway after the date in 1970 or 1986 would be inadmissible or at least arguably irrelevant. The artificiality of such an enquiry is in my judgment a strong pointer towards it being inappropriate to examine the question under section 31(8) at some earlier date than the date of determination. Mr Laurence recognised the force of the difficulties created by the exclusion of supervening events bearing directly upon the safe and efficient operation of the railway, and in his reply he sought to develop a hybrid approach whereby it would be possible for the Inspector to take account of such evidence, albeit still reaching a conclusion based upon a date at the start of the relevant 20 year period. In my view, whilst respecting Mr Laurence's endeavour to try to find a solution to the problem created by adopting an earlier date for examination of the question, this hybrid approach throws into sharper focus the practical problems created by taking the earlier date as the date for assessment. How such a hybrid approach could operate in practice is, in my view, very unclear and uncertain. Whilst there may be a mismatch between the timescales for the questions posed under section 31(1) and 31(8) when considering whether an order should be made or confirmed, the nature of those enquiries (retrospective under section 31(1), and both retrospective and importantly prospective under section 31(8)) and the practical issues with which they are engaged justify the difference in the times at which those questions are to be assessed.

46. It follows that not only am I satisfied that the British Transport Commission case settled that the question of fact under section 31(8) is to be examined at the point in time when the order is being examined, I am also satisfied that there is very good reason for taking that as the appropriate date for consideration of that particular forward-looking question.

47. The conclusions which I have reached effectively dispose of the subsidiary issue (which was in any event academic, on the basis that if I found that the date was not the date when the order was being examined the decision would be unlawful in any event) as to whether the presumed date of dedication is at the start of the period in accordance with the common law rule established by Turner v Walsh or, alternatively, as Mr Buley submitted at the end of the 20-year period in accordance with his construction of section 31(1). On the findings which I have made there was no error of law in the Inspector's decision and therefore this point does not arise for my determination. With due deference to the arguments which I heard, I prefer to leave the resolution of this issue to another case in which it is material and in point.

48. The next question is whether the Inspector fell into error in paragraph 9 of the decision by thinking that he was applying the "character" exception, when he should properly have been applying the "incompatibility" exception. I am not persuaded that there is any error of the kind claimed by the claimant in the Inspector's decision. In paragraph 9 the Inspector accurately sets out the law, starting by introducing the statutory scheme in the first sentence, then setting out the common law requirement for capacity to dedicate in the second sentence, before in the remainder of the paragraph explaining that whilst there had been adjustments to that requirement by the 1932 Act "in certain circumstances", the requirement that dedication should not be inconsistent with NR's statutory duties both at common law and under the statutory scheme remained a basis on which the Order could not be confirmed derived from capacity. This was an accurate statement of the law. As set out above section 1(7) of the 1932 Act and section 31(8) of the 1980 Act make clear that the common law in relation to statutory incompatibility have been preserved as part of the statutory scheme. Thus, whilst it is true that the Inspector did not specifically reference section 31(8) he did not need to do so. He had carefully set out the relevant law and no cross-reference was necessary to show that he was correctly directing himself to the issue which he had to decide. I do not accept, therefore, that the Inspector misdirected himself as the claimant alleges. Whilst Mr Buley and Mr Lopez raised the question as to whether in the event that I concluded there had been a misdirection of law, the provisions of section 31(2A) of the Senior Courts Act 1981 would operate so as to deprive the claimant of the benefit of relief, in the light of the conclusions which I have reached this point does not arise.

49. I turn then to the question of whether or not the Inspector ought, notwithstanding his conclusions, to have contemplated the imposition of a limitation on the order so as to enable it to be made and the statutory duties of the railway operator to be accommodated. I share the view given in his submissions by Mr Lopez that there are formidable difficulties in drafting any such limitation. Whilst respecting the spirit in which Mr Laurence's draft limitation was offered, the debate around it demonstrated how difficult it would be to identify when, in particular, a train on the railway lines was to have precedence such that the right of way over the level crossing was effectively suspended.

50. In my view there is a further, more significant, objection to this approach. In reality any person using the level crossing as a pedestrian as a trespasser at present will no doubt exercise circumspection and not wish to find themselves on the railway lines at any point when a train is on its approach or actually crossing. The existence of that natural desire for self-preservation, which is in truth no more or less than what is reflected in the limitation, is not a complete answer to resolving the safety issues which arise or the instances which may occur affecting the efficiency of the railway. With the best will in the world human error occurs. It is the existence of conflict, and the increased extent of such conflict, between pedestrian movements and train movements that increases the chance of human error and the number of times when there is a danger to public safety. Thus, the limitation is not an answer to the conclusions reached by the Inspector under section 31(8) because the limitation cannot itself avoid the impact on public safety and the efficiency of the railway which would arise with an increase in use of the level crossing caused by its recognition as a public right of way. There is force in the submission made by Mr Lopez that in fact the Inspector could not properly be criticised in this respect since the possibility of such a limitation was never raised with him. However, notwithstanding that point, even had it been raised I am satisfied that it would not have provided a conclusive answer to the findings which he made in respect of the impact of making the Order upon the statutory duties of the second interested party.

51. I turn then to the rationality Ground which was raised by Mr Laurence. Whilst I recognise that the matters raised were essentially matters of argument based on material which was already before the court, nevertheless in my view seeking to amend pleadings and argue new points at the hearing of a judicial review is in principle inappropriate. I allowed the argument to be heard and will offer my conclusions upon it, simply because I have been able to form conclusions upon the point with relative ease and for the assistance of the parties who engaged with the point. I am not, however, minded to allow the claimant to amend at the very late stage which it sought to since, as Mr Buley rightly points out, to do so would enable the claimant to avoid all of the disciplines and strictures of formal responses by the defendant and NR, and the necessary examination of arguability at the permission stage. Without prejudice to that position my conclusions are as follows.

52. I am satisfied that the Inspector's conclusions on the question of whether or not the safe and efficient operation of the railway would be affected so as to interfere with NR's statutory duties were entirely rational and open to him. As was observed in the course of argument, the reality in this case was that the Inspector only had technical evidence from NR on this point. That evidence addressed in detail objective engineering modelling of the risk presented by an increase in the number of persons using the way in the event that the order was confirmed. Paragraphs 12 and 13 of the Inspector's decision record that evidence, which forecast that were pedestrian movements across the railway line to increase to 20 crossings per day there would be an identifiable increase in the risk which use of the level crossing presented to the public and therefore, as the Inspector noted, a corresponding reduction in the safety of the crossing.

53. In my view Mr Laurence's point in relation to the CCTV survey recorded in paragraph 13 of the decision does not provide any argument that this analysis was fundamentally flawed or irrational. The CCTV survey provided some indication of the present level of usage. It was not presented on the basis that that would be the level of usage after the Order had been made and the right of way recognised. The CCTV survey enabled two conclusions to be reached. Firstly, the level of pedestrian usage was such at present that it would be likely to increase (and the forecast was to 20 pedestrians per day) if the Order was made. That led to the conclusion that safety at the crossing would be materially reduced. Secondly, it demonstrated that there were vulnerable users using the crossing who, if the right of way were recognised and the use persisted, would be at particular risk in using the level crossing as a right of way. It follows that the conclusions which the Inspector reached in paragraph 15 of his decision were securely founded upon the evidence before him, and conclusions that were clearly open to him on the evidence which he received at the inquiry. Thus, even had I permitted an amendment to allow this argument to be presented I would have concluded that the point was not arguable and refused permission for it to be raised as part of this judicial review.

Reason 2: the issues in respect of section 55 of the British Transport Commission Act 1949

54. Whilst the relevant text of section 55 of the British Transport Commission Act 1949 was set out by the Inspector in his decision, it is worthwhile for reference purposes to set out the full text relevant to these arguments which (as originally enacted) is as follows:

"55.— For better prevention of trespass on railways &c.

(1) Any person who shall trespass upon any of the lines of railway or sidings or in any tunnel or upon any railway embankment cutting or similar work now or hereafter belonging or leased to or worked by the Commission or who shall trespass upon any other lands of the Commission in dangerous proximity to any such lines of railway or other works or to any electrical apparatus used for or in connection with the working of the railway shall on summary conviction be liable to a penalty not exceeding forty shillings...

(3) No person shall be subject to any penalty under this section unless it shall be proved to the satisfaction of the court before which complaint is laid that public warning has been given to persons not to trespass upon the railway by notice clearly exhibited and that such notice has been affixed at the station on the railway nearest to the place where such offence is alleged to have been committed and such notice shall be renewed as often as the same shall be obliterated or destroyed and no penalty shall be recoverable unless such notice is so placed and renewed.”

55. All parties accept that the doctrine of illegality operates as a free-standing principle upon which the Order could be defeated, as opposed to being a factor which is part and parcel of the considerations under section 31(1) of the 1980 Act. In essence, as set out above, the Inspector concluded that on the basis that the use of the level crossing by pedestrians amounted to a trespass which was rendered criminal by section 55 of the 1949 Act, the Order should not be confirmed. This contention is the subject of challenge in these proceedings, as it was at the inquiry before the Inspector.

56. On behalf of the claimant Mr Luke Wilcox, who advanced this part of the claimant's case, made his submissions on essentially two bases. Firstly, he submitted that on the facts of this particular case the offence under section 55 of the 1949 Act did not in fact arise. Secondly, he submitted that even if it did, the principle of illegality was not engaged in the context of this particular offence, and therefore any crime which might have been committed under section 55 of the 1949 Act could not operate so as to defeat the Order. This latter submission was based upon an examination of two authorities which were key to the claimant's case: firstly, Bakewell Management Limited v Brandwood [2004] UKHL 14; [2004] 2 AC 519 and secondly R (Best) v Chief Land Registrar [2015] 3 WLR 1505.

57. Under section 55(3) of the 1949 Act it is in effect a defence to a charge under section 55 that no “public warning has been given to persons not to trespass upon the railway by notice clearly exhibited and that such notice has been affixed at the station on the railway nearest to the place where such an offence is alleged to have been committed”. It will be recalled that in paragraphs 25 and 26 of the decision the Inspector found that there had been signs in place at the nearest stations, namely Burton Joyce and Carlton, since 1949 and that such notices as were found by the Inspector “give warning to pedestrians not to cross the line or pass beyond the sign”. In fact the full text of those signs as exhibited in the trial bundle are as follows:

“Passengers must not pass this point or cross the line”

It appears from the photographs that the signs are situated at the end of the platforms at the stations.

58. Mr Wilcox submitted that the signs are not adequate to give rise to criminal liability under section 55. He submitted that where criminal liability was to be imposed it was essential that such was made clear in any relevant notice. He further submitted that since the 1949 Act was a private Act of Parliament there was a particular need for clarity in relation to the creation of the offence. He contended that it was particularly pertinent that the sign was directed only towards passengers at the station, and further did not clearly identify that failure to comply with the sign would amount to a criminal offence. In all of these circumstances he submitted that the requirement that a notice should be provided had not been met, in particular in terms of the contents of these signs, and therefore they were incapable of satisfying the requirements necessary in order to give rise to criminal liability under section 55.

59. To understand Mr Wilcox's submissions in relation to his second point as to the application of the principle of illegality it is necessary to set out the substance of the authorities upon which he relied as set out above, starting with the Bakewell Management case. That case concerned the owners of property who accessed their homes by driving vehicles from the public highway along tracks or roads over common land.

A deed had been deposited on 31st December 1927 pursuant to section 193(2) of the Law of Property Act 1925 by the owner of the common land declaring it to be common land to which section 193 of the 1925 Act applied. As a consequence of that declaration section 193(4) created a statutory prohibition upon vehicular use of the common in the following terms:

“(4) any person who, without lawful authority, draws or drives upon any land to which this section applies any carriage, cart, caravan, truck or other vehicle, or camps or lights any fire thereon, or who fails to observe any limitation or condition imposed by the minister under this section in respect of any such land, shall be liable on summary conviction to a fine not exceeding level 1 on the standard scale for each offence.”

60. No lawful authority was granted by the owner of the common land, but the occupiers of the homes who were accessing them upon the common land claimed entitlement to an easement by virtue of evidence of protracted use and the effluxion of time under section 2 of the Prescription Act 1832 or, alternatively, under the doctrine of lost modern grant. The claims were resisted by the land owner on the basis that since the use of the accesses over the common land was a criminal offence the doctrine of illegality applied so as to prevent the establishment of the easements claimed. In advancing the case on behalf of the owner of the common land reliance was placed on the case of Hanning v Top Deck Travel Group Limited 68 P&CR 14. In his speech Lord Scott identified that in the leading judgment of the case of Hanning Dillon LJ, having analysed the relevant authorities, concluded that they established the rule that:

“an easement cannot be acquired by conduct which, at the time the conduct takes place, is prohibited by a public statute.”

Lord Scott concluded that the cases did not establish that rule. He stated that instead:

“what they establish is a rather different rule, namely, that an easement cannot be acquired to do something the doing of which is prohibited by a public statute. ”

The distinction between those two propositions is made clear in paragraph 39 of his speech in the following terms:

“The feature of Hanning's case, and the present case, that distinguishes them from such cases as Legge's case and *Cargill v Gotts* is that the servient owner was able, notwithstanding the statutory prohibition, indeed by the very terms of section 193(4) , to make a lawful grant of the easement. A statutory prohibition forbidding some particular use of land that is expressed in terms that allows the landowner to authorise the prohibited use and exempts from criminality use of the land with that authority is an unusual type of prohibition. It allows a clear distinction to be drawn between cases where a grant by the landowner of the right to use the land in the prohibited way would be a lawful grant that would remove the criminality of the user and cases where a grant by the landowner of the right to use the land in the prohibited way would be an unlawful grant and incapable of vesting any right in the grantee. It is easy to see why, in the latter class of case, long and uninterrupted use of the land contrary to a statutory prohibition cannot give rise to the presumed grant of an easement that it would have been unlawful for the landowner to grant. It is difficult to see why, in the former class of case, the long and uninterrupted user should not be capable of supporting the presumed grant by the landowner of an easement that if granted would have been lawful and effective notwithstanding that the user was contrary to a statutory prohibition. I can see no requirement of public policy that would prevent the presumption of a grant that it would have been lawful to grant. On the contrary, the remarks of Lord Denning MR and Stamp LJ in *Davis v Whitby* [1974] Ch 186 , 192 and of Lord Hoffmann in *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335, 349

to which I have referred provide sound public policy reasons why, if a grant of the right could have been lawfully made, the grant should be presumed so that long de facto enjoyment should not be disturbed."

61. This analysis led Lord Scott to his conclusions at paragraph 46 in the following terms:

"My Lords, in my opinion, the decision in Hanning's case and the subsequent justifications of that decision are wrong and ought not to be followed. I accept that, at the end of the day, the issue is one of public policy. It is accepted, however, that a prescriptive right, or a right under the lost modern grant fiction, can be obtained by long use that throughout was illegal in the sense of being tortious. That is how prescription operates. Public policy does not prevent conduct illegal in that sense from leading to the acquisition of property rights. The decision in Hanning's case can only be justified on the footing that conduct illegal in a criminal sense is, for public policy purposes, different in kind from conduct illegal in a tortious sense. Why should that necessarily be so? Why, in particular, should it be so where the conduct in question is use of land that is not a criminal use of land against which the public law sets its face in all cases? It is criminal only because it is a user of land for which the landowner has given no "lawful authority". In that respect, the use of land made criminal by section 193(4) of the 1925 Act, or by section 34(1) of the 1988 Act, has much more in common with use of land that is illegal because it is tortious than with use of land that is illegal because it is criminal."

62. Lord Walker also emphasised the dispensing power of the land owner in the case of a criminal offence under section 193(4) of the 1925 Act in his speech. Like Lord Scott, he made reference to the public policy dimension of the illegality principle. His conclusions were expressed as follows:

"56. The present case is exceptional because of the unusual nature of the offence created by section 193(4) of the Law of Property Act 1925. It creates a criminal offence but it is, most unusually, an offence in respect of which the owner of the soil of the common has a dispensing power. It is common ground that that is the effect of the words "without lawful authority" in subsection (4). Moreover the landowner does not hold his dispensing power in any sort of fiduciary capacity. He is not bound to exercise it in the public interest. He can if he thinks fit exercise his dispensing power in his own private interest, by levying a charge for the grant of his authority. Miss Williamson (for the claimants) candidly agreed that from her clients' point of view the appeal is ultimately about money...

59. My Lords, in my view this House should not readily conclude that the decision of the Court of Appeal in Hanning's case was mistaken, especially as it has been followed, not only by the Court of Appeal in this case, but also on other occasions. Nevertheless I am satisfied that the wide formulations of the principle by Templeman LJ in *Cargill v Gotts* [1981] 1 WLR 441 and by the Court of Appeal in Hanning's case, although producing the right result in the generality of cases, are too wide in a case like the present. That is not to say that the residents of houses near Newtown Common did not commit a criminal offence (of a fairly venial nature) when they drove across the common to and from their houses. The principle of legal certainty requires the criminality or lawfulness of an act to be determined at the time when it takes place, and not with the advantage (or disadvantage) of hindsight. Nevertheless the prior authority of the owner of the common would have provided a complete defence to any criminal charge. In the ordinary case of prescription of a private right of way, the prior authority of the landowner (in the solemn form of a grant by deed) is presumed or inferred from long user, even though every act of user during the prescription period takes place without his actual prior authority and is a tortious (though not a criminal) act. I cannot see that any public interest would be served by holding that the absence of the landowner's actual prior authority should produce a completely different result in cases where section 193(4) is in play.

60. I do not see this as reintroducing the "public conscience" test which this House disapproved in *Tinsley v Milligan* [1994] 1 AC 340. It is merely a recognition that the maxim *ex turpi causa* must be applied as an instrument of public policy, and not in circumstances where it does not serve any public interest: see for

instance *National Coal Board v England* [1954] AC 403. In my opinion it is the landowner's unfettered power of dispensing from criminal liability, exercisable at his own discretion and if he thinks fit for his own private profit, which is the key to the disposal of this appeal. Since a dispensing power of that sort is very unusual, it is unlikely to apply to many other cases of criminal illegality."

63. Against the backdrop of these conclusions Mr Wilcox submitted that in the present case the second interested party had a dispensing power in respect of any offence under section 55. It was perfectly possible for NR to authorise the use of the level crossing without being in breach of their statutory powers, and by doing so they would have obviated any offence under section 55 since they had authorised the pedestrian use of the level crossing. In those circumstances there would be no trespass upon which section 55(1) of the 1949 Act could bite. He submitted that the Inspector was therefore in error in paragraph 37 of his decision when he concluded that "it is not possible for network rail to grant lawful authority for such use". NR could have granted permission for the level crossing to be used. The offence under section 55 is analogous to that under section 193(4) of the 1925 Act and thus the principle of illegality should not have been deployed so as to defeat the Order.

64. Turning to the second authority upon which the claimant relies, it is important to note that this decision was not made available to the Inspector. The case of Best concerned the claimant's application to the Land Registry to have himself entered on the Register as the registered proprietor of a property which he had entered as a vacant residential building without the registered proprietor's consent, and to which he had carried out building and other works of repair so as to make it his permanent residence. His evidence was that he had treated it as his own property since 2001. The Chief Land Registrar rejected the application on the basis that his occupation from 1st September 2012 (when section 144(1) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 came into force) had been a criminal trespass and could not therefore give rise to a claim for adverse possession. The Court of Appeal concluded that section 144 of the 2012 Act did not affect the settled law of adverse possession in relation to registered or unregistered land, and therefore the existence of section 144 did not prevent the claimant from having acquired a possessory title which should be registered.

65. The relevant offence under section 144 is established as follows:

"144(1) a person commits an offence if:

(a) the person is in a residential building as a trespasser having entered as a trespasser

(b) the person knows or ought to know that he or she is a trespasser, and

(c) the person is living in the building or intends to live there for any period"

66. In giving the leading judgment in the Court of Appeal Sales LJ identified in paragraph 51 of his judgment that the best guidance on the question of the operation of illegality is to be found in the speech of Lord Wilson JSC in Hounga v Allen (Anti-Slavery International intervening) [2014] 1 WLR 2889. Sales LJ set out his analysis of the decision in Hounga in the following terms:

"52. In doing so, the Supreme Court confirmed the position arrived at in *Tinsley v Milligan* [1994] 1 AC 340: the law of illegality does not operate to confer a broad discretion on a court to take any illegal actions on the part of a claimant into account when deciding the extent to which such illegality has an impact upon the relief sought by the claimant. Rather, the task for the court is to identify in the specific context in question a particular rule which reflects in an appropriate way the relevant underlying policy in that area: see *Hounga*, paras. [42] et seq.; also *Gray v Thames Trains Ltd* [2009] UKHL 33; [2009] AC 1339, paras. [30]-[31] per

Lord Hoffmann; *Stone & Rolls Ltd v Moore Stephens* [2009] UKHL 39; [\[2009\] 1 AC 1391](#) , paras. [20]-[25] per Lord Phillips of Worth Matravers; and now *Les Laboratoires Servier v Apotex Inc.*, supra, paras. [13]-[22] per Lord Sumption JSC. Although in each case a rule is to be identified, rather than just taking a discretionary approach of a kind disapproved in *Tinsley v Milligan*, *Hounga* and *Les Laboratoires Servier*, there is not one single rule with blanket effect across all areas of the law. Instead, there are a number of rules which may be identified, each tailored to the particular context in which the illegality principle is said to apply: see *Gray v Thames Trains Ltd* (para. [30]: the *ex turpi causa* policy is based “on a group of reasons, which vary in different situations”; and para. [32]: as between rules applicable in different contexts, “the questions of fairness and policy are different and the content of the rule is different. One cannot simply extrapolate rules applicable to a different kind of situation”) and *Les Laboratoires Servier*, paras. [19] and [22].

53. The issue in *Hounga* was, “In what circumstances should the defence of illegality defeat a complaint by an employee that an employer has discriminated against him by dismissing him contrary to section 4(2)(c) of the Race Relations Act 1976?” (para. [1]). In a significant respect, therefore, the question was similar to that before us, depending as it did on the extent to which the Supreme Court considered that the rights conferred by the 1976 Act should be treated as impliedly qualified so as to be subject to a defence of illegality. At paras. [42]-[44] of his judgment in *Hounga*, Lord Wilson said this:

“42. The defence of illegality rests on the foundation of public policy. “The principle of public policy is this ...” said Lord Mansfield by way of preface to his classic exposition of the defence in *Holman v Johnson* (1775) 1 Cowp 341, 343. “Rules which rest on the foundation of public policy, not being rules which belong to the fixed or customary law, are capable, on proper occasion, of expansion or modification”: *Maxim Nordenfelt Guns and Ammunition Co v Nordenfelt* [1893] 1 Ch 630, 661 (Bowen LJ). So it is necessary, first, to ask “What is the aspect of public policy which founds the defence?” and, second, to ask “But is there another aspect of public policy to which application of the defence would run counter?”

43. An answer to the first question is provided in the decision of the Canadian Supreme Court in *Hall v Hebert* [1993] 2 SCR 159. After they had been drinking heavily together, Mr Hebert, who owned a car, allowed Mr Hall to drive it, including initially to give it a rolling start down a road on one side of which there was a steep slope. The car careered down the slope and Mr Hall was seriously injured. The Supreme Court held that the illegality of his driving did not bar his claim against Mr Hebert but that he was contributorily negligent as to 50%. At the outset of her judgment on behalf of the majority, McLachlin J, at p 169, announced her conclusion about the basis of the power to bar recovery in tort on the ground of illegality, which later she substantiated in convincing terms by reference to authority. Her conclusion was as follows:

'The basis of this power, as I see it, lies in [the] duty of the courts to preserve the integrity of the legal system, and is exercisable only where this concern is in issue. This concern is in issue where a damage[s] award in a civil suit would, in effect, allow a person to profit from illegal or wrongful conduct, or would permit an evasion or rebate of a penalty prescribed by the criminal law. The idea common to these instances is that the law refuses to give by its right hand what it takes away by its left hand.'

44. Concern to preserve the integrity of the legal system is a helpful rationale of the aspect of policy which founds the defence even if the instance given by McLachlin J of where that concern is in issue may best be taken as an example of it rather than as the only conceivable instance of it. I therefore pose and answer the following questions: (a) Did the tribunal's award of compensation to Miss Hounga allow her to profit from her wrongful conduct in entering into the contract? No, it was an award of compensation for injury to feelings consequent on her dismissal, in particular the abusive nature of it. (b) Did the award permit evasion of a penalty prescribed by the criminal law? No, Miss Hounga has not been prosecuted for her entry into the contract and, even had a penalty been thus imposed on her, it would not represent evasion of

it. (c) Did the award compromise the integrity of the legal system by appearing to encourage those in the situation of Miss Houna to enter into illegal contracts of employment? No, the idea is fanciful. (d) Conversely, would application of the defence of illegality so as to defeat the award compromise the integrity of the legal system by appearing to encourage those in the situation of Mrs Allen to enter into illegal contracts of employment? Yes, possibly: it might engender a belief that they could even discriminate against such employees with impunity.”

54. Lord Wilson's assessment was that the considerations of public policy militating in favour of applying the *ex turpi causa* defence to defeat the claim were very slight: para. [45]. He then went on to consider the countervailing public policy considerations which were in play, in favour of allowing the claimant to rely on the Race Relations Act and to bring her claim. He concluded that these outweighed the public policy considerations in favour of allowing an illegality defence to the claim and that therefore the claim should proceed: paras. [46]-[52]. Lord Hughes JSC (with whom Lord Carnwath JSC agreed) agreed “that the claim of statutory tort in the present case was set in the context of the claimant's unlawful immigration, but that there was not a sufficiently close connection between the illegality and the tort to bar her claim”: para. [59].”

67. Sales LJ applied the guidance given in Houna to the particular circumstances of Best as follows:

“69. Following this approach, I accept Mr Rainey's submission that the relevant balance of public policy considerations shows clearly that the fact that a relevant period of adverse possession for the purposes of the LRA included times during which the possessor's actions constituted a criminal offence under section 144 of LASPOA does not prevent his conduct throughout from qualifying as relevant adverse possession for the purposes of the LRA.

70. For these purposes, what is required, following the guidance given by Lord Wilson in *Houna* at para. [42], is an amalgamated approach, balancing the public policy considerations which underlie and find expression in the provisions of the LRA governing acquisition of title by adverse possession against the public policy considerations which underlie and find expression in section 144 of LASPOA. Addressing that focused issue, I consider that it is clear that in enacting section 144 of LASPOA, Parliament did not intend that it should have any impact on the law of adverse possession set out in the LRA. The mischief which section 144 was intended to address and the objective it was intended to achieve had nothing to do with the operation of the law of adverse possession. (I would add that, in my opinion, each of the authorities relied upon by Mr Rainey for his wide submission is capable of being explained by application of the same approach).

71. The object of section 144 appears both from its own terms and from the Government's stated reasons for seeking its enactment by Parliament, as set out in the Response to Consultation. Although that response was not in formal terms a White Paper, in substance it fulfilled the same role of explaining the background to a legislative proposal introduced by the Government. In my view, therefore, the consultation paper has similar status to a White Paper as a legitimate aid to interpretation of section 144, and in particular as a legitimate source for guidance as to the policy objective which was sought to be achieved by section 144 (cf *Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591). The stated objective of section 144 was to provide deterrence and practical, on the ground assistance for home-owners in removing squatters from their property. Disruption of the law of adverse possession was not mentioned as an intended effect of the provision, nor was it suggested that it was being introduced to try to re-balance the rights of property owners as against those of adverse possessors with respect to the entitlement to be treated as title-holder in relation to property.”

68. In his submissions Mr Wilcox drew parallels with the case of Best and sought to apply the balancing of public policy interests required by paragraph 42 of Lord Wilson's judgment in the following way. He submitted that like Best the provisions of section 31 of the 1980 Act are grounded in principles akin to

adverse possession in terms of the requirement for long usage, and he drew attention to the public benefit to be derived from certainty as to the existence of rights of way, both in terms of the interests of land owners in knowing whether or not rights of way existed across their land, and also in terms of the public who might wish to use the right of way and the public benefits which were thereby provided. He submitted that the strong public interest in the secure and certain identification of rights of way provided by section 31 had to be balanced with the public policy interest of keeping trespassers off the railway, but contended that much more limited weight had to be given to that latter public policy consideration in the light of the fact that the sentence which the offence under section 55 attracts is very light, and far lighter than the sentence under section 144 of the 2012 Act. For these reasons he submitted that the doctrine of illegality ought not to apply in relation to section 31, which is premised on the tort of trespass in just the same way as were the easements in Bakewell Management and the adverse possession in Best. The acquisition of those rights should not, as a matter of public policy, be precluded by the section 55 offence.

69. In response to these submissions Mr Buley on behalf of the defendant submitted in response to the claimant's first point that in relation to the notices containing the prohibition upon entering onto the railway lines all that was required was the necessity of making clear that there was no lawful authority for persons to enter upon operational railway land and in particular to walk upon the railway lines. It was not necessary for the notice either to cite the word "trespass", or to identify that going on to the railway land would give rise to a criminal liability. He contended that the use of the word "passengers" was a perfectly sensible use of language bearing in mind the context that the notice appeared in a station. It was, he submitted, quite unrealistic to suggest that such a notice could not apply to any person who happened to be on the station who was not catching a train. In particular, he drew attention to the fact that section 55(3) is simply a defence to the crime created under section 55(1). In particular that defence does not require the offender to have seen the notice or even to have had access to the notice. All that is required is for notices to be exhibited at the station and that was what had occurred in the present case.

70. Turning to the submissions made by the claimant in relation to Bakewell Management, Mr Buley submitted that the factual circumstances of the present case were very different from that which pertained in that case. As Lord Walker had emphasised in paragraph 60 of his speech, the doctrine of illegality "must be applied as an instrument of public policy, and not in circumstances where it does not serve any public interest". In the present case Network Rail were serving the public interest by excluding trespassers from their land in the interests both of public safety and also the efficient operation of the railway. Thus, the present case engaged a wider and more important public interest, and the illegality doctrine was undoubtedly engaged. The public interest could not sensibly be measured in the present case simply by reference to the extent of the sentence which might be imposed for the crime concerned. Turning to the exercise of the principles set out in Best, Mr Buley accepted that the policy of section 31(1) was broadly similar to those legal principles associated with rights of prescription or adverse possession and that, as in Best, those principles are underpinned by a public interest which has to be afforded some weight in the overall balance. However, he submitted that on the other side of the balance was to be set the critically important public interest in the safe operation of the railway and the safety of the public, as well as the efficient operation of the railway as a piece of public transport infrastructure. He contended that the public interest in the safe and efficient operation of the railway will clearly outweigh any interest in the public policy lying behind section 31(1).

71. Mr Buley emphasised, further, that which had been observed by Lord Scott in paragraph 24 in his speech about the limitations upon what "lawful authority" could be granted by the owner of the common. In paragraph 24 Lord Scott observed as follows:

"24 The words in subsection (4) "without lawful authority" deserve careful attention. They have been taken, in cases like the present and like *Hanning v Top Deck Travel Group Ltd* 68 P & CR 14 , to refer to an authority given by the owner of the common. They might also, if proviso (a) is applicable, refer to an authority given by some public official or public body pursuant to the Act, scheme, byelaw or regulation in

question. But the ability of the owner of the common in question to give someone a "lawful authority" to do one or other of the things prohibited by subsection (4), or, indeed, to do one or other of those things himself, is subject, in my opinion, to an important qualification. The owner of a common cannot lawfully do anything on the common that would constitute an unreasonable interference with the rights of the commoners: see section 30 of the Commons Act 1876 (39 & 40 Vict c 56). To do so would be a nuisance: see Clerk & Lindsell on Torts, 18th ed (2000) para 31-27. Nor could the owner of a common lawfully authorise things to be done by others on the common that, if done, would constitute a nuisance. The reference to "lawful authority" in subsection (4) does not, therefore, mean that the owner of a common can authorise to be done whatever he pleases. Authority given to too many people to camp on the common and light too many fires could damage the sufficiency of grass on the common for the commoners' grazing rights. If that were so, the authority would not, in my opinion, be a lawful one. Similarly, authority to too many people to drive too many cars or other vehicles over the tracks on the common might not be lawful. It would depend on the facts. But, subject to that qualification, subsection (4) allows the owner of a common to which section 193 applies to authorise the doing of an act that if done without that authority would be an offence under the subsection."

Mr Buley submitted that this passage in the Bakewell Management case recognised that there was a limitation on the dispensing power of the land owner, namely that the land owner could not grant authority to a person to do whatever they pleased, and in particular could not grant authority to undertake acts which would harm the interests of the commoners. Thus, in the present case he submitted there were necessary limitations on the dispensing power of the second interested party founded upon the need for the second interested party to comply with its statutory duties in terms of operating the railway safely and efficiently. Mr Lopez supported Mr Buley's submissions on behalf of NR.

72. Having considered Mr Wilcox's submissions in relation to the form of the notice which was exhibited at the relevant stations from 1949 I am unable to accept his contention that, in substance, the notices were of no effect such that any person using the level crossing could have relied upon the defence under section 55(3) of the 1949 Act. In my view they provide a public warning to persons not to go onto the land occupied by the operational railway, and in particular the railway lines. I do not consider that it was necessary for the notice to specifically use the words "trespass", in circumstances where the obvious substance of the notice was to make clear that being present on the railway lines was prohibited (or not authorised) which is clearly the meaning of trespass as it is applied in section 55. The notice made clear that passing onto the railway lines was prohibited. Had it used the word "trespass" it would not have in any way changed the substance of the contents of the notice. As such it satisfied the requirements of section 55(3).

73. The notice is not required by section 55(3) to specify that going onto the railway lines when prohibited from doing so would amount to a criminal offence. I therefore do not accept that the failure of the notices in the present case to do so rendered them incompetent to preclude the defence under section 55(3). Thus I am satisfied that the Inspector was correct as a matter of law to conclude that the notices were adequate, and therefore on the factual findings which he made he was entitled to conclude that the use of the level crossing during the relevant period gave rise to a criminal offence.

74. Moving to consideration of the issues raised under the Bakewell Management and Best cases I accept the submission of Mr Buley that there is not, in substance, equivalence between the offence created by section 193(4) of the 1925 Act and that created by section 55(1) of the 1949 Act. When consideration is given to Mr Wilcox's suggestion that there is under section 55(1) a dispensing power whereby NR might grant an exemption by permitted pedestrian use of the level crossing, it has to be recognised immediately that such could only occur to the extent that it was consistent with the statutory duties of NR to preserve the safety and safeguard the efficiency of the operation of the railway. As is clear from NR's case and the findings of the Inspector in the present case, permitting public use of the level crossing as a right of way would both give rise to increased risk to public safety and also be inconsistent with the efficient operation of the railway. Thus any suggested power to grant exemption from the offence under section 55(1)

immediately runs across the same issues which are raised in relation to statutory incompatibility. Unlike Lord Walker's conclusions in paragraph 56 as to the dispensing power under section 193(4) of the 1925 Act, in the present case the public interest would be directly engaged in any exercise of any apparent dispensing power on behalf of NR. Thus Mr Wilcox's submission as to dispensing powers is not an answer to the issue in the present case.

75. It is necessary to undertake the exercise contemplated by Lord Wilson in paragraph 42 of Hounga and Sales LJ in paragraph 52 of Best. Firstly, it is necessary to ask what is the aspect of public policy which underpins section 31 of the 1980 Act. In that respect I accept that, akin to cases of adverse possession or prescription, section 31 is designed to provide clarity in respect of the rules relating to recognition of public rights of way where they have been the subject of long usage, and also to provide certainty and clarity for land owners and the public in respect of any public rights existing over land. As in the cases of Bakewell Management and Best the public interest in those factors is clear and obvious. Set against that must be such public interest as underlies the creation of the offence under section 55 of the 1949 Act. I have no doubt that the creation of an offence of preventing trespass on the railways had the objective of promoting and securing the safe and efficient operation of the railways. There is a clear public interest in excluding trespassers from the railway lines who may not only come to harm not only themselves, but also may give rise to health and safety risks for those working on the railway. Furthermore, the presence of trespassers on the railway line gives rise to obvious risks to the efficient operation of the railway and the provision of timely rail services.

76. Balancing those respective public interests I am in no doubt that the weightier public interests at stake in this case are those which are represented by section 55 of the 1949 Act and the safe and efficient operation of the railway. In my view the public safety objective of preventing people from trespassing on the railway by means of a criminal sanction is of particular weight in striking the balance. It follows that I am satisfied that it was appropriate for the Inspector to conclude that the principle of illegality did apply to the consideration of whether or not the Order should be made in this case, and his conclusion that the use of the level crossing had amounted to an offence under section 55(1) of the 1949 Act justified a finding that the Order should not be made.

Reason 3: The cul-de-sac

77. It will be apparent from paragraph 38 of the Inspector's decision set out above that he declined to make the Order on the basis of the objection of the NR. On behalf of the claimant it is submitted that even were the Inspector correct about that, and the inappropriateness of confirming the order in so far as it affected the level crossing, there was no reason why he could not have confirmed the order as, in effect, two cul-de-sacs, each running up to the railway lines and then terminating at the point where the level crossing commenced.

78. Issues of this kind were considered by Farwell J in the case of Attorney General v Antrobus [1905] 2 Ch 188. That case concerned an action brought against the land owner of Stonehenge. The land owner erected fences precluding the public from visiting the monument and an action was brought seeking the removal of the fences which had been erected. Part of the plaintiff's case was that there were public rights of way running up to and through Stonehenge which had been blocked by the land owner's fencing. Having heard evidence Farwell J found as a fact that there had for many years past been a large amount of traffic to Stonehenge as "the end and object of the journey". He concluded on the facts that there had in truth been no through traffic by any of these visitors but that the object of their journey had been to visit and enjoy the monument. He further concluded that on this basis permission must have been granted by the land owner for that activity and therefore no public right had in fact been created.

79. Part of the reasons for him concluding that the case should be dismissed related to the fact that the tracks relied upon as public rights of way simply led to the monument but did not pass through it. His conclusions were expressed in the following terms:

“Further, the tracks which lead into the circle cease there and do not cross, and the public have no jus spatiandi or manendi within the circle. The claim, therefore, is to use tracks which in fact lead nowhere. Now, the cases establish that a public road is *primâ facie* a road that leads from one public place to another public place (see per Lord Cranworth in *Campbell v. Lang* and *Young v. Cuthbertson*), or as Holmes L.J. suggests in the *Giants' Causeway* case, there cannot *primâ facie* be a right for the public to go to a place where the public have no right to be. But the want of a *terminus ad quem* is not essential to the legal existence of a public road; it is a question of evidence in each case, and it is, after all, only a question between the landowner and the public. It is competent to the landowner to execute a deed of dedication, or by similar unmistakable evidence to testify to his intention. But in no case has mere user by the public without more been held sufficient... In *Bourke v. Davis* Kay J. says: “But it is argued that a cul-de-sac may be a highway. That is so in a street in a town into which houses open and which is repaired, sewered, and lighted by the public authority at the expense of the public. But I am not aware that this law has ever been applied to a long tract of land in the country on which public money has never been expended.” Eady J.'s decision in *Attorney-General v. Richmond Corporation* accords with this. I venture to think that this expenditure of money is the important consideration, and that in such a case the landowner who has permitted the expenditure cannot be heard to say that a roadway on which he has allowed public money to be spent is his private road; but the mere transit of passengers to see a view or a house at the end will create no right, as Lord Cranworth says. But the landowner may by express words, or by conduct inducing the expenditure of money on the track in question, be shewn to have dedicated even a cul-de-sac to the public. There are doubtless drives in many seaside places and elsewhere which may have become public ways by this means. This explains the *Giants' Causeway Case*, for in that case the road in question had been “presented” by the Grand Jury in 1814, and had been repaired by the public authority.”

80. In the Oxfordshire County Council case Lightman J observed at paragraph 101 as follows:

“a cul-de-sac may be a public highway if there is some kind of attraction at the far end which might cause the public to wish to use the way.”

81. On the basis of these authorities Mr Laurence submits that at common law it was possible for a viewpoint, or point of particular resort as an attraction, to justify a cul-de-sac to being dedicated as a public right of way. At common law the land owner could evidence an intention to dedicate if the requirements under section 31 were satisfied. Furthermore, he submits that the railway line could properly be regarded as a point of resort or viewpoint which could properly lead to the dedication of the two cul-de-sacs running up to each side of the level crossing. As such the Inspector erred in law in failing to modify the order to reflect this submission and make the Order in those terms.

82. Mr Buley submits that the Inspector was perfectly entitled to reach the conclusion which he did in paragraphs 38-40 of the decision, namely that bearing in mind the missing link between the cul-de-sacs would involve a criminal trespass, and there was no “legitimate place of public resort” at the end of either cul-de-sac, the remainder of the route could not be established as a public highway at common law. Thus the Inspector was entitled to conclude that the Order should not be confirmed. He submitted that it was simply unrealistic to suggest that the railway line in and of itself amounted to a popular place of resort or local viewing attraction so as to amount to evidence of dedication.

83. I am satisfied that the conclusions which the Inspector reached in relation to the question of whether or not it would be lawful to confirm the Order in the form of two disconnected cul-de-sacs was entirely correct. As Farwell J in the Antrobus case observed, there cannot be any *prima facie* right for the public to pass

from the public highway (where they have a right to be) to a location where they have no right to be (such as a location which does not join up with other parts of the rights of way network or over which there is no other public right of use). Furthermore, as Farwell J emphasised, the question is one of evidence in each case. In the absence of any express dedication or public expenditure on the way claimed, mere use by the public without more of a cul-de-sac in the absence of some particular point of attraction could not amount to evidence justifying a finding that dedication had occurred. In the present case there was simply no evidence to suggest that people were using the two cul-de-sacs to gain access to the railway as a point of popular resort. Rather, all of the evidence suggested that the parts of the claimed right of way which formed the two cul-de-sacs were in fact being used as parts of a single journey traversing the whole length of the path identified in the order. There was not therefore in the present case the evidence necessary to demonstrate the dedication of two cul-de-sacs omitting the “missing link” identified by the Inspector. I am therefore satisfied there is no substance in the claimant’s contentions in this respect and that the Inspector’s conclusions on this part of the case were legally robust.

Conclusions

84. For all of the reasons which have been set out above, I am satisfied that the decision which was reached by the Inspector in relation to this Order was lawful and that there was no error of law in the decision which he reached in any of the respects which have been presented by the claimant. It follows that this claim must be dismissed.

End of Document



Neutral Citation Number: [2020] EWHC 1993 (Admin) Case No: CO/3369/2019

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

Wrexham Law Courts Bodhyfryd, Wrexham, LLP 7BP

Date: 30/07/2020

Before:

HIS HONOUR JUDGE JARMAN QC

Sitting as a judge of the High Court

Between:

NETWORK RAIL INFRASTRUCTURE LTD

Claimant

- and -

WELSH MINISTERS

Defendants

(1) CONWY COUNTY BOROUGH COUNCIL

(2) GUTO BEBB

(3) MIKE PRIESTLEY

(4) RAMBLERS

(5) ROGER AND GLENYS ARDEN

(6) J AND K PITT

Interested Parties

Mr Juan Lopez (instructed by **Eversheds Sutherland (International) LLP**) for the
claimant Mr Gwion Lewis (instructed by **Government Legal Department**) for the
defendants

Hearing dates: 16-17 July 2020

Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and released to Bailii. The date and time for hand-down is deemed to be 10.30 am Thursday 30 July 2020.

HH JUDGE JARMAN QC:

Introduction

1. By a decision dated 18 July 2019 (the decision) an inspector appointed by the Welsh Ministers confirmed the Conwy County Borough Council (Footpath No 73 in the community of Conwy) Definitive Map Modification Order 2016 (which council and order I shall refer to as such) and the existence of a public footpath over land in Conwy owned by the claimant. The description of the footpath (the footpath) given in the order, which was made under the Wildlife and Countryside Act 1981 (the 1981 Act) is:

“A Public Footpath, that is a public right of way on foot in the Community of Conwy, beginning at a ladder stile adjacent to a bus shelter on the southern side of Glan-y-Mor Road at grid reference SH 78621 78495 and proceeds over the stile and over two sets of railway lines in a south easterly direction for approximately 30m then over a stone stile to terminate at the junction with the coastal/cycle path at grid reference SH 786257 as indicated by a broken black line on the Order Map.”

2. It is important to note at the outset the limited extent of the footpath so confirmed. It starts and ends at boundary features enclosing two railway branch lines from Llandudno Junction to Llandudno, which features are surmounted by the wooden and stone stiles referred to. The other side of the stone stile a cycle path runs along the top of sloping masonry, as annotated on the plan forming part of the order. This masonry was constructed to support the lines and encroaches over the high water mark of the River Conwy estuary. As is clear from the order and the plan, the footpath as confirmed stops short of the cycle path and the sloping masonry.
3. An application to record that route was made by the second and third interested parties. The claimant objected to the making of the order and so a three day hearing was held locally before the inspector, at which the first interested party (the council) took a neutral stance, but the making of the order was supported by the other interested parties in these proceedings.
4. The wooden stile was removed in 1992 and so called into question the use of the footpath. The inspector considered whether 20 years user of the footpath as of right, that is not by force or stealth or permission, was established immediately prior to 1992 so as to amount to dedication of a public way under section 31 of the Highways Act 1980 (the 1980 Act). That provides that where it can be shown that a way over land has been enjoyed by the public as of right and without interruption for a full period of 20 years, the way is deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate.
5. The inspector also considered the claimant’s submission that pursuant to the Railway Regulation Act 1840 and the Regulation of Railways Act 1868 any such use would amount to a criminal offence. She decided that it was not possible to reach a firm conclusion on criminality given the period under consideration and the lack of evidence regarding user and what occurred at the time. She had regard to the decision of Dove J in *Ramblers Association v Secretary of State for Environment, Food and*

Rural Affairs [2017] EWHC 716 (Admin), in which he upheld a decision of another inspector to the effect that dedication of a public right of way over an operational railway would be incompatible with the statutory objectives of the claimant to provide a safe and efficient railway and its duty to ensure the safety of the public and its passengers. The inspector in the present case said that if that was the totality of the evidence, she may have concluded that it was not possible for dedication of a public right of way to have occurred at common law.

6. However, the inspector then observed that the case she was dealing with differed from that of *Ramblers* in that she had substantial documentary evidence from before and at the time of creation of the railway, and that if that evidence supported the existence of a path on the claimed route prior to or at the time the railway was constructed, that would suggest that the claimed footpath pre-existed the railway and had been dedicated at some point in the pre railway age. In that case statutory incompatibility would be irrelevant as the right of way would pre-date the railway.

The inspector's conclusion on a public right of way pre 1853

7. The inspector then examined the documentary evidence in turn and dealt with OS maps, an 1840 Tithe map, railway plans, and other documents. Her core reasoning in confirming the order was that she was satisfied that the evidence pointed towards the order route being available on the ground and used by the public on foot before the statutory process necessary to construct the railway lines was commenced in 1853. The reasoning is summarised in paragraphs 61-63 of the decision as set out below, after a finding that the claimant's predecessor had indicated a lack of intent to dedicate a right of way since 1992.

“61. Nevertheless, bringing all the threads together, I find the evidence in relation to the Order route to be more probable than not of it being a historical footpath predating the railway. In particular the Tithe map and early OS mapping strongly confer a track leading to the foreshore and are suggestive but not determinative of a public road, This track provided the only access in the local area to the foreshore, ferry links and onwards travel to Conway. In later mapping this track became Pentywyn Road.

62. I have no evidence that this link between the track and the foreshore was severed other than during the construction of the railway. At this time the railway provided both a pedestrian and vehicular crossing over the rails and constructed a new slipway which did not preclude public use. This is most clearly shown on the 1882 Railway Plan, which was completed post construction of the original branch line. The newspaper article, dated 1899, suggests continued use of the foreshore from Tywyn towards Llandudno, accessed using a crossing at Tywyn.

63. Although finely balanced in this case, I am satisfied that the evidence points towards the Order route being available on the ground, pre railway, that was used by the public on foot. Accordingly, all subsequent use will be use pursuant of the preexisting right and the submissions regarding statutory

incompatibility are irrelevant, the right of way having pre-dated the railway.”

8. Unsurprisingly, as these passages demonstrate, the evidence as to use by the public of the order route prior to construction of the railway lines consisted largely of what could be taken from maps and plans and in particular Tithe and OS maps, and plans forming part of the enabling statutes for construction of the railway lines.
9. The lines were built as a branch line from the Chester and Holyhead Railway to connect with St George’s Harbour at Llandudno Bay to the north. The foreshore referred to is that of St George’s Channel where the River Conwy flows into the Irish Sea, just to the west of Tywyn. The town of Conwy lies opposite on the other side of the channel. The ferry referred to operated across the channel between these communities before the construction of the suspension bridge across the River Conwy from Conwy to the opposite part of the foreshore. The construction of the bridge, designed by Thomas Telford, commenced in 1822 and was completed in 1826.

The nature of the challenge

10. The claimant’s challenge to the inspector’s reasoning is made under schedule 15 paragraph 12 of the 1981 Act which provides as follows:

“Proceedings for questioning validity of orders”

12(1) If any person is aggrieved by an order which has taken effect and desires to question its validity on the ground that it is not within the powers of section 53 or 54 or that any of the requirements of this Schedule have not been complied with in relation to it, he may within 42 days from the date of publication of the notice under paragraph 11 make an application to the High Court under this paragraph.

(2) On any such application the High Court may, if satisfied that the order is not within those powers or that the interests of the applicant have been substantially prejudiced by a failure to comply with those requirements, quash the order, or any provision of the order, either generally or in so far as it affects the interests of the applicant.

(3) Except as provided by this paragraph, the validity of an order shall not be questioned in any legal proceedings whatsoever.”

11. That statutory formulation is a familiar one in respect of the right to challenge orders made by inspectors under statutory powers, and it follows that the general principles of judicial review are applicable to this challenge (see *R Durbin v Welsh Ministers* [2014] EWHC 4458 (Admin).)
12. Those principles were conveniently summarised in respect of decisions by or behalf of ministers in *Seddon Properties Ltd v. Secretary of State for the Environment* (1981) 42 P&CR 26 by Forbes J, which so far as presently material may be further distilled as follows:

“The Secretary of State must not act perversely. That is, if the court considers that no reasonable person in the position of the Secretary of State, properly directing himself on the relevant material, could have reached the conclusion that he did reach, the decision may be overturned...

In reaching his conclusion the Secretary of State must not take into account irrelevant material or fail to take into account that which is relevant...

The Secretary of State must abide by the statutory procedures...

The Secretary of State in exercising his powers, which include reaching a decision such as that in this case, must not depart from the principles of natural justice...

Since the courts will only interfere if he acts beyond his powers (which is the foundation of all the above principles)...the courts will not entertain a submission that he gave undue weight to one argument or failed to give any weight at all to another. Again, in doing so he must, at any rate if substantial issues are involved, give clear reasons for his decision.

In approaching this task it is no part of the court's duty to subject that decision letter to the kind of scrutiny appropriate to the determination of the meaning of a contract or a statute. Because the letter is addressed to parties who are well aware of all the issues involved and of the arguments deployed at the inquiry it is not necessary to rehearse every argument relating to each matter in every paragraph.”

13. Further guidance on the adequacy of reasoning in this context was given by the House of Lords in *South Bucks District Council and another v Porter (No 2)* [2004] 1 WLR 1953. Lord Brown at paragraph 36 said:

“The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration...A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision.”

14. In *Clarke Homes Limited v Secretary of State for the Environment and East Staffordshire District Council* (1993) 66 P. & C.R. 263, Sir Thomas Bingham MR said that the question, when dealing with an allegation of inadequate reasoning, is whether the decision letter “leaves room for genuine as opposed to forensic doubt as to what he has decided and why. This is an issue to be resolved as the parties agree on a straightforward down-to-earth reading of his decision letter without excessive legalism or exegetical sophistication”.

15. The claimant accepts that the decision must be read fairly as a whole and that matters of weight and judgment were matters for the inspector. Nevertheless the challenge made on its behalf is put under five main heads, namely irrationality in the overall conclusion and the treatment of certain documents, material errors of fact, taking into account immaterial considerations and/or failing to take into account material considerations, inadequate reasons, and breach of natural justice or procedural or substantive unfairness.
16. The Welsh Ministers, in seeking to resist that challenge, do so on the basis that it is in essence an attempt to relitigate the merits of the claimant's case before the inspector and amounts to no more than disagreement with conclusions to which the inspector was entitled to come on the evidence presented at the hearing. I shall deal with each of the grounds in turn.

Ground 1: Irrationality

17. Mr Lopez, for the claimant, emphasises that this ground applies to the overall conclusions of the inspector but also to her treatment of several different pieces of evidence. The overall conclusion is irrational he submits, as the evidence adduced on behalf of the claimant was that the railway lines over which the footpath runs were built on land reclaimed from the sea. Accordingly, any public use of a way before 1853 could not have been along the order route, but if anywhere along a prereclamation route. In his skeleton argument he claims that the decision is entirely silent on the reclamation point.
18. However, the inspector expressly records at paragraph 37 of the decision that the claimant asserted that the claimed footpath cannot have been in existence at any time before the railway was constructed given that the line of the railway as built was on land that had to be reclaimed from the sea.
19. That comes within a section headed "Railway plans" from paragraphs 34 to 44. In paragraph 35 the inspector observed that the statutory process required to authorise railway schemes was exacting and that the book of reference and deposited plans needed to be of a high standard, and ended the paragraph with this observation:

"Railway plans, which were normally specifically surveyed for the scheme, usually record topographical detail faithfully."

20. In paragraphs 38 to 43 the inspector then dealt with the relevant plans from 1853 to 1882. The latter plan in particular shows the railway lines at points built on a stone retaining wall or embankment which is situated beyond the high water mark but some way short of the low water mark.
21. Whilst these marks were not referred to by the inspector, earlier on in the decision at paragraph 27 she referred to evidence linking the ferry with Tywyn and the visits of non-conformist preachers visiting "Tywyn the Ferry" many times from 1771, and continued:

"Moreover, it would appear from the submitted Admiralty Charts that the location of the crossing here was dictated by the depth of the water and the location of sand bars within the estuary."
22. The evidence given on behalf of the claimant at the hearing was that the sloping masonry dropped from rail level with its toe directly into the estuary waters, being

below the water mark where there was not a beach or path. However, it is clear from the order plan that the footpath ends some distance from the toe of the masonry at this point. Moreover, as Mr Lopez had to accept and as is clear from some of the plans, including some of the railway plans, the water mark here referred to is the high water mark. The low water mark at this point shows that apart from the times of high tide, the footpath does lead to foreshore between the two water marks. I do not accept that this means that one end of the footpath would be under water for substantial times of the day, as submitted by Mr Lopez, and although clearly frequency of user may be affected by the high tide that is unlikely to have been significant.

23. Mr Lopez criticises the inspector's treatment of each of the various pieces of documentary evidence, and so it is necessary to refer to this in some detail. I shall deal with them in the same order as the inspector did.

24. The first category of such evidence are early OS maps and an 1840 Tithe map. The oldest map before the inspector was the OS map for 1819. This shows the town of Conwy, and on the opposite shore across the estuary a building marked as Ferryhouse. A road or track runs from there to Pen-y-bont and Tal-y-sarn to the east and beyond. I shall refer to this as a road to avoid confusion with another track shown on later OS mapping which the inspector dealt with later on. She in places in the decision refers to this road also as a track, but it is clear enough from the context to what she referred. The community of Tywyn is not marked, although the community of Pen Towyn (this was spelt Pen Tywyn on later maps and in English means the top of or end of Tywyn) is shown further to the west, just to the west of Tyn-y-coed. The road is shown running from here right down to the foreshore, where further buildings are shown marked "Store houses." Just to the west of this are shown a scattering of more buildings marked as Pen-y-bryn. It is where this road meets the foreshore that the footpath lies.

25. At paragraph 27 the inspector said this:

"27. The 1819 OS map clearly shows a route from the estuary foreshore close to 'Store houses at Pen-y-bryn towards Tyn-y-coed. I was informed at the inquiry that the Store houses were historically used in conjunction with a ferry which operated from a point close to 'Ferryhouse' over the Conwy. The Ferry was thought to have been in existence from c.1285. Goods (including stone to build Conwy Castle) and people were said to walk/be transported along the foreshore to either access the road towards Tyn-y-coed or the ferry. The following account is made by Fiona Richards in 'Tywyn in Victoria Times' revised in 2012, which links Tywyn to the ferry: "*Non conformity had taken hold in Tywyn and one of the first non-conformist preachers to visit the area was Thomas Hughes who lived in Mochdre. He visited 'Tywyn the Ferry' many times, the first probably in 1771.*"

26. There is then the reference to the Admiralty Charts cited above, and at paragraph 28 the inspector continued:

"28. No other routes other than that at Store houses and Ferryhouse provide direct access to the estuary foreshore. I see no reason to doubt that the public extensively used this route to access the foreshore and walk along it."

27. Mr Lopez is critical of the inspector's treatment of the evidence regarding the ferry and submits that there was no evidence as to frequency, status, disembarkation points or timescale of the operation of the ferry. Given that it is likely that the ferry fell into disuse after the construction of the bridge in 1826, that is hardly surprising, and the inspector had to consider these matters on the basis of likelihood to be drawn from the available documentation.
28. Mr Lopez submits that the reference to Thomas Hughes cannot be taken to suggest that that particular preacher used the ferry. As it is said he came from Mochdre, and there is a place with that name to the north east near Colwyn Bay, that may well be right. But the inspector did not find otherwise. The importance of the reference is that Tywyn was linked with the ferry which gave the location. The precise point of disembarkation, which as the inspector observed was dependent on water depth, was not as important as the fact found by her that access to the foreshore was gained at Store houses over a route very similar to the order route to access the foreshore as a destination or for onward travel. Onward travel via the ferry was just one method and direction of onward travel, and in the context that the foreshore was also a destination.
29. Mr Lopez also criticizes the inspector for failing to deal with the possibility that the ferry may not have been used by the public as of right, but only by particular groups such as fishermen and miners and then only permissively. However, there was no hint in the documentation to suggest this might have been the case, and the inspector was entitled to have regard to the evidence of the Store houses and the Ferryhouse adjacent to the foreshore and to the link between the ferry and Tywyn in seeing no reason to doubt that the public extensively used this route to access the foreshore and walk along it.
30. Mr Lopez further submits that the inspector's reference to no other routes other than that at Store houses and Ferryhouse providing direct access to the foreshore is incorrect, as there are clearly such access points further to the south east, near to Penybont and Tal-y-sarn, for example. However, in my judgment paragraph 28 can only sensibly be read as referring to the vicinity of the claimed footpath route rather than the estuary foreshore in any wider meaning.
31. The inspector then deals with later OS maps in these terms at paragraph 29 and 30:

“29. This route is again shown in the 1841 OS map, although at this time the route along the foreshore to Ferryhouse is shown as a formal track. At Ferryhouse the then newly constructed Conwy Bridge is shown. It is highly probable that a track was constructed to provide a more reliable link to and from the bridge. Network Rail stated that it was this track which severed the right of way and the public would have no longer needed access to the estuary at this point. However, the 1841 OS map shows a small spur towards the estuary, below the ‘Storehouses’ which may have provided a slipway for boats and access to the estuary for those walking towards Llandudno, Great Orme or for people foraging for seaweed or shellfish. However, I accept that given the construction of a track towards Conwy the public would no longer need to access the foreshore to reach Ferryhouse, but there would be nothing to prevent them from continuing to doing so.

30. The 1862 and 1889 OS maps show the railway running along the seaward side of the routes described above. Whilst the scale of the map makes it difficult to assess in detail the construction of the railway was over the slipway. The railway authority constructed a new slipway, which is clearly shown on the 1889 map. These maps do not indicate a level crossing at this point. However, other level crossings indicated on the Railway Deposit Plans are also not shown.”
32. Mr Lopez submits that it is not clear which route the inspector says is again shown on the 1841 OS map. In my judgment it is tolerably clear from paragraphs 28-29 that this route is the one which provided direct access to the estuary foreshore at Store houses. That is still shown clearly on the 1841 OS map. The other direct access at Ferryhouse is not shown and Ferryhouse is not marked, because the bridge at this point connects with the road to the east and the new track to Store houses. Moreover, it is at Store houses that the footpath was confirmed.
33. Mr Lopez further submits that the inspector’s reference to a small spur at this point is unclear and was not canvassed at the hearing. This reference was made in the context of the claimant’s contention at the hearing that the new track from the bridge to Store houses would have severed the right of way. As the inspector acknowledges, the scale of the map makes it difficult to assess in detail. She alluded to the possibility of the small spur providing a slipway, but it is not clear where on the 1841 OS map that was. Mr Lewis for the Welsh Ministers suggests that it is a small spur to the west of Store houses serving scattered buildings and leading to the estuary at that point. The word used by the inspector - “below” Store houses - may also suggest the spur is a very small appendage in the direction of the estuary where the road from Pen-y-bryn to Tyn-y-coed meets the track.
34. Whichever it was, it is clear from these paragraphs and from paragraphs 61 and 62 that the inspector did not make a finding as to the likelihood of the spur providing a slipway or that this was along the order route but relied on the possibility in rejecting the claimant’s contention that the track had severed that link. It is clear from paragraph 61 that it was the road leading to the foreshore shown on the OS mapping, and not the slipway on the foreshore, which the inspector found was suggestive but not determinative of a public road. That was not irrational. Moreover, it is clear that the later OS mapping referred to in paragraph 30 showed that the railway was constructed over this slipway (whichever route it took) and that a new slipway on a different line to the east had been constructed with the railway.
35. The next criticism made by Mr Lopez was that the inspector in paragraph 33 said that overall, the Tithe and OS maps do not show conclusively whether the routes depicted were public or private but may assist in conjunction with other information. He submits that this is equivocal and the proper conclusion is that such mapping provides no evidence of the status of a way (see *Maltbridge Island Management Company v SSE (2) Herefordshire CC* [1998] EWHC Admin 820 and *R (Elveden Farms Limited) v SSEFRA* [2012] EWHC 644 (Admin)).
36. However, this point was expressly acknowledged by the inspector in paragraph 26, where she went into detail about the formulation of OS maps and the disclaimer they carry to the effect that a track or way shown on them is not evidence of the existence of a public right of way. In paragraph 31 she made a similar point in relation to Tithe maps, which as she observed were drawn up to show the productiveness of land for

tithe assessment and that a private, as well as a public, right of way can diminish such productiveness.

37. After dealing with the OS maps and Tithe map, the inspector went on to deal with the railway plans. It is clear that she did not regard the books of reference as giving any indication whether any way dealt with was public or private. In paragraph 39, she refers to a deposited plan dated 1856 which shows an occupational level crossing at the point of the claimed footpath after the building of the railway. She also referred to the Law Commission Consultation Paper 194 dated 2010 which stated that an occupation crossing occurred where the railway crossed a private road or way which served a farm, hamlet of village, and continued:

“We think that normally the private road or way would have a pre-existing right of way over it.” 38. In paragraph 40, the inspector said this:

“40. It is Network Rail’s case that this occupation crossing was provided solely for fisherman, who required access to the foreshore. However, I have no agreements or other evidence to support this claim and given that a stile and unlocked gate were provided there was nothing to prevent it being used by anyone. Indeed, given the historical access to the foreshore at this location there would be no reason for the public to doubt that this was not to continue via the level crossing.”

39. That case was stated by Jeremy Greenwood, the claimant’s head of liability negotiations. He said at the inquiry that the crossing was provided pursuant to section 68 of the Railway Clauses Consolidation Act 1845 to make good the interruption of private access confined to private users, probably fishermen and/or miners. Mr Lopez submits that the inspector misunderstood this evidence and that the provision of a stile and unlocked gate is not an indication of public rather than private use. However, the inspector’s reference to these features was in the context of rejecting the claimant’s case that the occupation crossing was provided for fishermen. Clearly no witness could give direct evidence of the particular use, and the inspector was entitled to draw proper inferences from the documents. She was entitled to take into account the absence of evidence to support the claimant’s contention, and was also entitled to observe that given the historical access to the foreshore at this location there was no reason for the public to doubt that it was to continue after construction of the railway.
40. The inspector went on in paragraph 41 to observe that a deposited plan in 1861 did not appear to show a crossing or a slipway, but that a plan attached to a conveyance in 1863 did show a slipway which continues to provide some evidence of a point of access to the foreshore. In paragraph 42 she referred to a railway map dated 1882 which clearly showed a crossing over the railway to link with the slipway and also a double-pecked line linking the road to the foreshore which seemed to infer both a vehicular and a pedestrian crossing.
41. Mr Lopez submits that it was irrational for the inspector to have regard to what was on the ground after the construction of the railway, when it was the pre-existing use which she was concerned with. I do not accept that submission. The inspector was entitled to take this into account as some evidence of pre-existing use and the weight to be attached to that was a matter for her.
42. The same applies to a letter from an asset liability manager of the claimant’s predecessor, Railtrack Plc, to the council dated 29 November 2001. In the letter the

manager said that he had visited the crossing at Tywyn and consulted Railtrack's previous records. The letter continued:

"This was once a vehicular level crossing probably constructed at the time of the advent of the railway here. Although the crossing is now disused, in as far as vehicles are concerned, separate pedestrian facilities were provided and are perpetuated. I cannot trace any signs have ever been displayed, at this site, which would lead any user to believe there was an intention by Railtrack or its predecessors not to dedicate the route to the public."

43. The separate pedestrian facilities referred to ties in with what is shown on the 1882 plan. At paragraph 60 the inspector observed that that letter would seem to confirm that public use had been established. Mr Lopez submits that that was a misunderstanding on the part of the inspector of the letter, but in my judgment the inspector was entitled so to interpret it.

44. After dealing with the railway plans, the inspector then went on to deal with prints, postcards, and photographs. In paragraph 45 she said this:

"The first is an 1822 watercolour, by Samuel Austin, which shows a track leading down to the foreshore, said to represent the slipway (or access to the foreshore) and the track to Tyn-y-Coed."

45. She also referred to prints dated 1850 and 1861 showing people and boats on the Tywyn side of the foreshore. She rightly reminded herself in paragraph 46 that the 1822 watercolour and other prints were creative works and their accuracy and reliability was unpersuasive, and remarked that taken on their own they do not demonstrate public use. In my judgment it is clear that the inspector accorded little weight to these works which she was entitled to do. She also noted that a later photograph when motor cars first appeared, showed a wooden style over onto the railway at this point.

46. The inspector then dealt with other matters which took the issue of a public right of way along the footpath no further, before concluding this section of the decision on documentary evidence by reference to an article (the article) published in the Llandudno Advertiser on 22 December 1899 entitled "A Short History of Old Llandudno." The authorship of the article is not revealed, but it is archived in the National Library for Wales.

47. It is said in the article that between 50 and 60 years ago, so between 1839-1849, Llandudno was a very small village where fishing and mining were the staple industries. Conwy was a very important market town and the centre of commerce for the locality. Goods were brought from there to Llandudno by horse and cart several times a week. One access to Llandudno was said to be along the sand on the western or northern side and then on through Llanrhos. The article continued:

"The other access to the town was along Conway Shore, turning to the left at Tywyn, following along the Beach, passing Deganwy (which was then a gentleman's residence), turning down to the sands, passing up to "Morfa Uchaf" (Higher

Marsh), just opposite the present west entrance to Gloddaeth Street.”

48. The mining referred to was mining of copper ore from the Great Orme which towered then as now over Llandudno. The article went on to deal with post office business in the following colourful way:

“All letters, papers, parcels etc, were carried to and from Llandudno by a short, hardy, strong man – John Hughes by name, who always used to carry the bags to and from Conwy by the sands. He would arrive here each day about 8am, then walk up to Penygwaith, do a hard day’s work, and return to Conwy about 6pm; this he did for many years.”

49. The inspector cited these passages in paragraph 55 of the decision (and referred to the article in paragraph 61) and said this in paragraph 56:

“56. It would appear from this that people would have used the road/track (constructed c.1841) along the shoreline to Tywyn, where this road ended. At this point it would be highly probable that people then used the rail crossing at Tywyn to access the foreshore, particularly as no other similar crossing point hereabout has been brought to my attention. It is clear that the foreshore was accessed by a variety of people and not solely fishermen. Tywyn was a thriving area at this time and had a population greater than Deganwy.”

50. In a footnote to that paragraph the inspector clarified her reference to using the rail crossing as follows:

“Given the construction of the railway in 1858, the slip way at Tywyn would have been used to get down to the foreshore and continue their walk to Llandudno.”

51. Mr Lopez submits that the inspector overlooked the reference in the article to two accesses from Conwy to Llandudno. However, far from overlooking that reference, the inspector cites the article as showing this access as “another” access. The article makes clear that the other was an inland route via Llanrhos. Mr Lopez further submits that it was irrational for the inspector to conclude that access was along the shoreline to Tywyn, when there are more prominent roads shown on the 1841 OS map which would have been used by pedestrians between Conwy and Llandudno, such as the one via Marle. However, he was not able to answer how those roads would sit with the reference to “...along Conwy shore turning left at Tywyn...”

52. In my judgement the inspector was entitled to conclude that that reference was to access along the track appearing in the 1841 OS map from the bridge to Tywyn and then turning left at Tywyn onto the beach. This ties in with her rejection of the claimant’s contention that this track severed any link between Pentwyn Road and the foreshore at that point. The inspector’s reference to people using the rail crossing at Tywyn in this context also shows the timescale which she drew from the article.

53. Mr Lopez submits that this access would have been less used if there was another access, that the fact that Llandudno was a very small village meant that any such use would not have a sufficient quality of public use, that the reference to one postman would not have that quality and that in any event that may have been a permissive service. In my judgment there is nothing in any of those points. Although Llandudno

was a small village, the community of Tywyn as found by the inspector was thriving. The vivid account of the postman was just one example of use of access between the commercial centre of Conwy and the village of Llandudno, the others being of trading access.

54. After the inspector dealt with that article, under a subheading “Whether the footpath subsists on the balance of probabilities,” she concluded in paragraph 57 that taking the documentary evidence as a whole, a route very similar to the order route has existed for a long time and it is clear that that route had been used by the public for access to the foreshore as a destination or for onward travel. In the next three paragraphs she dealt with the issue that user after construction of the railway was “as of right” and concluded that it could not be presumed that a public footpath had been dedicated in accordance with the provisions of the 1980 Act.
55. That led to paragraphs 61-63 cited above, in which the inspector concluded that the evidence pointed to the order route being available on the ground, pre-railway, that was used by the public on foot.
56. Mr Lopez submits that the reference to the Tithe map and the early OS mapping “in particular” in paragraph 61 shows that the inspector placed impermissible weight on these documents as showing public as opposed to private use. In my judgment that is not a fair reading of the paragraph, which begins “...bringing all the threads together...” It is clear that the inspector placed particular weight on these maps to show a road leading to the foreshore. They were, she concluded, “suggestive” but not determinative of a public road. However, it is also clear from the following sentence as to why she was able to reach that conclusion. It was not the mere fact that the road was shown on the mapping. It was because it provided the only access in the local area to the foreshore, ferry links and onwards travel.
57. In my judgment these and all the points taken by Mr Lopez to show the decision was irrational amount to attempts to reargue the merits of the issues before the inspector or involve a misreading of the evidence or of her findings. The ground is not made out.

Ground 2: material error of fact

58. Mr Lopez accepts that there is what he terms overlay between the points which he says support ground 1 and those supporting ground 2.
59. It is not in dispute that for a material error of fact to be properly challengeable, four conditions must be fulfilled (per Carnwath LJ (as he then was) in *E v SSHD* [2004] EWCA Civ 49 at [44]-[67]). First, there must have been a mistake as to existing fact. Second, the fact or evidence must have been established in the sense that it was uncontentious and objectively verifiable. Third, the applicant must not have been responsible for the mistake. Finally, the mistake must have played a material (not necessarily decisive) part in the tribunal’s reasoning.
60. Most of the alleged errors involve points already made under ground 1, namely public use, the spur/slipway and new slipway, the severance by the new track of any access to the foreshore at Store houses or the existence of such access, the inspector’s conclusion that the 1892 plan showed a separate pedestrian access, and her conclusions as to the ferry. In my judgment none of these involve uncontentious or objectively verifiable facts. They involve drawing inferences of fact from documentary evidence as to the likelihood of the existence of a public right of way over the footpath before the statutory railway process commenced in 1853.

61. One additional error of fact alleged is that the inspector at paragraph 11 indicated that the claimant had argued that the application to confirm the public right of way was motivated by the opening of the cycle path next to the railway in 2006, when that claim was not in fact made. No transcript is available of what was said at the hearing, but even if this had not been claimed, it is difficult to see how this played a material part in the inspector's reasoning that a public right of way had been established. Ground 2 is not made out.

Ground 3: Material/immaterial considerations

62. Mr Lopez says in his skeleton argument that for the reasons given under grounds 1 and 2, the inspector has alternatively failed to take into account material considerations and/or has taken into account immaterial considerations. Two further aspects are now relied upon by Mr Lopez, having abandoned the third referred to in his skeleton argument, namely that the inspector failed to take into account; first, that none of the post railway OS maps show a way over the railway lines; second, the significance of the stile and gates installed on construction of the railway.
63. For reasons already given, in my judgment none of these points show a failure to take material points into account or taking immaterial points into account. The inspector was not required to comment on every piece of evidence presented at the hearing. The inspector dealt with the stile and gates in paragraph 40.

Ground 4: Inadequate reasoning

64. The lack of adequate reasoning challenge is particularly focussed upon evidential leaps and unfounded speculation from the OS and Tithe mapping to a conclusion of public status.
65. However, it will be apparent from my conclusions under ground 1 that in my judgment the reasoning of the inspector was adequate, and any doubts raised by Mr Lopez are merely forensic doubts. It is reasonably clear in particular from her conclusions at paragraphs 61-63 how and why she reached her conclusions on the main issues, and I cannot see how the claimant has been substantially prejudiced by any want of reasoning.

Ground 5: Breach of natural justice; procedural/substantive unfairness

66. Mr Lopez, who represented the claimant at the inquiry, submits that the inspector did not give the claimant an opportunity to comment upon the interpretations of the documents which she had in mind or upon the Law Commission Consultation Paper 194 which was not before the inquiry. Moreover, she drew from another inspector's decision in 2012 which in turn summarised the Planning Inspectorate's "Definitive Map Orders: Consistency Guidelines" and Training Manual without allowing the claimant an opportunity to comment on these matters. She did so in her approach to such issues as Tithe mapping, deposited railway plans and the book of reference, and user evidence. Finally, she did not address her mind to whether the weight to be afforded to those witnesses who were not cross-examined should be reduced.
67. The guidelines referred to are within the public domain, whereas access to the training manual is not so easily available.
68. As for the first of these points, Mr Lewis relies on the observation of Lord Diplock observed in *Hoffmann-La Roche (F) & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 at 369D-E as follows:

“Even in judicial proceedings in a court of law, once a fair hearing has been given to the rival cases presented by the parties the rules of natural justice do not require the decision maker to disclose what he is minded to decide so that the parties may have a further opportunity of criticising his mental processes before he reaches a final decision.”

69. In my judgment that reasoning is equally applicable (if not more so) to the inspector’s thought processes on the documentary evidence and is sufficient to dispose of the first point. In relation to the Law Commission Consultation Paper 194, the relevant extract was cited in the applicants’ statement of case.
70. The training manual draws heavily in turn upon the guidelines, and as Mr Lewis submits is generic guidance which, so far as material, is not controversial as applied in this particular case. For example, the advice as to user evidence was not central to the reasoning of the inspector in her approach to documentary evidence in deciding whether on the balance of probabilities a pre-railway public right of way was in existence. For similar reasons, the fact that some witnesses were not cross examined takes the matter no further.
71. Mr Lopez pointed to what he termed nuances between the guidance and how it was paraphrased in the 2012 decision of the inspector’s colleague, including the approach to user, OS and Tithe mapping, and railway plans. However, I am not persuaded that such nuances impacted upon the inspector’s conclusions to the extent that failure to flag up reliance upon her colleague’s 2012 decision which in turn referred to the guidance and/or the training manual amounts to a breach of natural justice or procedural or substantive unfairness.

Outcome

72. Accordingly, none of the grounds of challenge to the decision are made out. The inspector rightly recognised that the issue of whether the evidence pointed towards the order route being available on the ground, pre-railway, that was used by the public on foot was finely balanced. She was entitled on that evidence to conclude that the balance tipped in favour of it being likely that there was such a route.
73. The claimant’s application is dismissed and the order stands. Counsel helpfully indicated that any outstanding consequential matters can be dealt with on the basis of written submissions, which should be filed and exchanged within 14 days of hand down.

Case No. D80NE064

Neutral Citation Number: [2020] EWHC 2606 (Ch)

**IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN NEWCASTLE
PROPERTY, TRUSTS AND PROBATE LIST (ChD)**

The Moot Hall,
Castle Garth, Newcastle upon
Tyne NE1 1RQ

Date: 01/06/2020

Before:

His Honour Judge Kramer sitting as a judge of the High Court

Between:

EASTEYE LIMITED

and

MALHOTRA PROPERTY INVESTMENTS LIMITED

MALHOTRA PROPERTY LIMITED

PFS (NEWCASTLE) LIMITED

**THE COUNCIL OF THE CITY OF NEWCASTLE
UPON TYNE**

(Judgment as handed down in writing at a remote hearing by Skype for Business)

Mr George Laurence QC and Mr Charles Morgan of counsel (instructed by **Square One Law**) for the **Claimant**

Mr Michael Pryor of counsel (instructed by **Clarke Mairs**) for the **Defendants**
Ms Ruth Stockley of counsel (instructed by **Newcastle City Council Legal Services**)

Hearing dates: 28,29,30,31 October, 4,5,6,7,8,12,12,14,15 November

Judgment

His Honour Judge Kramer Introduction

1. Grey Street in Newcastle upon Tyne was described by Nikolaus Pevsner, the architectural scholar, as “one of the best streets in England”.¹ Until the 1800s, however, it was no more than a steep banked dene through which ran the Lort Burn, described as “a receptacle of filth, butchers’ offals, &c. of the neighbourhood”.²³ Lort is a Scandinavian word for dung but, unlike others words of Norse or old German origin, such as spelk (splinter), bait (food) and hyem (home), it no longer features in the Geordie lexicon. The dene ran past the backs of burgage plots. Those to the west fronted onto what was then the Flesh Market (soon to become the Cloth Market) and it is this area with which the case is concerned.
2. The burgage plots, which are said to date from the 13th Century, were served by lanes giving access from the Flesh Market to the rear of the plot of which it formed part. Two of those lanes, White Hart Yard and Ship’s Entry, are the subject of these proceedings. The Claimant is the freehold owner of both. The disputes in this case are as to the existence of public and private rights of way over these lanes.
3. The trial lasted 13 days, in the course of which there was a site view, I heard evidence from 43 lay witnesses, and read the evidence of five

¹ The Buildings of England: Northumberland (1992)

² A descriptive and historical account of the Town and County of Newcastle upon Tyne p. 176 (E Mackenzie

³)

witnesses, whose statements had been produced under Civil Evidence Act notices, and a further eight witnesses whose statements were admitted by agreement as hearsay on the basis that the opposing parties did not agree their contents but neither wished to cross-examine the makers. In addition, the Claimant and the Defendants each called three experts. I have had 2 sets of written submissions from each party in the course of the hearing plus a further 4 sets of submissions from the Claimants and the Defendants post final submissions, the last on 21st April 2020. The documents in this case fill 14 lever arch files. I'm very grateful to counsel for Easteye Limited, Mr Laurence QC and Mr Morgan, to Mr Pryor, counsel for Malhotra Property Investments Limited, Malhotra Property Limited and PFS (Newcastle) Limited, and Ms Stockley, counsel for the Third Party, the Council of the City of Newcastle, for their assistance in guiding me through what would otherwise have been a morass of information.

4. In order to gain an understanding of the essential features of this case I have attached to this judgment, at appendix A, a greyscale plan showing the relevant buildings and land. I have set out at appendix B a summary of the key witnesses and some documentary evidence which I have taken into account for the period following the 1960s in relation to White Hart Yard. I have taken the same approach with the witness and documentary evidence for Ship's Entry at Appendix C for the period from the late 1950s. Where appropriate, I have included my observations on particular witnesses. In respect of each witness I have indicated, in brackets, the period of time which their evidence covers. To have included this quantity of evidence in the body of the judgment would have been unwieldy, appearing more akin to a summing up. Appendix D contains an index to the judgement; I am further grateful to Mr Morgan and Mr Pryor for compiling this index.

5. I shall refer to the Defendants and PFS as the Malhotra companies, as they are owned by members of the Malhotra family. The Claimant is owned by the Ladhar family. Indeed, the dispute has been described to me as the Ladhars versus the Malhotras.

The relevant land

6. White Hart Yard and Ship's Entry are marked on the plan at appendix A; in some documents the latter appears as 'Ship Entry' but for consistency I will stick with 'Ship's', which seems to be the modern name. The land owned by Easteye is shown in dark grey and includes White Hart Yard and Ship's Entry. That owned by the Malhotra companies is shown in light grey; they also own the rest of the block between Balmbra's and Mosley Street. Balmbra's is on the site of what was the Wheat Sheaf Inn, to the rear of which, and now incorporated into Balmbra's, was the Oxford Music Hall.
7. White Hart Yard runs from the Cloth Market, at Point E, through an undercroft, emerging through another undercroft into Grey's Court at point D. Grey's Court is a cul de sac running through a further undercroft to Grey Street. The yard has a cobbled roadway with paving on both sides. The entrance to the western end of the yard is flanked by numbers 16 and 14 Cloth Market. For most of the length of the yard there are derelict buildings dating from the 17th to 19th Centuries. At the eastern end, however, there is a night club, and formerly a casino, operated by Easteye. These premises are on either side of the eastern undercroft and extend a little way back into the yard. Currently, there is decking along much of the yard as it is used as an outside area for the nightclub.
8. Ship's Entry also leads from the Cloth Market at point A, through an undercroft to point B, where it passes under no.11-13 Grey Street, and

enters Grey's Court at point C via the 'Dog's Leg', also sometimes referred to as the 'Dog Leg'. It is within the title of 10 Cloth Market.

Currently, there are gates at points E,D, C and A as well as a gate in Ship's Entry in the vicinity of the boundary between the Easteye and Malhotra land to the west of 11-13 Grey Street (rear). There is a dispute as to what was gated and when, and whether the gates were locked. The buildings along the length of Ship's Entry are empty and in need of renovation, as is –11-13 Grey Street.

9. 11 Grey Street consists of a ground floor property and basement fronting onto Grey Street. It has a rear door opening into the Dog's Leg on the Ship's entry side of the gate at point C. 13 Grey Street consists of the 3 floors over number 11 which front onto Grey Street and passes over the Dog's Leg at first floor level from where it runs west along Ship's Entry as a 4 storey building. It has a fire exit at ground floor level at its western end, opening onto Ship's Entry. Until 1934, 13 Grey Street also comprised the first and second floor over the arch between Grey's Court and 15 Grey Street, the remaining storeys of which were in the title of 15

Grey Street. In that year this part of the building was conveyed to the owners of number 15 Grey Street. The plan to that conveyance, in particular, has featured in the argument.

10. Most of White Hart Yard and all of the buildings along and beyond Ship's Entry are in need of redevelopment. In 2011 a planning application by the Malhotra companies to develop their properties included Ship's Entry within the scheme of development. Permission was granted on 10th December 2012 but not implemented. In 2017 Mr Jagmohan Malhotra, who is a, if not the, key member of the family with control of the Malhotra

companies, was in a dispute with Baldev, known as Dave, Ladhar, now deceased, the patriarch of the Ladhar family with control of Easteye, as to whether the Malhotras had any rights over Ship's Entry. That dispute has developed into the case before me.

The dispute

11. The Malhotra companies allege that there are public rights of way over White Hart Yard and Ship's Entry, and, if there is no right for the public over the latter, the First and Second Defendants nevertheless have private rights over that land. These include a right of way between Grey's Court and the Cloth Market by virtue of their ownership of 11/13 Grey Street, a right of drainage from the eaves of Balmbra's with rights to enter to inspect and repair, and a right of fire escape from 11/13 Grey Street in both directions, i.e. to both the Cloth Market and Grey's Court. Easteye has accepted that there is a right of drainage for Balmbra's and that this includes a right to inspect and repair on notice; in the course of the trial the parties were able to agree the terms governing the operation of such rights.
12. Easteye also accepts that the occupiers of 11 Grey Street have, for the purposes of their business, a right of way on foot over Ship's Entry from the ground floor door at the rear to a storeroom on the opposite side of the Dog's Leg and a right of way for the purpose of a fire escape from the rear door along the Dog's Leg into Grey's Court.
13. As regards 13 Grey Street, which is served by a boiler situated in a boiler room opening into Ship's Entry, but not the building itself, Easteye accepts that there exists a right of way over Ship's Entry between the fire

door at the western end of 13 and the boiler room and a right of fire escape between that door and the Dog's Leg into Grey's Court.

14. The existence of all the other claimed rights is denied. A right claimed by PFS, the owners of 15-17 Grey Street, to a right of way over Ship's Entry was abandoned by the time of trial.

15. Newcastle City Council takes a neutral stance. It was joined as the relevant Highway Authority in view of the public rights claimed. The council has no record of there being public rights of way over White Hart Yard or Ship's Entry but will be guided by the Court.

The legal bases of the Defendants' public law claims.

16. I shall deal with the law in outline at this stage to identify what has to be proved. I will look at the law in greater detail when considering the parties' respective submissions. A similar approach is adopted in relation to the private law claims.

17. The Defendants' case is that the public is entitled to a pedestrian right of way over White Hart Yard and Ship's Entry either as a result of an implied dedication at common law or by operation of s.31 of the Highways Act 1980.

18. It is common ground that in order to establish the existence of a public right of way the Defendants must prove dedication and acceptance by the public, usually by user. To make out the common law claim the Defendants must persuade the court to infer that a qualifying use of the way by the public continued for a period sufficiently long to support a conclusion that the owner dedicated and intended to dedicate a public right over the land. In order to do so the following must be proved;

- a. the public had use of the way uninterruptedly;
- b. the public used the way as of right, namely without force, secrecy or permission;
- c. the public had used the way in such a manner that a reasonable landowner would appreciate that a public right was being asserted;
- d. the public's use, even as of right, has been such as to support a finding of an actual intention to dedicate on the part of the landowner.
- e. In relation to Ship's Entry, the landowner had capacity to dedicate; this arises in the case of Ship's Entry alone because it was owned by a charity until 1974 which, says the Claimant, is a bar to a finding of dedication.

It is for the Defendants to prove each of these conditions is met save for the existence of permission, where, at the very least, an evidential burden falls on the landowner Claimant in the face of evidence of long public user without interruption; see **Welford and others v Graham and Anor [2017] UKUT 0297 (TCC)** per Morgan J at [43]-[46] on this last point.

19. Statutory dedication arises under section 31 of the Highways Act 1980, subsections (1), (2), (3) and (8) of which provide:

“(1) Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be

deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.

(2) The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice such as is mentioned in subsection (3) below or otherwise.

(3) Where the owner of the land over which any such way as aforesaid passes—

(a) has erected in such manner as to be visible to persons using the way a notice inconsistent with the dedication of the way as a highway, and

(b) has maintained the notice after the 1st January 1934, or any later date on which it was erected,

the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway.

(8) Nothing in this section affects any incapacity of a corporation or other body or person in possession of land for public or statutory purposes to dedicate a way over that land as a highway if the existence of a highway would be incompatible with those purposes”.

19. It is apparent from the section that there is no need to prove dedication by the owner as this is deemed to have occurred if the conditions in the section are made out. The presumption can be defeated

on proof that there was no intention to dedicate, but the burden of so proving is upon whomever makes that assertion, usually the landowner. The person claiming the right does, however, have to establish actual enjoyment by the public as of right, i.e. without force, secrecy or permission, for a period of 20 years before the right is brought into question. The 20 year period must be continuous up to the time when the right is called into question; see **De Rothschild v Buckinghamshire County Council (1957) 8 P.&C.R. 317** where it was held that there could be no deemed dedication where albeit there was in excess of 20 years of qualifying user, such user had ceased 8 years before the right was called into question.

20. There is certain evidence which the court is required to consider when faced with a question as to dedication. Section 32 of the Act provides:

“ A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced.”

21. Section 31 of the 1980 Act is the statutory successor to section 1 of the Rights of Way Act 1932. That section is not identical to section 31 in that it adds that dedication will be deemed:

“unless during such period of twenty years there was not at any time any such person in possession of such land capable of dedicating such way.”

The 1932 Act has been held to affect the substantive law and thus operate retrospectively; see **Fairey v Southampton County Council [1956] 2 Q.B. 439**. Thus, the court can look at any period of 20 years prior to the calling into question of the right. It is not restricted to a period following the commencement of the 1932 Act.

The legal bases of the Defendants’ private law claims

22. By the end of the trial, the only disputed rights were those claimed by the First and Second Defendants as owners of 11 – 13 Grey Street to a right of way over the full length of Ship’s Entry, or a right of fire escape towards the Cloth Market. The Defendants’ case is that until 1991, 11-13 Grey Street and 10 Cloth Market, which includes Ship’s Entry, were in common ownership, albeit that no. 11 was let to a third party which ran a restaurant, L’Aragosta, from those premises. In 1991 11-13 Grey Street was conveyed to Patrick Murphy and is alleged that at the time of the conveyance Ship’s Entry was used as a way between Grey’s Court and the Cloth Market for the benefit of numbers 11 and 13 Grey Street. The Defendants argue that this usage amounted to a quasi-easement which passed to the title owner of 11 and/or 13 Grey Street by the general words implied into conveyances by section 62 of the Law of Property Act 1925 and such rights also passed to number 13 under the rule in **Wheeldon v Burrows (1879) L.R. 12 Ch D 31**. They originally contended that this rule operated in favour of number 11 but now accept that it does not in the light of **Kent v Kavanagh [2007] Ch 1**.

23. Section 62 of the Law of Property Act 1925 provides that save where a contrary intention is shown, every conveyance of land passes all “*easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or at the time of the conveyance...enjoyed with ...the land or any part thereof.*” Save, possibly, in the case of rights to light, the section only operates where there was either diversity of occupation of the dominant and servient tenements, see **Sovmots Investments Ltd v Secretary of State for the Environment** [1979] AC 144, or the right was continuous and apparent;

see **Wood v Waddington** [2015] 2 P.&C.R. 11. Continuous and apparent, in the case of a right of way, means that it shows its presence, such as a made up road or worn track or its use is obvious in connection with the land conveyed; see **Boorman v Griffith** [1930] 1 Ch 493 and **Hansford v Jago** [1921] Ch 322. Of its nature, a right of way is not used continuously, i.e. in an unbroken way, but from time to time, but this does not prevent a way from being regarded as continuous and apparent. The word “continuous” is all but superfluous in the case of a right of way; see **Wood v Waddington (above)** per Lewison L.J. at [15]. There must, nevertheless, be evidence of sufficient use prior to the conveyance to justify a finding that there were rights, privileges or advantages enjoyed with the land, which are to be implied into the conveyance; see **Alford v Hannaford & another** [2011] EWCA 1099 per Patten LJ at [34]-[35].

24. For the rule in **Wheeldon v Burrows** to operate, not only must the quasi-easement be continuous and apparent, but it must be necessary for the reasonable enjoyment of the land granted and had been, and was at the time of the grant, used by the grantor for the benefit of the part granted.

The evidence

25. Although there is inevitably some crossover between the claims concerning the two ways in that the evidence came, in part, from the same witnesses, it is convenient, save in relation to the uncontentious history and certain common classes of documents, to deal with the evidence in relation to each separately.

Uncontentious History

26. By 1788 the lower part of the dene, which carried the Lort Burn to the River Tyne, had been culverted and filled in to form what is now Dean Street and Mosley Street. In the early 19th century the northern part of the dene was filled and in 1808 the corporation constructed the New Butcher Market on the reclaimed land. It was following the construction of this market that what had been the Flesh Market was renamed the Cloth Market. A map of 1830 shows an L-shaped passage to the south of the New Butcher Market of which it was said *“A passage for carts into the west side of the new flesh market has just been opened (i.e. The New Butcher Market), with a view of disencumbering Mosley Street from the long rows of potatoe (sic) carts which stood there on market days.”*³ This passage runs east to west along the north side of 10 Cloth Market, plot 244 on the map, which is the land of which Ship’s Entry forms part, and turns north to run along the eastern boundary of plot 243 which includes White Hart Yard. It is common ground that this is the genesis of Grey’s Court.

27. The butchers did not remain long in the new market for in 1835 Richard Grainger, the builder and developer who redeveloped much of the centre of Newcastle in a style dubbed “Tyneside Classical”, built the Grainger

Market on Grainger Street to which they moved. He purchased the New Butcher Market and the surrounding land upon which he created Grey Street (originally Upper Dean Street). The building of the new street did not affect White Hart Yard but it did result in the removal of the northeast end of 10 Cloth Market upon which was built 11-13 Grey Street.

Passage from Ship's Entry into Grey's Court was achieved by the construction of the Dog's Leg. The pre-1835 plans are unclear as to whether, prior to this development, Ship's Entry provided a route from Cloth Market to the way leading to the New Butcher Market. A plan of 1830 appears to show a building obstructing the way whereas an 1833

³ A descriptive and historical account of the Town and County of Newcastle upon Tyne p. 176/7 (E Mackenzie 1827)

plan shows it to be open. Since 1835, the footprint of 10 Cloth Market has remained unchanged although the western end was rebuilt in 1898.

Classes of documents common to both White Hart Yard and Ship's Entry

Highways Records

28. Neither White Hart Yard nor Ship's Entry is recorded in the Highway Authority's records as highways maintainable at public expense. Neither did they appear in the proposed definitive map of public rights of way which the authority is obliged to prepare. To understand the evidence concerning these records it is necessary to look at the statutory context against which it is set.

29. Prior to 1835 all public highways were maintainable at public expense. This state of affairs was changed by section 23 of the Highways Act 1835

which required certain conditions to be met before liability to maintain could fall on the public; in essence the conditions were directed at ensuring that the road was built to a suitable standard and introduced a mechanism of notice and determination to ensure that it was. Footways were not caught by section 23 and remained repairable at public expense.

30. Section 84 of the Public Health Act 1925 required all urban authorities, within 6 months of the commencement of the Act, to cause to be prepared a list of the streets in the district repairable by the inhabitants at large; for this purpose street included footways as they are within the definition of 'street' in section 4 of the Public Health Act 1875, which is applied by section 1 of the 1925 Act. Thus, if Ship's Entry or the pavement of White Hart Yard had become public footpaths by the passing of the 1925 Act they should have been on the section 84 list.

31. By virtue of section 47 of the National Parks and Access to the Countryside Act 1949, as from the date of commencement of the Act, 16th December 1949, all public footpaths became maintainable at public expense whether they were created before or after that date. Mr Laurence took, as an example, White Hart Yard. If the whole of the yard had become a public footpath before 16th December 1949, the footways would have been caught by section 23 of the Highways Act 1835 and the carriageway by section 47. As a whole they would have been maintainable at public expense and should have appeared on the list required by section 84 of the Public Health Act 1925.

32. Section 38 of the Highways Act 1959 and its successor, section 36 of the Highways Act 1980, require the council of an area to cause to be made, and keep corrected, a list of streets in their area which are highways which are maintainable at public expense. The list must include all streets

maintainable at public expense; “streets” includes all highways, footpaths and pedestrian routes, see section 48(1) of the New Roads and Street Works Act 1991 as applied by section 329(1) of the Highways Act 1980.

33. Under Part IV of the National Parks and Access to the Countryside Act 1949, there is a duty on councils to undertake a survey in their area of all lands over which a public right of way is alleged to subsist and prepare a definitive map and statement of footpaths and bridleways over which public rights of way exist. The map and statement have to be continuously reviewed and kept up to date. The survey and draft map were to be produced within 3 years of the commencement of the Act. The usual mechanism for the draft map to become definitive is the making of a successful application for a modification order to add a new path, but that is not the only way. By section 53(2) of the 1949 Act a council is under a duty to consider making a modification order if it becomes aware of evidence which satisfies it that a public path subsists or is reasonably alleged to subsist.

34. The County Borough of Newcastle, as it then was, did not fulfil the Part IV duty. In 1976 the Department of Environment excluded the centre of Newcastle from the requirement to produce a definitive map. That exclusion was removed by section 55 of the Wildlife and Countryside Act 1981. The Act also provides for anyone to apply to the council for a Definitive Map Modification Order if they believe the map is incorrect.

35. There was evidence from Simon Carey, a Public Rights of Way Officer with Newcastle City Council. He told me that the Council have prepared a map and statement of the areas previously excluded. It was approved by the Council on 15th January 2019 and was awaiting the making of the first modification order to become definitive; this was expected to happen in

the next 4 to 8 weeks. Neither White Hart Yard nor Ship's Entry are on the approved version of the map and no-one has, up to the date of trial, asked the Council for either to be included. Mr Carey was unable to say why the map had taken so long to produce as he has only been in post for the last 9 years.

36. Susan Millard works in the Place Directorate of the Council. She has been responsible for maintaining the list of highways which the council are obliged to keep under the Highways Act 1980. The maintained highways, both carriageways and footpaths, are marked on plans which she produced. Neither White Hart Yard nor Ship's Entry is shown as publicly maintained in these records. She has looked for, but been unable to find, the section 84 list. The earliest records she has been able to produce are those marked on a 1951 edition of the Ordnance Survey map.

37. White Hart Yard and Ship's Entry are not included in the non -statutory records kept by the council, in essence its highway inspection and maintenance records. The inspection records show that there were walked inspections of the former in 2009, 2015 and 2016. Pamela Holmes, a principal engineer in the Newcastle City Council's Highway Department told me it was treated as subject to the inspection regime in error. This came to light in 2012 when the council aligned their Local Land and Property Gazetteer, which is a database of property and land within the council's area, with the National Street Gazetteer, which is a dataset of streets requiring, amongst other things, highway maintenance. It was then realised that there were a number of streets which should not have been included in the latter, one of which was White Hart Yard. In consequence, it was marked as "*closed*" which meant it was treated as a private road and not maintainable at public expense.

38. None of the Council's witnesses were challenged as to either the truth or accuracy of their evidence and I accept what they say.

The statutory notice concerning electrical works

39. In November 1882, the London Gazette carried a notice of an application by the Mayor and Aldermen of Newcastle to the Board of Trade to enable the Corporation to, among other acts, break up streets in Newcastle in order to distribute electricity. White Hart Yard and Ship's Entry were listed as private streets not maintainable at public expense.

The Finance Act 1910 Documents

40. I was referred to Field Book entries prepared under the Finance Act

1910. The Act sought to place a value on all land as of 1909 with a view to levying a tax at the time of sale on any increase in value. Mr Carr, the Claimant's highways expert, described how as part of the assessment it was possible to claim deductions for matters which may have an effect on the value of the property, including the existence of a public right of way. In the event the tax was never levied.

41. The process of collecting the information for the Field Books was described in *Land and Society in Edwardian Britain (1997)* by Brian Short at Chapter 4, a copy of which was provided in the bundle. A Form of Return was provided to land owners, usually personally by the Land Valuation Officer. The form required extensive details about the property, including as to the existence of any public rights of way over the land. The owner was compelled to complete and return the form on pain of a fine if they failed. Information from the owner's return was transcribed into the Officer's Field Book. This was subject to checking by Temporary Valuation Assistants who had power to inspect the land. The

valuations placed on the properties were made following inspection. Thus, the information in the Field Book comprised that provided by the owner and the Valuation Assistant. This matches the evidence of Mr Carr to the effect that the information in the Field Book was a composite of the work of surveyors, valuers working for the Inland Revenue and the landowner.

42. The 1910 Field Book entry for White Hart Yard, which is plot 540 in the reference plan, is headed “*12 to 16 Cloth Market, White Hart Hotel*”, but it also lists “*public house, shops, offices and warehouses*”; it clearly include the whole yard. The owner is stated as John Fitzgerald, the occupier, Mr Twibell. Under “*Charges, Easements and Restrictions affecting value in Fee Simple*” there is a blank. In that part of the form which deals with reduction in value due to the presence of a public right of way there is also a blank.

43. In the Field Book for Ship’s Entry the heading dealing with public rights of way is left blank but there was a deduction shown for easements.

The evidence in relation to White Hart Yard

44. The claim for a public right over White Hart Yard relies upon evidence from two periods. The first is from 1867 to the 1960s. I shall call this historic user. There is no direct witness evidence as to use of the yard prior to the 1960s. The Defendants’ case relies upon the analysis of, and inferences to be drawn from, contemporaneous documents and physical features, with the assistance of expert evidence. For the period from the 1960s onwards, which I shall term modern user, there is direct oral

testimony together with documentary and expert evidence upon which the Defendants rely.

Historic User

45. Mr Pryor takes 1867 as his starting point because there is evidence that as late as December 1864 there was a gate on the eastern entry to White Hart Yard within which was a wicket gate. This is to be found in an article from the Chronicle newspaper of 3rd October 1864 concerning the burglary of a shop at 15 Grey Street. The report indicates that there was a large gate with a small man door at the entrance into White Hart Yard from Grey's Court, albeit this did not prevent the burglars from obtaining a ladder from the Yard which they subsequently returned; the report suggests that the latch to the man gate had been left open. In 1867, however, plans were drawn for alterations to White Hart Yard; the plans are dated 26th June 1867 and are headed with the name of Mr Alexander Joel. These show that the south and north -eastern buildings in the yard were to be demolished and rebuilt with the building line to the southern side moved northwards, narrowing the eastern end of the yard. The building line onto Grey's Court was unaltered.

46. A comparison of the 1867 plan with an 1841 plan of White Hart Yard appears to show a change of use. In the 1841 plan the yard contains the White Hart Inn together with stabling and haylofts, spirit cellars with dwelling rooms above, kitchens, a bar room and brewhouse with dwelling rooms, a shop fronting onto Grey's Court, and a dwelling house in the centre of the yard. The White Hart Inn dates back to at least 1711. There is evidence that in the 19th Century at least 2 stage coaches a day were

leaving from the yard. Given the presence of stabling and haylofts, The White Hart is likely to have been a coaching inn.

47. In the 1867 plan, the dwelling rooms and shops fronting Grey's Court are shown as a bar, the area for stabling on the south side of the yard is reduced in width but lengthened and a coach house is added; although the bar onto Grey's Court is a change from the 1841 plan, it appears from the 1862 Ordnance Survey map that there was already a bar on that site named White Hart Low Bar. The spirit cellars with dwelling rooms above appear to have been rebuilt as a warehouse with offices. On the north side of the yard warehousing and offices replaced the stabling and brewhouse.

The plan does not show a gate at the Grey's Court entry. It shows window lintels and door openings but no detail of the structures at the Cloth Market end of the yard. There are press notices of the time evidencing that the warehousing was being let and that businesses had moved in.

48. There are block plans for 1870, 1893, 1918 and 1953 and Fire Insurance plans of 1887 and 1893 which do not show gates at either end of the yard but Mr Pryor does not place reliance on such absence as the highways experts in this case agree that it is not significant as that level of detail is not to be expected on such plans.

49. Albeit that the alleged period of unobstructed user is alleged to have commenced in 1867, there is evidence that White Hart Yard was described as a route between the Cloth Market and Grey Street prior to that date. A report from the Newcastle Guardian of the 1850s concerning the charging of two men for being in White Hart Yard at night for unlawful purpose, says that one of them "*went into the White Hart Yard, which leads from the Cloth Market to Grey Street*" A report of an assault and attempted

robbery in the Courant from the 1850s states that coming down the Cloth Market the victim “*was persuaded...to go down the White Hart Yard as it was a cut into Grey Street*” There are also press reports of the 1850s and 1860s detailing offences being committed in the yard, and in 1879 a report that a Thomas Murray was said to have stolen some cigars from a tobacconist in Grey Street and run into Grey’s Court; Mr Pryor asks, why would Mr Murray have run into Grey’s Court if it was a dead end with no access to White Hart Yard and from there to the Cloth Market?

50. On 17th September 1877 there was a report in the Journal of a fire in the premises of Mr Foster Hara, a wholesale stationer and printer in White Hart Yard. It records that at 8.00pm the police officers who spotted the fire forced their way into the building from the passage adjoining the Oxford Music Hall, i.e. Ship’s Entry. In order to tackle the fire at the point it was confined in the top storey, the fire hose was carried over the roof of Mr Joel’s property. Stock was removed from the burning building and taken in to the passage and bar of the Music Hall.

51. Goad plans for 1893, 1893 show that White Hart Yard was occupied by a variety of businesses. This is supported by trade directories starting from 1869 which refer to the presence of the White Hart Inn and various merchants and artisans. I do not need to specify the businesses operating from the Yard and their dates of occupation, for both sides to this dispute accept that there were businesses there into the 1980s. In summary, by the 1890s the yard had 10 business occupants. White Hart Inn was kept by John Fitzgerald, there were three Commission Agents, a printer (Mr Joel), a bookbinder, plumber and three provisions importers. The last trade directory entry for the White Hart Inn is in 1917. After the First World

War the number of traders declined , there were seven in the 1920s, five in 1938, and seven in 1950.¹ The period after 1960 is dealt with in the witness evidence.

52.The electoral registers for the period 1918 to 1962 show that there were a number of people, not residing in the yard, qualified to vote due to their connection with business carried on there. The figures are as follows: 1918- 8, 1923-13, 1926-13, 1928-16, 1933-9, 1935-7, 1938-8, none between 1938 to 1962, in which year there were three entitled to vote on the basis of their property ownership. The relevance of the presence of places of business, which in any event included an Inn even pre-1867, is that those who occupied the yard, including the tenants, will inevitably have made use of it as access to the business premises as will their visitors.

53.The conveyance of part of the first floor of 13 Grey Street to 15 Grey Street in 1934 was accompanied by a plan on which appears the words “*Grey Street*” to identify the road to the east of the conveyed property, the word “*Road*” on the land that forms the part of Grey’s Court to the west of that property and the way leading from Grey’s Court to the west marked “*To Cloth Market.*” The way shown is in a position which corresponds with White Hart Yard; it is the same approximate location and is the first road on the left after one turns into Grey’s Court. It does not show a gate at the junction between the way and Grey’s Court. In contrast, where there is marked on the plan “*Passage Way to Ship Entry*” there is a marking which appears to indicate a gate. The conveyance describes the conveyed land as being “*over the public passage way or entry known as Grey’s Court leading from Grey Street aforesaid to the*

¹ The report of Nicholson Design Partnership on behalf of Easteye Limited March 2002

Cloth Market...” The parties to the conveyance were the local vicar, and three local solicitors, Adolphus Dickinson, Henry Ingledew and Frederico Lundi.

54. The first plan which provides evidence of the existence of a gate at the Grey’s Court end of White Hart Yard is attached to a lease dated 18th August 1967 and is dated 30th December 1965, albeit this is a 7th June 1966 revision . There is a dotted line across the entrance in line with the frontage onto Grey’s Court which is marked “*Existing Doors to be retained for the purposes of “way leave rights”. Iron Grill at High Level to be retained.*” The plan shows building works in connection with a proposed licensed club in White Hart Yard, including the installation of “*New Security Gates*” set towards the western end of the undercroft. The plan also indicates the presence of “Russells Auction Rooms” within the yard.
55. The first document showing gates at the Cloth Market end of the Yard is a photograph dated about 1975 on which can be seen what appear to be a pair of solid wooden gates. There is a photograph from the same time showing solid gates at the Grey’s Court end of the yard.
56. Other than the plans and photographs, Mr Pryor relies upon the surveying evidence as to gates. At the Cloth Market end the surveyors noted existing steel gates which Mr Jude, the Claimant’s expert, dated to 2001, based upon evidence from the Claimant’s witness statement, and Mr Penrice, the Defendants’ expert, dated to the early 1960’s or 70’s, in evidence he said about 1974. His reasons for reaching that conclusion are faulted.

57. Mr Penrice arrived at this date on the basis that the telephone number on the window above the gate shows a pre-1995 'BT PhONEday' prefix, it is an 091 number, not 0191, and he associates the presence of Heras fencing, a glimpse of which can be seen on a photograph, with work upon the construction of Sun Alliance House on the other side of the Cloth Market, which he dates to 1974. An observer at the site view would have noticed that the window still carries the same telephone number. All that can be inferred from its presence is that when the number was painted on the window it was an 091 number. As regards the Heras fencing, it is the usual type of fencing seen around construction work and repair but there is nothing to link it with the construction of Sun Alliance House other than one can see two or three sections of fencing on the roadway of the Cloth Market. The photograph of the fencing upon which Mr Penrice relied is from 2002. He is clearly wrong as to his dating of the steel gates. There are a number of photographs which show the wooden gates still in place after 1974 and all the other witness evidence points to the steel gates being installed after the takeover by Easteye. Mr Penrice's dating of the gates cannot be correct and I do not accept his evidence on this point.

58. At the Grey's Court end, the surveyors identified modern timber gates dating from 2015 to 2018. They also, however, found iron hinges in close proximity to the entrance to Grey's Court under a grille attached to the underside of the undercroft. They agree that the hinges probably date to the original construction of this part of the building. Mr Penrice accepted that the hinges dated from the works on Grey Street between 1830 and 1862 and the grille dated from the same time; he referred to it as "*an ancient feature associated with the gates below.*" He said these type of grilles were a feature of 19th century gates; the grille can be hooked back

to accommodate a higher load and the hooks for the grille are also still in situ; a feature to which my attention was drawn at the site view.

59. Although the historic user case is not based on recollection, there was one witness of fact who could give relevant evidence about this period. David Horgan is the great grandson of Sir John Fitzgerald and the managing director of Sir John Fitzgerald Ltd, a company incorporated in 1926 and still in family ownership. It is common ground that Sir John Fitzgerald and the company had owned White Hart Yard from the 1890s until 6th July 1990; this is supported to a degree by the entry in the Field Book for plot 540. Mr Horgan said that his recollection went back to the 1960's. He was 22 in 1969 but before that he used to accompany his father around the company estate from a fairly young age, which would cover most of the 1960s.

60. Mr Horgan's recollection was that from the time he visited White Hart Yard there were barred gates at the Grey's Court end which were attached to the hinges still in place and they were under the grille which can be seen to this day. He could not recollect how the gate was locked but he thinks it was with a padlock and chain. At the Cloth Market entrance there were a pair of wooden doors secured by a padlock and chain and at other times by a hasp, staple and padlock. I shall look at his evidence in greater detail when comparing the evidence of the various witnesses who deal with White Hart Yard. Depending upon what I make of his evidence, the presence of gates hung from original hinges in the 1960s positioned under a grille which the surveyors accept dates back to the 19th century and worked in combination with the gate below may be some indication that they had been there for a very long time, given that the yard had been in the same ownership going back to the 1890s.

The Highway and Surveying Experts

61. Easteye relied upon the evidence of Robin Carr, a Fellow of the Institute of Public Rights of Way and Access Management, and the Malhotra companies upon Dr Nicholas Bunn, a Member of the Chartered Institution of Highways and Transport, as highways experts. On surveying issues Easteye relied upon Chris Jude FRICS and the Malhotras upon George Penrice FRICS, both building surveyors, all suitably qualified in their own fields. There was a large amount of material produced by the experts but there is no purpose in reviewing the entirety of their evidence. The protagonists in this case, by which I mean the parties other than the City Council, made little reference to the expert evidence in closing arguments. The highways experts, in particular, have trespassed into fields reserved to the court, such as what can amount to dedication of a highway, which is a matter of law, or ascertaining the date(s) when any right of way was called into question, a matter of mixed fact and law. Mr Penrice also offered opinions on matters which properly fell within the sphere of the highway experts

62. It is helpful to have expert evidence to explain documents and physical features and their potential significance but the factual inferences to be drawn are for the court, not the expert. I accept that an expert may opine that the absence of a gate on a plan may indicate that there was no gate present and underpin his opinion with an explanation as to the nature of the plan or such like, but it is not for the expert to decide that fact or to express a conclusion as to whether on balance of probability the facts, as found by the expert, following a self-direction on the law, have resulted in the public having rights over the way. The evidence of the highway experts has gone badly wrong in this respect. One can see where this has

led for much of the cross-examination of Dr Bunn concerned his grasp of the difference between the establishment of a public right of way at common law and under the 1980 statute, the quality of user necessary for that purpose and whether it is necessary to identify a date to which the 20 years of user runs under the 1980 Act. I refer to this as a cross-examination, but it was more in the nature of a viva voce on the law. Mr Carr was equally guilty of going beyond his brief as an expert, as Mr Pryor was quick to point out. The direction for expert evidence on highways was limited to evidence *“concerning the existence and interpretation of historical documents, plans and maps relating to the possible past use by the public of Ship’s Entry and the Dog’s Leg and White Hart yard as public highways”*. Mr Carr added that his instructions also asked him to *“state whether, in my expert opinion, any of these routes has become a public highway by virtue of common law and/ or section 31 of the Highways Act.”* He too, set out in his report his self- directions on law, reached factual conclusions leading to an opinion as to whether the claims for public rights of way would succeed or fail. In consequence, much of his cross-examination was in the nature of a viva voce on procedural law as to the role of an expert in litigation.

63. I agree with Mr Pryor’s observation that they were only acting as experts when offering opinions on whether certain features were or were not pictured on old plans and what that might indicate, to which I would add entries in other documents, producing surveys of features visible from old plans and documents or are currently visible and opining on the age of features currently visible or appearing on photographs. I disagree with his suggestion that acceptance by both highway experts that members of the public would use the ways if not blocked is either an expert matter or, indeed, what they say. In their joint statement they agree that there may

be a propensity for people to use the most direct route between two points, which is not a proposition requiring any particular expertise. They go on to agree, however, that notwithstanding such propensity a number of issues remain matters of evidence before such use could establish a public right of way namely, whether, in particular, the use has taken place.

64. In relation to White Hart Yard, the key dispute on the documentary evidence as to historic user arises from the 1867 plans and the 1934 conveyance. Dr Bunn and Mr Penrice both rely upon the absence of an indication of a gate at the entrance to Grey's Court on both plans as indicating there was no gate between 1867 and 1934. Dr Bunn also relies upon the description of Grey's Court as a public passageway leading to the Cloth Market and the plan to the conveyance including the words "*to Cloth Market*" at the entrance onto White Hart Yard. Mr Carr and Mr Jude disagree with these conclusions, largely on the basis that the 1934 conveyance was not concerned with White Hart Yard and the 1867 plans need to be seen in the context that there was no need to do any work in relation to the gate as part of the development.

65. Dr Bunn and Mr Carr agree that the Ordnance Survey Maps are of no assistance in ascertaining the existence of a public right of way and the absence of gates shown on Goad fire plans indicates that there were no iron gates but are of no assistance in determining whether there were wooden gates. They also agree that newspaper reports of events in and around the routes in question are of no assistance in determining status and nor are the census records and trade directories, as access to the premises would be over land owned by the same parties, thus there would be no requirement for such access by virtue of a public highway.

66.As to the fact that the yard is not shown in the highway records as maintainable at public expense, Dr Bunn says that this is no evidence that highway rights did not exist. Mr Carr accepts that whilst it is not necessarily evidence that such rights do not exist it points towards the route not having the reputation of a public highway for the obligation on the highway authority to keep a list of highways maintainable at the public expense dates from the Public Health Act 1925. Further, if White Hart Yard had been a public footway prior to The Highways Act 1959 it would be a highway maintainable and public expense and should feature on the highway authority's maintenance map.

67.Mr Carr described the 1910 Finance Act documents, the Field Book, as a "Second Doomsday" survey. He said they were powerful evidence of the existence or reputation of the existence of a public right of way but the fact that an owner did not claim tax relief for such a way, by including it on the relevant form , Form 4, is not conclusive that such right did not exist. The most probable reason for omission was that the author did not think that such rights existed. Dr Bunn expressed the view, in a supplemental report, that these documents provide no further evidence whether rights of way existed over the yard. The experts agree, however, that the exclusion of a way from valuation on the 1910 Finance Act valuation plan is generally considered to be good evidence in support of the existence of a public highway because it indicates that the way was vested in the rating authority and that neither White Hart Yard or Ship's Entry was excluded from valuation.

68.In cross-examination, Mr Carr accepted Mr Pryor's suggestion that the absence of information as to the existence of a public right of way on the entry for plot 540 is of limited evidential value as it may have been

omitted by the landowner who considered it contrary to his interest to record the existence of such a right. Equally, there could be the opportunity for tax evasion in recording rights which did not exist; he pointed out in his report that the penalty for the provision of false information was up to 6 months hard labour. He did not, however, go so far as to say that the Field Book entries were of no evidential value. It is also worth noting at this stage that the person responsible for providing the return was John Fitzgerald, a distinguished citizen of Newcastle who later became Lord Mayor and was knighted for his services to the city.

The informants for Ship's Entry were the trustees of the Moulton Trust who, by 1934, were 3 local solicitors and a vicar. This is some indication that it is improbable that they would have deliberately falsified their return. Furthermore, taking up Mr Pryor's suggestion that the owners may not have declared the existence of public rights over their land, of which they were nevertheless aware, in order to preserve its value, that would be some evidence that they were alert to the damaging effect of the existence of such rights. If that were so, they would have had both the motive and the means to prevent such rights coming into being by gating off the ways, or putting up a suitable notice, in the late 19th century, to which time their ownership extended.

69. I have already dealt with the evidence concerning the presence of gates at the Grey's Court end of the yard. Mr Jude found evidence that there had been gates fixed to the Cloth Market entrance prior to the steel gates and identified original hinge locations and recesses in the walls to accommodate historic gates when in the open position; the 1975 photographs appear to show the large wooden gates folded back into the recesses when open. Both experts agree that these features are present. Mr Jude expressed the view that these are part of the original gate features but

Mr Penrice said he was unable to comment. Other than that the presence of a gate which predates the steel gate does not fit in with his view as to the gating at this end of the yard, it is unclear why he is unable to comment as the features are there to be seen.

70. Mr Penrice was of the opinion that in the 19th Century there was open access from both ends of White Hart Yard. Here he was talking about the public having open access. He explained that he based this conclusion not just on the absence of gates shown on any plan, but also upon his interpretation of the use to which the yard would have been put, looking at documentary evidence concerning, for example, occupancy and commercial usage. As it was accepted by the parties that block plans were not a reliable source for determining the presence of gates or otherwise and the plan of works to the yard of 1867 did not show any detail of the Cloth Market end, Mr Penrice did not have any plan upon which to base his conclusion that the Cloth Market end of the yard was an open access in the 19th Century. He can only have based his opinion on the other evidence concerning yard usage in reliance upon directories and the census, which were matters for the highways experts. He was cross-examined on the basis that such interpretation did not fall within his remit under the directions for surveying evidence. Mr Pryor indicated that, the point having been made, he did not require Mr Morgan to cross-examine Mr Penrice in respect of each occasion upon which he expressed

an opinion which fell within the province of the highways experts.

71. I have doubts as to the reliability of the opinions expressed by Mr Penrice and gained the impression that he was too ready to reach conclusions which favoured the proposition that the yard was ungated between 1867 and the late 1960s and early 1970s. Having reached an illogical

conclusion as to the dating of the steel gates, he relied upon it to reach the further conclusion that the gate was installed in the late 1960s to early 1970s to provide security for both ends of the yard whilst at the same time expressing the opinion that the security gates shown on the 1965 plan were erected some time after 1966. Thus, at a time when, even on his evidence, he was of the opinion that there may have been gates at both ends of the yard, he suggests that it is the Cloth Market gate which is providing the security. In doing so, he also overlooked the reference on the plan to the existing doors being kept.

72. He further sought to support his reasoning by reference to a photograph from 1975/76 looking into the yard from the Cloth Market. He seems to be the only person connected with this case, both witnesses and legal representatives, who could not see that there were a pair of a wooden doors at the Grey's Court end. He drew the conclusion that at the time of the photograph the yard was open for vehicles because there was a no parking sign painted on the face of the eastern undercroft, thus taking into account neither the concrete bollard in the foreground nor the closed door at the end of the yard; the only safe inference to draw from the no parking sign is that the yard was open to vehicles at the time it was painted on the wall, whenever that was. There are other examples of reasons to doubt Mr Penrice's evidence which we shall meet along the way.

73. Mr Penrice illustrated what he believed the position to be in 1974 with a plan showing the Grey's Court entrance as open access and marking the Cloth Market entrance as "*gate erected late 1960's early 1970s.*" Not only was it illogical to conclude that the current steel gate was installed in 1974 given that he exhibits in his report a photograph which he says is circa 2000, of the gate which can be seen on the 1975 photographs, but he

also dates those gates as mid to late 1990s based upon the presence of the 091 telephone number on the window above, upon the logic of which I have already commented.

Modern user; documents and evidence from witnesses whose recollection goes back to the 1960s.

74. For this period there was documentary and expert evidence as well as evidence from witnesses who provided their recollection as to White Hart Yard, some of whom speak to the documents. In order to set some of this evidence in context it is worth recording the ownership of White Hart Yard in this period. The property was owned by Sir John Fitzgerald Ltd until 6th July 1990. Between that date and the 22 July 1997 it was in the ownership of Bridgewater Estates Ltd whereupon it was sold to Mr and Mrs Davison who sold it to Easteye on 7th August 2001, in whose ownership the property remains. Where possible I shall consider the documentary evidence with that of the witnesses who can speak to the documents.

75. The earliest recollection concerning White Hart Yard was that of Joanna Blue. She was born in 1959. She said her father had a workshop halfway down the yard, he operated an optical manufacturing business. There were iron grille gates at the Cloth Market entrance which were secured by a large key. She and her brother vied with each other to turn the key, which they regarded as a treat. When she was about 6, in about 1965 or

66, she squeezed between the bars of the gate dirtying her dress. Her punishment was to be forced to wear boys' clothes for a day. The gates were unlocked by her father when they arrived and locked when they left. She thinks her father locked the gates whilst they were in the yard to

prevent the children getting out. She does not recall whether there were gates at the other end of White Hart Yard although her cousin, who is nine years older, has told her that there was a solid metal gate at that side which was the height of a typical farm gate. She recalls her father driving down White Hart Yard to his premises, on occasion. She described the yard as a private enclosed yard. Her father gave up his premises in 1967 which is when her knowledge of the yard ended.

76. In her statement dated 12 April 2019, Ms Blue had said that when her father died she and her mother found a large key which her mother stated was the key to the gates of White Hart Yard. Very shortly before the trial she found what she claimed to be the key. It was on a ring with two other keys. The largest key was that which operated the Cloth Market gates. There was a damaged key which she said operated the external door to her father's premises and a small key to a cupboard in his workshop.

77. The production of the key resulted in both sides obtaining further evidence as to its age and the type of lock for which it could be used. In this respect, the Claimant relied upon the evidence of John Charnley, a Fellow Qualified Master Locksmith of the Master Locksmith's Association for some 35 years and third generation successor to the business trading as Charnley & Sons Locksmiths. The Malhotra companies relied upon the evidence of Danny Ritson, whose business specialises in the restoration, repair and manufacture of antique and obsolete locking systems. He had experience of working with the locks from the age of 11, having worked with his grandfather Thomas Watson, a lock and safe engineer. He is not a member of the Master Locksmiths Association but explains that this is due to his lack of acquaintance with modern locking systems. He performs tasks necessary to qualify as a

Master Locksmith in 18th and 19th-century locks. He has worked on antique keys and locks for owners of large country homes and organisations such as the National Trust. He says he is one of a handful of locksmiths in the United Kingdom who work in this area.

78. When I first saw the experts' reports it looked as something of a coup that, at very short notice, the Defendants had found an expert in the field of antique locks living in the locality of this court. Having heard both experts, however, it was apparent that they were each highly knowledgeable in relation to the history of locks and well-qualified to provide an opinion as to whether the key produced by Ms Blue could have been that used in connection with the gates which she described. Mr Charnley, in particular, dealt well with Mr Pryor's impressive display of knowledge concerning the history of locks, correcting him as appropriate. The experts agreed that the key was approximately 150 years old and that it operated a dead bolt rim lock. The mechanism is known as a bridge ward lock. The lock is set in a casing which is attached to the face of the door or gate and that arrangement is called a stock lock. They also agree that such a lock is unsophisticated and prone to picking although the lock would be robust at withstanding a brute force attack. The lock was of the cheapest and most simple type of lock manufactured and used during the 19th century.

79. The area of disagreement was narrow. Mr Ritson was of the view that the key was too large for use in a wrought iron gate as such keys tended to be smaller. Mr Charnley agreed that was usually the case but said there were variations. Mr Ritson did not believe that such a lock would have been fitted to secure commercial premises due to its vulnerability. Mr Charnley agreed that the lock offered minimal security but said that the owner of the

yard might not have known that. He told me that gates were often supplied by a blacksmith together with a lock. Thus, the selection of the lock may have been by the blacksmith who simply provided something cheap, though because it was big it may look impressive. Mr Ritson accepted in cross-examination that whilst the majority of locks fitted to a wrought iron gate would be smaller there would be some in which the lock was larger. At one stage he suggested 10%, but no empirical basis was provided for that assessment. He acknowledged the possibility that a blacksmith may have provided the gates with a lock which they had fitted and they would not have a knowledge of the best type of lock to fit. It was his view, however, that there were more secure locks available at the time that the key was produced. I asked him whether what he was really postulating was that the owner of a commercial property in the Victorian era would select a more secure lock than this one. He acknowledged that, essentially, was his evidence.

80. The expert evidence on keys gives no conclusive guidance as to whether or not the key produced by Ms Blue was used in connection with a gate at the entrance to the yard. If there was a lock, there is no evidence as to how and by whom it was selected. The reasons given as to why the lock which this key operated may or may not have been affixed to the external gate to the yard are equally likely. If, therefore, I am persuaded that Ms Blue's evidence should be accepted in other respects, I would not be dissuaded from accepting her evidence as to the provenance of the key on the basis of the expert evidence I have received.

81. Ms Blue impressed me as an honest witness. She is a true neutral in that her involvement in this case is the result of her response to a Facebook post on the 'Tyneside Past and Present' group asking for information

about the yard. She responded as she has an interest in local history. I have to bear in mind, however, that her recollection is from a young age and at a considerable distance in time. There is evidence from the Claimant which casts doubt on her recollection as to the existence of barred gates. This can be found in the evidence of David Horgan whose recollection is from a similar time, or possibly slightly later, to that of Ms Blue.

82.I have introduced David Horgan at paragraph 59 of the judgement and his recollection of the gates and how they were secured. His recollection of the yard spans the period from the early 1960s to 1990. Throughout the time of his company's ownership he was concerned to keep the Cloth Market gates closed and locked at night, particularly against Friday and Saturday night revellers. These gates were open for trading by 9 am and closed and locked after 5 pm. They remained closed on Sundays. Tenants were responsible for closing and opening the gates and they had the keys. He accepted that the business hours may have altered over the years.

83.He was challenged as to how he could be confident that the Cloth Market gates were locked after business hours. He said that as the landowner his company were concerned to see that the yard was kept secure outside operating hours. He gave as a reason that the Bigg Market was notorious in the 1970s and 1980s as a frequent trouble spot. In cross-examination he added that he could only talk about the period after 1969, from which time it became rowdier as there were plenty of pubs along the Bigg Market, Cloth Market and Groat Market which were well used; this is a matter well known to anyone living in Newcastle at the time and was unchallenged. He regularly visited the licensed premises his company operated elsewhere in Newcastle, in particular the Bridge Hotel and the Crown Posada. Coming from his base in Nelson Street, Newcastle, he

would walk along the Cloth Market to see the gates locked or alternatively would come down Grey Street and look into Grey's Court to see what was going on there. Furthermore, the tenants who consisted of a second-hand bookseller, a jeweller, a warehouse for brushes, dustbins and other household goods and an auction room had an interest in keeping the premises secure outside business hours.

84.Mr Horgan's account of his desire to keep the public from White Hart Yard at night is supported by a letter he wrote to Ladbroke Group Limited on 26 March 1979. At the time Ladbroke's were operating Grey's Club Casino. The company wished to undertake development work at the club which included having a fire escape access from White Hart Yard to the Cloth Market instead of the solid doors described by Mr Horgan. In his letter he recorded that he had been requested to permit a grill gate giving access to the Cloth Market in place of the solid doors. He commented that in principle he had no objection but went on to say "*we must keep the public from gaining access to White Hart Yard at night and I am sure you will agree*".

85.At the Grey's Court end of White Hart Yard Mr Horgan recalled that there was a gate which he believed were metal grille gates situate where the hinges, and metal grille above, are still to be seen. He identified the 1967 lease of Grey's Club to White Hart Enterprises Ltd. The plan to the lease is that originally dated 30 December 1965 and which referred to the retention of the existing doors. The plan also shows the proposed installation of new security gates of unequal size towards the western edge of the undercroft leading to Grey's Court.

86.Mr Horgan identified a letter dated 24 January 1966 from the solicitors for the lessees to the Fitzgerald solicitors upon which he recognised his

father's handwriting. The letter evidences the lessees' proposed agreement to execute a lease on condition that they obtain a licence to use, for emergency escape purposes, White Hart Yard and the eastern gate and to alter or re-site the gate to comply with the requirements of the licensing authority. Mr Horgan's father had written on the letter that he met one Spark, who I was told was the Fitzgerald architect, at 8 Nelson Street, where they went through the drawing. His father noted that the existing doors were retained for purposes which are difficult to decipher. He proposed that a bollard be installed. It is difficult to read the rest of the entry. It seems to say that the bollard was to be installed on the inner gate and goes on "*the proposal would be negated by parked vehicle*". Mr Horgan thought that the concern was that the people may park in the undercroft, but that was just his conclusion on the document, he had not been given an explanation for the words on the letter. There is in the bundle an unexecuted licence which seems to date from this time, entitling the lessee to alter the existing gate at the east end of White Hart Yard and replace, reconstruct or provide such other gate as was necessary to comply with bylaws and the requirements of the council and licensing justices.

87. Mr Horgan did not recall how the Grey's Court metal grille gates were locked, he thought it was with a padlock and chain. He thinks they were locked at night before Grey's Club operated and by the club owners after Grey's took over the property. The new security gates were constructed and he was able to identify them on a photograph from 1975. He was aware that the gates he described were removed at some time, he did not recall when. He reasoned that they will have been replaced in consequence of the installation of the security gates. He said one of the gates was a fire door enabling people who had escaped into the yard to access Grey's

Court; it is not disputed that the gates were installed with fire escape mechanisms.

88. He was cross-examined on the basis that it was pure speculation that the new gates were being used for security in place of the original gates as the point from which the latter had been hung was not included in the demise. That is not a valid criticism of Mr Horgan's evidence for it is obvious from the draft licence and correspondence that the tenants were only prepared to enter the lease on condition they had a licence which enabled them to position their new security gates and relocate or remove the existing gates. Mr Horgan's evidence was that whether the original gates controlled eastern access to the yard or only the new gates, he was nevertheless concerned to see that they were locked. Mr Horgan was a seemingly credible witness whose evidence was supported to some degree by the contemporaneous documents.

89. Consistent, in large part, with the evidence of Mr Horgan is that of David Fleming. He is an architectural technologist who had substantial familiarity with White Hart Yard in a professional capacity between the mid 1960s and 2000. He prepared the plan, originally dated 1965, which was appended to the 18 August 1967 lease and further design drawings in 1970. In April and June 1989 he prepared further plans for Sir John Fitzgerald Ltd. In June and November 1990 he surveyed and reported upon the state of repair of the property for Bridgewater Estates Ltd, the new owners. In April 1995 he produced designs for 16 Cloth Market in connection with an application for planning permission and listed building consent which carried on into 1996; the client is shown as Mr and Mrs Giacomini. He undertook a feasibility study of White Hart Yard in 2000 for Bridgewater Estates.

90.His recollection was that when he produced his plan of 30 December 1965, the one ultimately appended to the lease, there were old timber gates at the Grey's Court entrance which were probably the same age as the metal grille which hung above. New security doors were installed with a fire escape mechanism as part of the development for which he had prepared his plan, and which he identified on a plan he prepared in 1970. They were still there on a photograph taken in 1975. His 1970 plan did not show the old gates which led him to infer that they had probably been removed by that date. The new gates could be opened from the inside to facilitate escape from White Hart Yard into Grey's Court. When he drew a further plan in 1989, the new security doors were no longer present. He could not say when they were removed. The Cloth Market end of the yard was secured by wooden gates throughout his involvement with the yard between the mid-1960s and 2000.

91.His impression, when visiting the yard, was that it was a private space the entry to which was controlled by the gates from Grey's Court, whilst in place, and by the gates to the Cloth Market. He saw the public use the yard on the Thursdays when Russells, the auctioneers, held sales but did not see anyone using the yard whilst undertaking his surveys.

92.Edward Berg operated a nightclub and casino from Grey's Court, together with his partner John Selig, between 1966 and 1978 and again from 1980 to 1982; they traded through a number of corporate names. The business was sold to Ladbrokes in 1978 who carried out refurbishment and reopened in 1979. In 1980 Ladbrokes lost the gambling licence and the business was repurchased by Mr Berg and his partner.

93.Mr Berg had a recollection of wrought iron gates at the junction of the yard with Grey's Court which he described as appearing on a couple of

photographs in the bundle. He described the security gates installed in the 1960s. He said these were generally kept closed day and night. The gates were to provide an emergency exit from White Hart Yard to Grey's Court and he pointed to the note to Mr Fleming's 1965 plan which recorded "*Panic Bolts on left-hand gate to be held closed during hours of business.*" He suggested that this was a requirement from the relevant authorities as the 1966 letter between his solicitor and that of a lessor made reference to the re-siting of the gates "*to comply with the requirements of the licensing authority and Newcastle upon Tyne Corporation.*" He said the gates were generally only open for deliveries into White Hart Yard. The gates at the Cloth Market end were open during the day for customers to visit the businesses in the yard. He didn't believe they were open all hours and expected they were closed at nights as a matter of security, but he did not know that to be the case. He did, however, say that the yard was not used as a thoroughfare by the public from Cloth Market to Grey's Court, or vice versa, whilst he was working there.

94. David Steedman (1963-2007) gave evidence for the Claimants. He said he is very familiar with the area having joined the family antiquarian book business at 5-7 & 9 Grey Street in 1963. His evidence was that in the 1960s he would use White Hart Yard as a cut through during the day but less often as time progressed. He recalled there being gates at the Cloth Market entrance preventing access outside normal business hours. They were wooden gates similar to those shown on a photograph taken in 2000. He thought the book seller at the Cloth Market entrance to the yard locked it at the end of the working day. He did not recall seeing many others using the yard as a short cut. He was not challenged on his evidence concerning the yard.

95.The Defendants' evidence as to public use of the yard in the 1960s was extremely limited. There was a hearsay statement from Walter Clark a member of the Newcastle Amateur Cinematic Association which was based in Ship's Entry. He said that in the 1960s the club filmed 'A Christmas Carol' shooting scenes in White Hart Yard. Filming was probably during the day. There was no gate or anything to prevent anyone entering the yard. Sham Vedhara provided a statement which was admitted as hearsay stating that between 1966 or 67 and the mid-1970s he visited Grey's Club during the day. On occasion he would cut through White Hart Yard from the Bigg Market in order to reach the club. He did not recall any gates at either end of the yard. If there were gates, they were never closed.

96.I have looked in some detail at the evidence concerning public usage of the yard in the 1960s as this provides a useful starting point but I'm alive to the fact that Messrs Horgan, Fleming and Berg also deal with a considerable period of time after that decade and I therefore need to weigh their evidence against that of witnesses who speak to the period between 1970 and the 90s. The remainder of the lay witness evidence for these periods and reference to some of the relevant documentation is set out in Appendix B.

The expert evidence in the period of modern user

97.The highway experts' reports for this period are of no great assistance other than that they identify plans which evidence the existence of gates. In essence, there are plans from 1970 and 1978 which show there were gates at the Grey's Court end but by 1988, no gates are shown. Dr Bunn, for the Malhotra companies, accepts that after 1960 there are conflicting witness statements as to user of the way which is a matter for the court to resolve. Mr

Carr, in the expert's joint statement, also accepted that the case based on actual user was a matter of evidence for the court, not the experts.

98. The surveyor's evidence in this period was largely limited to confirming the existence of features shown on the photographs, apart from Mr Penrice's faux pas in dating of the steel gates, referred to above, and his attempt to date the No Entry signs in the yard to later than 2000, which on the evidence puts it into a very narrow time frame of 2000 to 2002. I am doubtful, in the absence of a cogent explanation, as to how it is possible for Mr Penrice to date a No Entry sign to within 2 years of mounting.

The contentions concerning the factual findings relating to White Hart Yard

The Defendants' case

99. Mr Pryor asks that I should find that between 1867 and 1934 public access to White Hart Yard was not obstructed and that this state of affairs continued until the right of public access to the yard was called into question in 1967, at the latest. He argues that I should infer that during this period the public made the requisite use of the yard sufficient to give rise to a public right of way at common law or under the Highways Act 1980. He says that there is no impediment to making such a finding based upon inference alone and points the case of **Souch v East London Railway Company (1873) LR Eq Cas 108** as authority for the proposition that such a finding can be based on inference and in the absence of direct evidence of the requisite user.

100. The Defendants accept that there was a gate at the Grey's Court end of the yard in 1864. They say that the gate must have been removed in the development in 1867 because it is not shown on the architect's plan whereas

other details, such as doorways and windows, appear. The 1934 conveyance of property from 11- 13 Grey Street is significant, says Mr Pryor, because the conveyance plan shows a gate at the end of the Dog's Leg but not at the Grey's Court junction with White Hart Yard. The conveyance describes Grey's Court as being a public way leading to the Cloth Market and the plan to the conveyance depicts the entrance to the yard and is marked with the words "*to Cloth Market*". Significance is placed upon the fact that the parties to the conveyance were local people, three solicitors and a vicar, who it is said will have had personal knowledge of the situation on the ground. It is accepted that there was a bringing into question of the right by the 1960s as there is a 1965 plan, revised in 1967, which shows gates at the Grey's Court End. In addition, there was direct evidence as to the existence of gates at the Cloth Market entrance.

101. I am asked to infer use by the public as of right on the basis that the yard is situated in a busy part of Newcastle between main thoroughfares. As a matter of common sense, and supported by expert evidence if needs be, members of the public would use the yard as a shortcut to avoid taking the longer routes via Mosley Street or High Bridge. Furthermore, there is evidence that even prior to 1864, and certainly thereafter, the yard was used as a cut through, as appears from newspaper reports concerning criminal activities in the area. Mr Pryor also points to the fact that the trade directories and other records, such as the electoral roll and the census, show that there were numerous businesses operating in the yard in the nineteenth and first third of the twentieth centuries and that a number of people resided in the yard or were registered to vote by virtue of their ownership of a property or businesses at that location. They must all have required access to the yard and it would have been impractical for them all to have required keys.

102. Mr Pryor says I should not place weight on the fact that the highway authority have not recorded the yard to be a public highway as this is merely indicative of the authority's opinion and the absence of diligence in compiling highway records. The fact that it was shown on a list of streets, roads, footways and thoroughfares not repairable by the corporation of Newcastle upon Tyne in the 1882 application to the Board of Trade to carry out electrical installation work is equivocal.

103. The Defendants' case on modern user is, in essence, that I should accept their witnesses' accounts of open use of the yard from the 1960s onwards and the absence of gates in preference to the evidence given by the Claimant's witnesses. Mr Pryor's closing submissions on the witnesses largely repeated the key evidence from the Defendants' witnesses, any helpful evidence from the Claimant's witnesses and reasons why, where the evidence was unhelpful to the Defendants, it was unreliable.

The Claimant's case

104. Many of the Claimant's submissions were directed at demonstrating that even on the factual case as advanced by the Defendants they could not succeed on the law. I shall deal with those submissions, as necessary, when dealing with the legal arguments. In relation to the Defendants' case on historic user, Mr Laurence says that there is no case in which a public right of way has been established on the basis of inference alone. There must be some evidence of actual user, both of the fact of user and that it is of right. That is a protection which is required by the landowner who is faced with the harsh consequences of the rule of English law 'once a highway always highway'. Unless the court is particularly vigilant to ensure the claim is supported by proper evidence, he says evidence of actual user, the landowner is deprived of the opportunity to cross-examine, explain the weakness of the evidence upon

which reliance is placed or to assemble evidence to negative the inference which the court is asked draw.

105. The case of **Souch** is of no relevance because there was evidence of user in that case, the headnote states that evidence tending to show dedication was given, and the case is factually different because, unlike this case, there is no linkage between the ownership of the highway and the adjoining houses. This last point is factually incorrect because in both cases the freehold of the premises and highway was vested in the same person, albeit that the use of the premises was, in part, different.

106. It is not accepted that the 1867 plan can be relied upon to show that the gate which was known to be in place in 1864 at the Grey's Court end was removed in the 1867 building works. Even if it was removed, there is nothing to say that the need for such a gate did not reassert itself so that it may have been replaced as early as 1868. There is documentary evidence of gates which were present in 1965 and who is to say that they were not in place by 1868, if indeed they were not the original gates. Furthermore, whatever the position at Grey's Court, there is a 1975 photograph showing wooden gates at the Cloth Market and no evidence to show that they were not in place in 1867 or were replacements for existing gates.

107. The 1934 conveyance does not establish the presence of a public right of way over the yard. The reference in the conveyance to "*the public passageway or entry known as Grey's Court leading from Grey Street aforesaid to the Cloth Market*" is used to describe the land conveyed because it lies above that undercroft. Furthermore, the words "*public passageway or entry*" is a description of the physical features available to gain access to Grey's Court. Other words would have been used if those drafting to document wished to identify it as a public highway. The conveyance does not

say anything about the status of White Hart Yard. The entrance to the yard is marked "*to the Cloth Market*". There is no significance in the absence of gates shown at the entrance as the conveyance was not concerned with the use of that entrance. This is in contrast to the gates shown at the passageway leading to Ship's Entry from which rights of way were reserved in the conveyance.

108. The Claimant argues that the lack of action by the highway authority in relation to yard is significant in two respects. First, the footway of the yard would have been maintainable at public expense and should therefore have been listed as such when section 84 the Public Health Act 1925 came into force. The carriageway in the yard would have become maintainable at public expense under section 47 of the National Parks and Access to Countryside Act 1949, thus by the time of the 1949 Act the whole of the yard would have had to be shown on the section 84 list. Had they so featured, they would have appeared on the list required by section 38 (6) of the Highways Act 1959 and its equivalent in the Highways Act 1980. The fact that it has not appeared in any list, despite the matter having to be considered after both the 1949 and 1959 Acts is an indication that the yard had not gained a reputation as a public highway. Secondly, had it achieved such a status by the date of the 1934 conveyance and thereafter been gated off, one could have expected the highway authority to have taken steps to reopen the highway and, indeed, some local outcry about the blocking of a public street. There has been no evidence of either.

109. The fact that there were businesses operating from the yard as well as at least one public house, and that there were some residents, may give rise to the inference that the gates were opened during trading hours but does not establish the gates were left open throughout. Accordingly, if user during the

historic period is a matter which is capable of inference, such inference cannot safely be drawn in the presence of gating which may or may not have been locked at night. In any event, Mr Laurence invites me to find that the gate at the Cloth Market was frequently locked, especially at night and at weekends.

110. The Claimant places reliance upon their witnesses in relation to the modern user case. They evidence the presence of gates at the yard which were locked for much of the time. These are largely people who are likely to have an accurate recollection as to whether gates were locked because a number of them had reasons to see that they were. There is the police report of 6 February 2001 which establishes that the gates were locked on that night. The lease plan of 30 December 1965 shows the existing gates and security gates to be installed. There is evidence that the security gates had been removed by 1989 but how soon before that date is unknown. I am invited to find that the new security gates were locked at some part of nontrading hours and at weekends. Even if I did not accept the evidence of the Claimant's witnesses, the Defendants' evidence as to use between 1981 and 2001, when the Ladhars installed gates which were locked outside trading hours, is insufficient to prove use for the full period of 20 years. Mr Laurence takes the year 1988 and makes the point that there is no evidence of actual user both day and night for that year. The only witness as to daytime use in 1988 was Mr Malhotra. Quite apart from his observations as to the credibility of this witness, the height of his evidence was that from 1983 to 1988 he would on occasion traverse White Hart Yard during the day; that is not a recollection of actual use in 1988.

111. Mr Laurence also points to the fact that there was no public complaint notwithstanding that the gate at the Cloth Market was locked on the 6th

February 2001 and has been consistently locked outside of trading hours since 7 August 2001. The absence of a public outcry at the barring of the way is an indication that the public had not been using the yard in the manner suggested by the Defendants.

The case for the local authority

112. Whilst taking a neutral stance, the council points to its statutory and nonstatutory records showing that it has never recorded any public rights of way over White Hart Yard. Although absence of a route from the statutory records is not conclusive proof that no publicly maintainable highway exists, it is nevertheless of evidential value. There has been no application or request to the council to amend its records. When it joined the proceedings it was not aware of any material evidence suggesting there were public rights of way over this route.

Evidence in relation to user of Ship's Entry

The evidence as to historic user

113. It is to be recalled that Ship's Entry does not appear in any of the council's records, statutory or otherwise, as a highway maintainable at public expense. It was also shown on the list of streets etc. not maintainable at public expense in the 1882 application concerning electrification. The Finance Act 1910 Field Book does not record any public right of way over

Ship's Entry but does record, and make a deduction from the property's value, in respect of easements.

114. Plans were drawn in January 1883 for alterations to the Oxford Music Hall to the back of 8-6 Cloth Market, now Balmbra's. One of the plans shows various passages. Ship's Entry is marked "*open passage*" as is the external passage to the other side of the building. An internal passage is marked simply "*passage*". On the block plan for the alterations the external passages are marked "*passage*".
115. I have been shown trade directories for the period 1854 to 1969. These show a number of business were carried on from 10 Cloth Market and Ship's Entry. The electoral roll shows that there were people registered to vote at 10 Cloth Market from 1893 to 1975 and one in Ship's Entry in 1938, but that entry and most of the 10 Cloth Market entries were not in respect of residential occupiers but those qualifying to vote on other grounds, for example, of business occupation or husband's occupation. The census material for the period 1831 to 1939 shows an entry for Ship's Entry in 1831 but apart from that all the entries are for 10 Cloth Market. A close analysis of this data is unnecessary as both highway experts agree that as the passage and adjoining properties were in common ownership, there would be no need for access to the properties over a public highway for their occupiers and visitors.
116. Plans were drawn for the rebuilding of 10 Cloth Market in July 1897. The original plan of the front elevation shows a gate across both the passageway and the front door to the premises. In October 1897 the detail of the front elevation, including the gate, was altered and a new plan prepared showing no gate across the passageway or the front door. It is apparent from a comparison of the original ground floor plan and that deposited with the building inspector in 1898 that whereas the word 'gate' appears across the passage entrance, it does not appear on the plan

received by the building inspector's office in 1898. Further plans were drawn in 1909 for alterations to 10 Cloth Market showing no gate at the Cloth Market entry. Mr Carr, the Claimant's highway expert, says the plan provides no evidence as to the existence or otherwise of gates. Dr Bunn, for the Defendants, says that he would expect a gate to be shown on the plan if there was one. In the expert's joint statement Dr Bunn stated that the 1897, 1898 and 1909 plans evidence the absence of a gate at the Grey's Court end of Ship's Entry. He accepted, in cross-examination, that he was incorrect in that assertion and that what he had said about this in the expert joint statement should be deleted.

117. The plan to the conveyance of 22 December 1934 relating to 15-17 Grey Street shows a gate at the Grey's Court entrance to the Dog's Leg. The conveyance reserves private rights, including rights of way from Ship's Entry over Grey's Court in favour the grantor. There are further plans of the Cloth Market end of Ship's Entry dated 1937, 1948 and 1952 which Mr Bunn relies upon as evidencing the absence of a gate whereas Mr Carr is of the view that they are not evidence whether there was a gate there or not. Dr Bunn accepted that the omission of a gate on the 1952 plan was not conclusive evidence that there was no gate.

118. There are a few further pieces of documentary evidence, which are on the cusp of the period of human recollection. There is a 1957 film entitled 'The Secret of Ships Entry' made by the Newcastle Amateur Cinematic Association whose club premises were situated in Ship's Entry. The film shows the presence of a wrought iron gate at the Cloth Market entrance and that it was open at the time of the making of the film. A photograph taken in 1964 shows the gate open and a woman exiting into the Cloth Market. There is a letter dated 12th July 1962 from solicitors for the owner of Balmбра's to

the owners of Ship's Entry stating that in order to comply with fire safety requirements they would pay the owners a licence fee if they agreed that the '*proposed gates*' at each end of the passageway would accord with regulations imposed by the police and fire authorities and that such licence could be withdrawn by the owners if the passageway was ever found to have been used other than for emergency purposes. A still from a film produced by the Cinematic Association from 1975 shows the gate open and a sign with the Association's name displayed on the inside of the gate. There are photographs from 1975 and 1977 which show that the gate was at different times open and closed.

119. The highway experts disagree as to whether the historical documents show that the public used Ship's Entry as a thoroughfare. Mr Bunn says that they do up to the point that the gate shown on the 1934 conveyance plan was installed, based upon his interpretation of the 1883 plans. After that it may have been used as a thoroughfare if the gate could be opened. He does not say when that gate was installed and accepted, in cross-examination, that he was wrong in the conclusion that earlier plans showed that it was not. He believes that the reference to '*open passage*' on the 1883 plan must mean that it was open to the public at both ends and that the removal of the gate on the revised plan indicates that the Cloth Market entry was ungated. He infers use on the basis that if the passage provided a short cut it would be used by the public. He also made the point that the Cinematic Association sign would only be visible from the Cloth Market if the gate was kept open as it was affixed to the inside.
120. Mr Carr is of the view that as the routes were not created as public highways evidence of the physical existence of the route is not evidence it was a public highway. The documentary evidence does not provide

evidence of actual use. He says that the wording '*open passage*' on the 1883 plan may just mean it is open to the elements, or even if open for passage, it does not indicate that at some times the way was not blocked by gates, for example at night. He accepted that the revised 1897 plan was good evidence that there was not going to be a gate but with the caveat that the proposal to put the gate on the original plan is an indication of the landowner's mindset as to what rights there were over the passage. It may have been that they dispensed with the gate at the time following discussion with the tenants. It is just speculation as to why the plan was changed. He did not agree with the proposition that if the passage was not gated the public would automatically use it.

121. Both experts agree that the 1962 licence indicates that the landowner believed that Ships Entry was not a public highway. They make identical points in relation to the lack of entries showing any public rights over Ship's Entry in highway authorities' documentation, the Field Book entries and the public notice concerning the installation of electrical services as they do in respect of White Hart Yard, save that in relation to the Field Book entry. That too does not record a public right of way, but Mr Carr points to the deduction of £840 for easements which he believes is for properties located in the hereditament. It is his view that had the route been a public highway it would have been excluded from valuation so the fact that there is an overt claim for easements is significant.

122. Mr Jude and Mr Penrice agree about the following relevant historic features:

- a. the rear doorway from 11-13 Grey Street leading into Ship's Entry dates back to 1830s when Grey Street was developed, as do the doorways leading into the store and boiler rooms situated there.
- b. There are 3 openings on Ship's Entry from Balmbra's, all of which date from the late 19th century or thereabout.
- c. The door leading from the rear fire staircase at 13 Grey Street into Ship's Entry dates from the late 20th Century.
- d. The steel gate at the entrance to the Dog's Leg has a push bar release mechanism which is a 20th Century addition, Mr Jude believes it dates to the 1960s, Mr Penrice suggests the 1990s.
- e. A steel gate in the custody of the police, and which the Claimant says was the intermediate gate on Ship's Entry, has the correct dimensions to fit this aperture. Mr Jude believed the gate dated from the early 1990s given the state of the steel. Mr Penrice thought the gate was installed in 1974 as he drew the inference that the installation was connected to the sale of 11-13 Grey Street by the owners of 10 Cloth Market and the removal of the external fire escape staircase and its replacement with an internal fire escape; the presence of the gate is noted on Mr Penrice's plan showing the gates as at 1974. The undisputed evidence, however, is that the relevant sale took place in 1991 and the work to design the new fire escape in 1990/91.
- f. An historic hinge in the floor at the Cloth Market entrance is related to the wrought iron gate which can be seen on various photographs of the Cloth Market entrance. The gate has the ability to be locked. At the time of examination the gate had a panic bar. Mr Jude was of the view that the gate was part of the original construction in the 19th Century. Mr Penrice said in the joint report that the gate was present in 1974 and it is possible it was

present in the early 1960s. In cross-examination, however, he accepted that the gate dated back to the 19th century or early 20th century and that in style it matches the balcony of 10 Cloth Market.

- g. There is a timber doorway and frame with existing hinges and evidence of a right hand keep to accept a locking mechanism within the undercroft to

Ship's Entry. Mr Jude thought it dated from the early to mid 19th century and was visible on the 1957 film, *The Secret of Ship's Entry*. Mr Penrice thought the door dated from the 1960s and did not believe it was visible on the clip.

- h. There is a doorbell at the Grey's Court entrance to the Dog's Leg but it is a relatively modern installation. It is not possible to trace where it rang. There is no evidence of doorbells at the Cloth Market end.

123. As in the case of White Hart yard, Mr Penrice sought to draw inferences as to whether there was public use of the passage based upon an interpretation of drawings, evidence as to the use of the buildings on Ship's Entry and the terms of the 1934 conveyance. His stance was that if a drawing did not show a gate there was no gate present. He pointed to plans from 1897, 1909, 1934, 1948 and 1952 in relation to the Cloth Market entrance, the 1883 plans as to both entrances and an 1889 plan relating to works at 11 Grey Street in relation to the Dog's Leg alone. In the event, I do not need to analyse all the plans up to 1934 as Mr Pryor's case on user up to 1934 depends on the sole question as to how the reference to '*open passage*' in the 1883 plan is to be interpreted. Though Mr Penrice had, in his report, relied upon this entry as meaning that Ship's Entry offered open access at both ends and, indeed, was ungated, he accepted in cross-examination that the interpretation of this document should properly be left to the court.

124. Mr Pryor did not place weight on Mr. Penrice's interpretation of the exception and reservation provisions in the 1934 conveyance. In his report he stated that the wording of the provision coupled with the fact that the existing fire door into the alley from 11-13 Grey Street is an original opening, indicates that there was no gate at the Cloth Market end. I cannot see the logic of that conclusion. When asked about this in cross-examination he said that whilst he accepted that the construction of the conveyance was a matter of law, he understood that the purpose of the provision was to allow

the people referred to in the conveyance to pass between Ship's Entry and the Cloth Market.

125. Even if that is what the wording provided, it sheds no light on whether there was a gate at the Cloth Market end. The provision in its terms deals with something else, the reservation of a way in favour of the grantor from the premises known as Ship's Entry across Grey's Court. Clearly, there was concern that as the conveyance included the land beneath the undercroft, if Grey's Court was not a public highway, the grantor required a private right of passage if it was not to lose its access from Ship's Entry to Grey Street; the grantor was the Moulton Charity which was the common owner of 10 Cloth Market and 11-13 Grey Street.

126. As regards the post 1934 plans, Mr Pryor has not relied upon Mr Penrice's opinion as to the 1948 and 1952 plans, rightly so given that neither the passage nor the ground floor were the focus of those plans and do not show much level of detail, not even the existence of the undercroft.

Evidence as to modern user of Ship's Entry

127. I have summarised the key lay witnesses evidence and documents for

Ship's Entry in Appendix C. The land of which Ship's Entry forms part was part of a block including 10 Cloth Market and 11-13 Grey Street which had been in the ownership of the trustees of the Thomas Moulton Charity from 1772. On 27th August 1974 the trustees sold their land to Sir John Fitzgerald Limited, which in turn sold the land to Bridgewater Limited on 6th July 1990. Patrick Murphy purchased 11-13 Grey Street from Bridgewater on 11th November 1991, which ended over 200 years of the common ownership of Ship's Entry and 11-13 Grey Street. Mr Murphy sold to Mrs Robinson on 23rd March 2001, which was followed by sales or transfers to Robinson and Murphy on 28th April 2004, Robinson, Murphy and Facer on 22nd September 2004 and final a sale to DAV and UGC, both Malhorta companies, on 11th February 2010. The land comprising 10 Cloth Market and Ship's Entry was sold by Bridgewater, together with White Hart Yard, to the Davisons , on 22nd July 1997, who sold both lots to Easteye on 7th August 2001.

The Defendants' contentions as to public use

128. Mr Pryor relied on use during two periods, the first being from 1883 to the first interruption, which he puts at 1934 or such later time as the

Grey's Court gate was locked. The second period is from 1975 to 2002, when there is photographic evidence of the presence of the intermediate gate.

129. His case on the earlier period hinges on his assertion that the words on the 1883 plan "*open passage*" must mean that it was open to the public to use until the installation of the 1934 gate which is seen on the plan or such later time as it was locked. He also argues that the omission of a gate on the revised 1883 and 1909 plans indicates that the Cloth Market entrance was ungated up to that time and that the first evidence of the presence of a gate is 1957. Further, the gate was

kept open, or at the least, never locked. In that state, it is to be inferred that the public made the requisite use of the way as it was a cut through situated in a busy inner city area.

130. As to the later period, Mr Pryor says that the evidence shows that any attempt to control access to Ship's Entry was abandoned by the early to mid 1960s and during the period 1975 to 2001, or even as late as 2007. His claim is based on the oral evidence as supplemented by such documents as exist from that time. He dealt with the user evidence in relation to both ways together and in the same manner as I have described in relation to the Defendants' case on White Hart Yard.

The
Defendants' contentions as to private use

131. By the end of the trial the only issue in dispute concerning private rights was the First and Second Defendants' claim for a right of fire escape from the fire doors at the rear of 13 Grey Street which lead onto Ship's Entry and the rear door to 11 Grey Street which opens onto the Dog's Leg and a general right of way to pass along Ship's Entry between Grey's Court and Ship's Entry.

132. Mr Pryor argues that the key issue is as to whether there was an intermediate gate in Ship's Entry. If there was no gate, the Defendants' witnesses demonstrate that the public could use the whole of the alley to pass between Grey's Court and the Cloth Market. It is common sense, he says, that in the event of a fire in the part of 11-13 fronting Grey Street, anyone escaping into Ship's Entry or the Dog's Leg would want to go towards Cloth Market rather than the burning building. He pointed to the bulkhead lighting along the South Face of the buildings facing Ship's Entry. Both Mr Fleming and Mr Hopper said that such lights were intended to light the length of the alley and Mr Pryor likened them to the emergency lights in the passenger compartment of an aeroplane. This is all evidence pointing to the whole of the alley being available as an emergency exit from 11-13 Grey Street.

133. As to the general right of way he relies upon evidence that those who worked at Santino's in the 1980s and Mr Giacomini say they visited L'Aragosta at no 11 Grey Street. There was no evidence that the staff of L'Aragosta used the alley to visit Santino's. Mr Pryor says that too is sufficient to imply into the 1991 transfer a private right of way over the alley in favour of his clients.

The

Claimant's contentions as to public use

134. The Claimant argues that the construction the Defendants place on the words in the 1883 plan are impossible, but even if correct would not avail them as they cannot show that the 1934 gate was not in place at any date in between 1883 and 1934. Accordingly, the question as to whether the 1897/8 plans demonstrate the absence of a gate at the Cloth Market is an academic one. Nevertheless, even if the those plans are evidence that no gate was erected at the Cloth Market at that time, it could have been installed at any time thereafter, say in mid 1898 and probably replicated the situation which had existed before the 1897/8 development, for the owners of the Ship's Entry would have been as interested in preventing people from entering from the Bigg Market as were the owners of White Hart Yard. In addition, the Claimant challenges the assertions that the public will always use a cut through in a city centre and that the claim to the public right of way can be proved by inference. Mr Laurence makes the point that it is inherently unlikely that the public would be attracted to use Ship's Entry as it was comparatively unattractive to alternative routes.

135. The description of the condition of Ship's Entry in modern times renders it inherently improbable that the public would choose to use it as a cut through. The four witnesses from Santino's had access from the restaurant and were not ordinary members of the public passing and repassing along a route linking two highways. There is a gap in the Defendants' evidence as to use in 1988 and apart from those working at Santino's there has been no evidence of daytime use in the period 1983 to 1988. In any event, the way has been gated at both ends and there is good

The evidence that the gates were locked. It is likely that the Cloth Market entrance was permanently boarded up in 2003 when Mr Collett, a tenant, left.

Claimant's contentions on the facts concerning private use.

136. The Claimant points to the evidence in the 1988 Grey Street Initiative and the reasons given by the council in 1991 for being minded to grant listed building consent as establishing that the rear of no 13, that part bordering Ship's Entry, had been vacant and derelict for many years. There can have been no actual use or reputed benefit appurtenant to Ship's Entry as a fire escape other than towards Grey's Court. There is an absence of any use of the alley as a way between Grey's Court and Cloth Market by the owners of either 11 or 13 Grey Street capable of maturing into an easement of way in favour of Mr Murphy on transfer.

137. There is significance in the fact that the plans for the fire escape at 13 Grey Street date from a time when the sale to Mr Murphy was in anticipation. The plans show the escape door opening clockwise inhibiting exit towards the Cloth Market. The common intention of the parties to the sale must have been that the right of fire escape was in the direction of Grey's Court. The intermediate gate was constructed at about this time to reflect that intention.

The case for the local authority

138. As in the case of White Hart Yard, the City Council takes a neutral stance and observes that Ship's Entry has never featured in its statutory and non-statutory records and no-one has previously requested that it should. Although absence of a route from the statutory records is not conclusive

The
proof that no publicly maintainable highway exists, it is nevertheless of
evidential value.

Discussion and conclusion on the fact of public user

139. In approaching the task of fact finding I do not accept that the court is precluded from drawing an inference of public user and the nature of such use from other facts proved. Mr Laurence suggested otherwise. He said that no case on public rights of way had ever been established without direct evidence of user.

140. Mr Pryor referred me to **Souch** and an extract from Phipson on Evidence 19th Edition at Chapter 1-13 in which the author says:

“Direct evidence means that the existence of a given thing or fact is proved either by its actual production, or by the testimony or admissible declaration of someone who has himself perceived it. Indirect or presumptive evidence means that other facts are thus proved, from which the existence of the given fact may be logically inferred. The two forms are equally admissible, and the testimony, whether to the factum probandum or the facta probantia, is equally direct; but the superiority of the former is that whilst it contains fallibility of assertion and perception as sources of error, the latter has, in addition, fallibility of inference.”

I have not been pointed to any special rule for highways cases. As long as there is reliable evidence to prove the other facts from which the inference is drawn there is no reason in logic to eschew indirect evidence. Care has to be taken before drawing an inference in circumstances where due to the nature of the case there are facts which cannot be known and may have a bearing on

the safety of the inference. In this case there is a large gap in the direct evidence over a period of almost 100 years.

141. In **Re Bate [1947] 2 All ER 418** the court was faced with the difficulty of drawing inferences in circumstances where, for good reason, the evidence was incomplete. This was a case in which the court, on limited evidence, was asked to decide which of a husband and wife had died first, they having been found dead in their kitchen the victims of carbon monoxide poisoning. Jenkins J said at 421:

...”I think all would have agreed that Lord Simon did not put it too high when he spoke of “evidence leading to a defined and warranted conclusion.”

Applying that as the test, am I, as a reasonable tribunal of fact, on this evidence, warranted in coming to a definite conclusion that the testator survived the wife? To do that, I think, I must be able to do something more than merely conclude that a reasonable explanation of the circumstances was that the testator survived his wife, or indeed, that on the whole the more reasonable conclusion is that he survived her. I think I must be able to come to a conclusion of fact on grounds which so far outweigh any grounds for a contrary conclusion that I can ignore the latter. It seems to me that, on the evidence in this case, I cannot do anything of the kind”

This, of course, was said in a very different context. Nevertheless, it deals with a similar problem to that in the instant case where there are several reasonable explanations for the evidence upon which I am asked to draw inferences and an absence of direct evidence to point to the acceptance or rejection of any of them.

142. Mr Pryor appeared to see in **Souch** a case where user had been inferred merely from the fact that the public would have been able to use the relevant way, Victoria Place, Shadwell, or dedication proven from the fact that the public could access the way, whether or not they did so. The case is not authority for either proposition. As Mr Laurence pointed out, the headnote to **Souch** indicates that evidence tending to show dedication was given. The extent of that evidence is unknown, but it is recorded in the report that it included evidence that the local authority installed lighting and a drain in the road, which they would not have done if it was not a public way; in **Eyre v New Forest Highway Board (1892) JP 517**, Wills J held that evidence that a way was maintained by the parish was strong evidence that it was a public way. Furthermore, the argument did not focus on the quality of evidence necessary to establish public use. Mr Pryor took me to a passage in the speech of the Vice-Chancellor, Sir Richard Malins, which he says is authority for the proposition that proof of use can be inferred from the fact that the public are able to use the route at will. The Vice-Chancellor said, at p.111:

“I was astonished to hear any argument going to the extent that a *cul-de-sac* is not just as much a public highway or public street as any other street.

There are plenty of *cul-de-sacs* in *London* , such as *Ely Place*, *Bartlett’s Buildings* , and *Thavies Inn* , in *Holborn* , ***111** *Stratford Place* in *Oxford Street* , and *Stratton Street* in *Piccadilly* , each of which is just as much a public street as any street which is a thoroughfare. A *cul-de-sac* has frequently been decided to be a public highway, These houses have been built more than twenty years, and the passage has been left open to the public, who have been allowed to enter night and day whenever they thought

fit. That amounts to a dedication to the public, and it makes a way or street so opened a public one.”

143. The first observation is that what is said here is directed at negating the assertion that a cul-de sac cannot be a public highway. It is not clear if there was any issue in the case as to whether the public were using this particular street. The law then, which is unchanged, was that user by the public could evidence an intention to dedicate; see **Poole v Huskinson (1843) 11 M&W 827**. It has never been the law that the fact that a way is open to the public if they chose to use it, but as to which there is no evidence of use, is, without more, evidence of an intention to dedicate. The rationale for the use having to be open and as of right is that it brings home to the owner of the way that a public right is being claimed; **R (Lewis) v Redcar and Cleveland Borough Council (No 2) [2010] 2 A.C. 70** per Lord Walker JSC at [36]. The reference in **Souch**, therefore, to the public being allowed to enter must refer to actual use, not the mere opportunity for the public to enter if they had so wished, and cannot be relied upon as an indication that such use was inferred in that case.

Historic user

White Hart Yard

144. The Claimant accepts that the yard must have been used by the public during the hours of trading of the businesses situate there, it is accepted that this is a legitimate inference. I can properly draw the inference that if the yard was open at this time, some of the users will have used it as a way through between Grey’s Court to the Bigg Market, i.e. for purposes other than visiting the commercial premises. I shall deal with the question as to

whether any of such visitors used the yard as of right when considering the parties' legal submissions.

145. Mr Pryor asks me to infer that the use was much wider than only during business hours. He argues that, putting to one side those who used the yard for purposes of visiting the commercial premises, I should conclude that the public used the yard without any restriction between 1867 and 1934, at the minimum. Before I could draw such an inference I would need to be satisfied that there were no gates controlling access to the yard whether at night or during the day. I shall deal separately as to whether proof of use in this period without identifying the date upon which it was brought into question suffices for a claim for dedication under the 1980 Act.

146. The burden is on the Defendants to prove the premise upon which it asks the inference to be drawn, i.e. this was an open yard uncontrolled by gates. This is to be distinguished from the question whether the presence of gates signifies permissive use by the landowner, the evidential burden of demonstrating permission being on the landowner once evidence of long user capable of being as of right and without interruption has been established. The Defendants accept that there were gates present at Grey's Court in 1864 in view of the press report of the burglary in that year. The issue here is whether they are correct in the argument that the absence of gates on the 1867 plan indicates that they had been removed by that time, indeed they suggest that the removal must have been part of the 1867 redevelopment.

147. On its own, I am not persuaded by the plan of 1867 that the gates were removed at, or by, that time. The force of the point concerning the absence of gates on the drawing is mitigated by that fact that they were not situated on a part of the building upon which work was proposed. It is correct that there is

detail on the plan of windows and lintels but it is clear, when compared with the 1841 plan, that these appear on areas upon which work was to be performed. Furthermore, the top grille for the gates is not shown on the plan either, yet Mr Penrice's interpretation of the plan was that the gates were removed but the grille and hinges left in place. In his report he had suggested that the grille may have been replaced, albeit he changed his position under cross-examination. Even if, however, the current grille were not the original, both experts agree that it is 19th Century in origin, so even if the gates and original grille were removed in 1867, it is likely that the grille was replaced in the Victorian era. As there would be no reason to install a grille unless it was to work with gates below, the presence of the current grille, whether it is the original or a replacement, is evidence which runs counter to a case based on there being no control on public access from 1867 and continuing to 1934.

148. There is other evidence which points to the retention of gates. The redevelopment of the yard in 1867 added considerable warehousing, whereas prior thereto the buildings had been substantially associated with the presence of the coaching inn. Mr Laurence posed the question: even if the gates had been removed who is to say the that need which they met would not quickly reassert itself? The security of stored items is central to the role of a warehouse, which is some indication that the gates would have been retained or replaced. It is also noteworthy that the yard has been in the same ownership since at least the 1890s. There is evidence, which I accept, that there were doors hanging under the grille as late as 1967. Where are the grounds to drive me to the conclusion that whatever caused the owner to maintain gates on the yard up to 1967, such grounds did not exist in the late 19th Century? There are none.

149. Mr Penrice, in his report, placed reliance on a 1901 plan relating to alterations to 15-17 Grey Street in support of his opinion that there was no gate at the Grey's Court end. In view of his concession that the draughtsman probably did not need to record architectural features on White Hart Yard, I give little weight to the absence of gates on that plan. This was yet another occasion upon which he seemed to too ready to draw an unwarranted conclusion.

150. As regards the Cloth Market entrance, there is no evidence that it has ever been without gates. It is common ground that such plans of this entrance as exist, all block plans, are of no significance in this regard. There is some evidence which would point to the existence of locked gates in the 19th Century. The report of a fire in premises within White Hart Yard records that entry was obtained via Ship's Entry and in order to reach the top floor of the building a hose was passed over the roof of Mr Joel's property, i.e. that in White Hart Yard. Although there is no reference to gates to the yard being closed, the report begs the question as to why access to the property was obtained by this indirect method if access through the yard had been available.

151. There is other documentary evidence for this period, relevant to the historic case, which is consistent with the yard being used as a private way. The Field Book entries for 1910 do not record any right of way. Whilst it has been postulated that owners of land may have lied when providing information for the entry, I have explained, at paragraph 68, why I regard that as improbable and, if correct, not necessarily helpful to the Defendants. I prefer Mr Carr's explanation that the most probable reason for the omission was that the author did not consider such rights existed. These are people who are likely to have known the use which was being made of their

property. There is, after all, other contemporary evidence to support that view.

152. The 1882 advertisement in the London Gazette concerning the installation of electricity treated the yard as a private street and the list of publicly maintainable streets kept under s.84 of the Public Highways Act 1925 would have been expected to list the footpath of the yard at the very least; though the 1925 list has not been found, it can properly be inferred that had it appeared in that list this information would have been carried over to the more recent records.

153. The other piece of documentary evidence relied upon by the Defendants is the plan to the 1934 conveyance. Here too the Defendants' experts rely upon the absence of a gate on the plan and, in addition, Dr Bunn relies on the wording "*to the Cloth Market.*" A contrast is drawn between the fact that no gate is shown at the entry to the yard but there is one at entry to the Dog's Leg. The Claimant's experts disagree, making the point that the plan was not concerned with White Hart Yard. Mr Carr said that whilst the entrance to White Hart Yard was incidental to the plan, the gate at the Dog's Leg was material to the conveyance given the reservation of a way from Ship's Entry over Grey's Court.

154. On any view the entrance to White Hart Yard and the route to the Cloth Market were incidental to the conveyance. The route was referred to in order to describe the location of the conveyed rooms. It was Grey's Court which was described as a "*public*" passage. Furthermore, the reservation of a right over Grey's Court in favour of the grantors is an indication that they were not sure if it was a public highway. Mr Pryor emphasises that weight should be given to the plan as the grantors were local solicitors and a cleric who would know the area. The reality is that they were even unclear as to the status of

Grey's Court. In any event, they do not say that Cloth Market is a public passage. The conveyance says Grey's Court leads "*to the Cloth Market*" and this is cross-referred to in the plan by use of the same words.

155. Dr Bunn is of the view that the presence of these words must mean that there was no barrier at the Cloth Market entrance. That is to grossly overstate the significance of those words. There is no dispute that the yard would have been open during business hours given the presence of various commercial premises. Anyone using the yard during these times could pass between

Grey's Court and the Cloth Market. The wording on the plan is not inconsistent with the owners of the yard controlling entry at other times. Accordingly, I do not infer from the wording that to the knowledge of the grantors White Hart Yard was accessible to the public at all times or was ungated.

156. The absence of gates on the plans could be some evidence that there were no gates if I accept the evidence of Dr Bunn and Mr Penrice on this issue. The plan is drawn on the back of the conveyance . There is no architectural detail on the plan other than the gate to Ship's Entry, indeed the passage way is not even drawn. Mr Carr and Dr Jude indicated that the context in which a plan was produced is important to its interpretation. As Mr Penrice accepted in relation to the plan of 1901, the draughtsman may well have left off architectural features relating to White Hart Yard as the plan was concerned with another building. I do not see why the same does not apply here.

157. The highway records are also of some significance. The highway authority would have had to consider the existence of highways maintainable at the public expense after the commencement of section 47 of the National Parks and Access to the Countryside Act 1949, and again after

the Highways Act 1959 prescribed a new list in place of the section 84 list. The fact that public user as of right did not come to the attention to the authority not only on those occasions, but over the years before and since those enactments, is some indication that such user was not occurring. Furthermore, had the yard taken on the character of a public highway in the period of over 60 years post 1867, it could be expected that there would have been an outcry which would have come to the attention of the highway authority, if it had been stopped after this period, and steps taken to prevent the obstruction.

158. The documents to which I have been referred, the newspaper article and the statutory records and notices have to be weighed by reference to section 32 of the Highways Act 1980. The newspaper report has the benefit of contemporaneity and, thus, is likely to be broadly correct. The Field Book entries are likely to be correct, having been compiled by those with knowledge of the yard in circumstances where entries were to be checked by the assistant valuers and a false entry could lead to imprisonment. I accept that the notice concerning electrification is likely to have been based on information held by the local authority and is dependent upon the accuracy of their records. Those who compiled the highway records were local officers of the highway authority who could be expected to have a knowledge of their locality and I can see no evidence, or reason, why they would have failed to record the yard in the records if it appeared to them to be a public highway or a stopping up of the yard had led to public objection. All of this points to a situation in which those who were responsible for recording the existence of public rights over the land did not see that it was used in a way which could give rise to such rights and the purported existence of such rights was not brought to their attention.

159. Looking at the totality of the evidence up to and including 1934, the inferences I am asked to draw from the two plans to which I have been referred are far outweighed by the other factors I have identified. I have not been satisfied by the Defendants that White Hart Yard was ever uncontrolled by gates or that it was available to be used by the public whenever they chose, i.e. outside business hours. In those circumstances it is not open to me to infer that it was used by the public in this way from 1867 to the modern era, even if I accept the premise that I can draw such an inference solely on the propensity of the public to use a cut through, in this case at all times of the night and day, if one exists. For completeness, I would add that I do not accept that as a proposition when considering the use of the yard over the period of a century. There may be all sorts of reasons why the public would or would not use White Hart Yard, much may depend on what was happening in the yard, the lighting, its condition, who or what else might be in the yard, for example large vehicles parked overnight, drunken patrons disgorging from the White Hart Inn, a night watchman or a savage guard dog. Equally, there may have been gates which have been removed without trace. There are too many unknowns to come to a defined and warranted conclusion. The proposition as put by the Defendants is simply too broad to establish proof of the use claimed.

Ship's Entry

160. Mr Pryor acknowledged in the course of his submissions that his case on historic user was not strong. There is no evidence as to when the Grey's Court gate was installed. He cannot point to a time when it was not there unless he makes good on his interpretation of the 1883 plan and the reference there to "*open passage*", which he says means it must have been open to the public at both ends. In this he was supported by Dr Bunn and Mr Penrice,

although the latter accepted in cross-examination that the interpretation of the plan was for the court. Dr Bunn, it is to be recalled also had to concede that his opinion in the expert joint statement that the 1897, 1898 and 1909 plans also showed that the Grey's Court end was ungated was wrong. Furthermore, his conclusion that there was no obstruction to the use of Ship's Entry prior to 1934 does not stand scrutiny. It is founded on the fact that the first plan to depict a gate at the Grey's Court entrance is the 1934 conveyance plan. There is no evidence, however, that it was not installed until 1934 or for how long prior to 1934 the gate was present.

161. The alternative interpretation, and that put forward by Mr Carr, was that the passage was labelled as open because it was outside. There is force in that suggestion because Ship's Entry and the passage to the south side of Balmбра's are marked in this way. They are both open to the elements. The passage to the south leads to a dead end as it is blocked by the back of a building at its eastern end. There is another passage on the plan marked simply "*passage*". It is adjacent to Ship's Entry and is internal to Balmбра's. On these facts, it is far more likely that the passages were marked as they were to contrast those which were outside and those within the building. This is yet another example of both Dr Bunn and Mr Penrice giving unjustified significance to some of the documents in reaching conclusions as to the absence of gating.

162. In the result, I am not satisfied that there was no gate at the Grey's Court entrance to Ship's Entry at any time. There is still a gate in that location and no reason to conclude that this entrance had not always been gated. Mr Pryor, supported by Dr Bunn, suggested that even during the presence of the gate shown on the 1934 plan, it may not have been locked; this point was raised in connection with the question as to when the public right to use the way had

first been brought into question. It is for the Defendants to prove that it was left open in order to make good their assertion that I can infer from the existence of the way that it must have been used by the public. There is no evidence that it was not locked prior to the modern era.

163. In view of my conclusion as to the presence of the Grey's Court gate, a decision as to the Cloth Market gate is academic. The revision to the 1897 plan is some evidence that the proposed gate at the Cloth Market entry to Ship's Entry was not installed at the time. Another revision to the plan removed the proposed gate across the front door to 10 Cloth Market and to this day it is not constructed to take a gate. The age and design of the gate is some evidence as to the date of installation. I prefer Mr Jude's evidence that it probably dated back to the time of the original construction given its age and the fact that it matched the style of the balcony of 10 Cloth Market as it appeared on the 1897 revision. Mr Penrice, when cross-examined, accepted that the match between the gate and the balcony and said that it dated back to the 19th century or early 20th century, albeit in his report he had said that the gate was present in 1974 and possibly dated back to the 1960s.

164. Mr Pryor argued that the gate may have been unlocked for it may not have been there to keep people out. For example, it may have been in place to keep out stray dogs. In those circumstances, he says, there was a public right of way which was subject to an openable gate. An alternative explanation for the gate not being locked, though not one advanced by Mr Pryor, is that it may have been ornamental, to complement the iron work on the balcony. These considerations are largely speculative and could not justify a finding that the gate was unlocked throughout its history. The only objective evidence is the agreed evidence of the surveyors that the gate had an ability to be locked which begs the question as to why a lockable gate was

installed unless it was to be secured. Neither party has sought to place significance on the wooden doorway within the undercroft.

165. The 1957 film shows the gate to the alley is open but it does not follow that it was always open. The gate could have been opened for the purpose of the film or kept open on nights when the Cinematic Association held their meetings. Clearly, if people were using Ship's Entry they would need access past the gate. The presence of the sign on the inside of the gate is not an indication that the gate was always kept open. The sign may have been affixed for the 50th anniversary film in which it appears; it cannot be seen on the gate in the 1957 film for which it would have had to have been fixed to the outside of the gate to have notified passers-by of what lay within. Even if the sign was permanently fixed to the gate, if the gate was kept open on club nights, it would be logical to place the sign where it could be seen when the gate was in the open position.

166. As in the case of White Hart Yard, and with like significance, the contemporaneous documents, namely the notice in the London Gazette concerning the installation of electricity, the Field Book Entries from 1910 and the highway records treat Ship's Entry as a private way and there has been no request of the highway authority, until this case, to treat it any differently. In the case of the Field Book entry for Ship's Entry there is the deduction that was made for easements. The entry indicates the specific thought was given to the rights over the property at the time the entry was made. The observations I made in relation to the records relating to White Hart Yard concerning the application of section 32 of the Highways Act 1980 hold good for those relating to Ship's Entry.

167. The point that the alley must have been used as a short cut as it passed between two busy streets in a city centre is even weaker in the case of Ship's Entry than in the case of White Hart Yard. First, the alley is blind from either direction, one cannot see to where the alley leads from either end; a number of the witnesses in the modern era were unaware as to where it led. Even Mr Clark, who had used the alley for several years on his way to the film club, had not realised that it came out in Grey's Court until towards the end of his period of visits. Secondly, in the historic user period, as White Hart Yard was open during business hours, there would be no reason to use Ship's Entry, which on any view was far narrower.

168. Looking at the evidence in the round, whilst I must accept that those who worked or lived in Ship's Entry and their visitors will have had access, certainly from the Cloth Market end, I am not satisfied that there was open access to the public to and from Grey's Court to support the inference upon which the Defendants' case on public usage depends.

Modern User

White Hart Yard and Ship's Entry 1960-1980

169. It is necessary to compare the witness evidence in relation to both yards together as many witnesses gave evidence as to both. The accuracy and credibility of such witnesses has to be looked at in the context of the totality of their evidence.

170. I am guided by two general propositions. The first is the obvious consideration that witnesses who are seeking to recollect events which happened between 10 to 60 years ago cannot be expected to have an accurate or detailed recollection as to user of the ways or the timescales covered by such user. The second is that witnesses who had day to day dealings with the

way, or had a reason to be focussing their attention upon it, or a motive for treating the way in a particular manner, are more likely to have an accurate recollection of user than those whose knowledge was incidental to other activities, such as spending an evening in Newcastle visiting licensed premises. Aside from those general points, the best way to test the accuracy of the witness evidence is to compare it to contemporaneous documents and, insofar as it is possible, the objective narrative.

171. The Defendants' witness evidence concerning the use of both yards prior to 1980 was very limited. There was the hearsay evidence of Walter Clark; in fact, it was an unsigned witness summary with no indication as to whom the information in the summary had been imparted, but no objection was taken to its admission as evidence. He referred to the daytime filming of A Christmas Carol in the yard. Sham Vedhara said he cut through the yard during the day between 1966/67 and the mid 1970s. Peter Cussins, who dealt with the period 1972-76 deferred to Mr Horgan's better knowledge of the yard and was principally a day time user. Syed Aziz dealt with the period 1973 to the 1990s but was referring to a different yard. Sunil Khanna said he used the yard from some unspecified date in the 2 to 3 years starting 1979 when going out at night with Mr Malhotra; the latter said he started using the yard in 1981. Levent Hepurker said he used both White Hart Yard and Ship's Entry between 1977 to 1985, I have explained when summarising his evidence why I considered it unreliable in relation to each. George Woodhave said he recalled using Ship's Entry on a couple of occasions in the 1960s and on his birthday in 1971, though there were some inconsistencies in his evidence.

172. The Claimant called Joanne Blue, David Horgan, David Fleming, Edward Berg and David Steedman, all of whose recollections of the one or other, or

both alleys, started in the 1960s. I have no doubt that Mrs Blue is clear and sincere in her recollection of squeezing through a gate into the Cloth Market and vying with her brother for the key which she has, with the assistance of her mother, identified as that which was used to lock that gate. I am, however, unable to accept the reliability of that recollection, first, because this is a very old childhood memory from long ago and secondly because I have other evidence which suggests that the entrance to the yard was covered by the doors which are shown on the 1975 photograph and which is likely to be more accurate.

173. Although David Horgan's professional involvement with White Hart Yard commenced in 1969, when he was 22, his recollection went further back to the early 1960s when, as a teenager, he used to visit the Sir John Fitzgerald properties with his father. He identified the doors shown on the 1975 photograph as those which had always been present during his involvement with the yard. In the identification of those doors, he was supported by David Fleming who had good reason to recollect the yard from the mid-1960s to 2000 as he has worked at the yard at various times in his capacity as an architectural technologist. Mr Steedman, whose recollection went back to 1963, recalled the gates shown on the photograph as present at that time, as did Mr Berg whose business operated at Grey's Court from 1966. Mr Horgan, Mr Fleming and Mr Steedman recalled the gates being locked outside business hours, Mr Berg thought that they were but did not know.

174. There is evidence from Messrs Horgan, Fleming and Berg that there were gates at the Grey's Court end of the yard. The recollection of Mr Horgan and Mr Berg is that these were gates whereas Mr Fleming recalls they were old wooden doors. He is likely to be correct because on the plan he drew in 1965 they are marked as '*doors*'. It was suggested to Mr Horgan and Mr

Berg that they had been mistaken in their recollection because an old photograph showing the east end of the yard appeared to terminate in a barred gate, whereas the barring was probably associated with a window grille opposite the entrance. That is a credible and likely explanation for their error.

175. Mr Horgan's recollection was that the gates were locked at night but once Grey's Club took the premises, which was in 1966, this was left to the club owners. Mr Berg, the then club owner said these gates were generally only open to take in deliveries. All three witnesses recall the security gates which are identified on the 1965 plan.

176. Mr Berg's recollection of locked gates at the Grey's Court end seems unreliable for the period in which he was running the club between 1980 to 1982, after he took it back from Ladbrokes. Tracey Foster, whose father took over the club in 1982, said that there were no gates at that end during her time at the club. As Mr Berg did not say he removed any gates, the likelihood is that in the course of Ladbrokes' work to enlarge the undercroft, the security gates were removed with the intention of replacing them as per the design which indicated that detailing of the gate was to be provided but, for whatever reason, that work was left incomplete. Mr Berg's evidence also conflicts with the evidence of Mr Cussins to the effect that he used White Hart Yard in the day to visit Grey Street in the period 1972-76. There is also a 1967 day time photograph showing the smaller of the two security gates open.

177. The 1965 plan supports the presence of both the original and the additional security gates. The note on the plan concerning the panic bolts to be held closed during hours of business, i.e. of the club, supports the

assertion that the gates were closed. The fact that the scheme evidenced by the plan introduced new gates is an indication that they were to be kept closed. There would be no reason to install new gates if the Grey's Court end of the yard was to be kept open.

178. The letter of 24th January 1966 concerning a licence to the club to use White Hart Yard for emergency escape purposes only through the gate at the eastern end further supports the existence of closed gates and the absence of public rights over the yard. If the gates were left open and the public could use the yard freely there would have been no need to obtain the licence. It is also some indication that the Cloth Market gate was locked at times, for otherwise there would have been no need to obtain a licence to use the gate to the east as the Cloth Market exit would have been available in emergencies.

179. The letter produced by Mr Horgan dated 26 March 1979 stating that the public were to be kept from the yard at night further supports his evidence that he sought to keep the Cloth Market gates locked at night. Thus, he had a well evidenced motive to check that they were as well as the opportunity to do so when travelling from Nelson Street along Cloth Market to visit his other premises. The letter is also an indication that the Cloth Market doors were locked at night at the time, for Ladbroke would not be asking for an emergency exit via those doors if they were always kept open. That is consistent with Ladbroke's request being limited to an emergency grille gate through which customers could see the club from the Bigg Market; they were not seeking a gate which allowed access from the west entrance.

180. Unless I was to consider the evidence of Mr Horgan as unreliable, which I do not, the evidence of the existence of gates at both entrances to the yard which were locked from time to time, is overwhelming and is supported by

Mr Berg and Mr Steedman and Mr Fleming, all independent witnesses without a motive to misrepresent; I do not regard the fact that Mr Fleming worked in his professional capacity on another of the Ladhars' projects elsewhere as supplying such a motive and Mr Pryor made it clear to Mr Fleming that he was not suggesting there was anything untoward arising from that connection. Apart from Mr Steedman, they all had extended dealings with the yard and good reason to recall the arrangements as to gating for which there was documentary support, including plans showing the new security gates in 1970 and a photograph showing the gates, one of which was open, in 1975. Mr Fleming did not have the regular dealings with the yard of the others but he drew the 1965/7 and 1970 plans which will have required him to have directed detailed attention to the gates.

181. The Defendants' evidence for the period 1960 to 1980 is, in contrast, either unreliable, vague as to dates, untested or of limited weight as it does not come from witnesses who had a day-to-day knowledge of the operation of the yard. Mr Khanna is not an independent witness and may not have been referring to the period prior to 1980 as he said he used the yard with Mr Malhotra, whose claimed usage started in 1981 and Mr Hepurker was brought into this case by Mr Guclu whose business relies heavily on the goodwill of Mr Malhotra and only deals with the period from 1977, in any event, and could not discount that his passage between Cloth Market and Grey Street was not via other yards and alleys.

182. The only potentially supportive objective evidence is a 1967 photograph taken during the daytime showing that one of the new security gates was open whilst the other is closed. There is also the evidence of Mr Cussins that he used the yard in the day in the period 1972 to 1976, and the evidence of Mr Steedman that he used the yard as a short cut in the 1960s.

Findings 1960-80 as to the use of White Hart Yard.

183. I accept the evidence of Messrs Horgan, Berg, Fleming and Steedman as to the presence of gates at both ends of the yard between the early 1960s and 1979 and that the Cloth Market gates were open during the day but locked at night. The evidence as to the Grey's Court gate is more finely balanced. In the light of the photograph and the evidence of Mr Steedman and Mr Cussins, which I accept on this point, I find that at least one of the gates at the Grey's Court end was left open during the day; this is also consistent with the fact that there were businesses trading from the yard. At night, however, when Mr Berg was operating his club, it is likely that the gates were closed, as he suggests. That is consistent with Mr Horgan's expressed desire to ensure that the public did not get into the yard at night, the plan for the new security gates and, though it is but a straw in the wind, the fact that on the 1967 photograph the larger of the two gates is closed, thus indicating that some control was being exercised at the Grey's Court end. I am not persuaded by the Defendants' witnesses for this period that they used White Hart Yard as a cut through at night.

Ship's Entry 1960-1980

184. In order to get an overview of what was happening in Ship's Entry, it is necessary to look at the period 1962 to the late 1980s because the behaviour of Bass clearly had an influence on events at the Cloth Market end.

185. My starting point for this period is the 1962 Bass licence to use the alley as an emergency fire escape with gates meeting Police and Fire Authority standards. There would be no need to meet such standards if there were no gates and they did not lock. Mr Jude, who I regard as more reliable than Mr

Penrice for reasons already given, thought the gate from the Dog's Leg dated from the 1960s and was probably installed pursuant to the 1962 licence. That evidence accords with those witnesses who recollect the gate in the 1960s. It has a push bar preventing entry but permitting exit. The Cloth Market gate did not have a push bar on the 1957 photograph, at which time it opened into the alley. Mr Penrice acknowledged that the bar may have been added pursuant to the requirement to enable it to provide a means of escape. It is likely that it was added for this purpose as it is clear from the photographs that at some time after 1957 the gate was altered so that it opened towards the Cloth Market; I accept Mr Jude's opinion that the hinges for the gate must have been moved back so that it could open outwards without encroaching onto the pavement. Thus, on any view, there were gates at both ends of the alley which were intended to be kept closed, locked when in the closed position due to the push bar mechanism, but could be released from the inside by use of the push bar.

186. At the Cloth Market end of Ship's Entry there is a common theme running through the 70s, 80s and 90s concerning Balmbra's misuse of the alley. The Defendants' evidence on the use of Ship's Entry in the 1970s is limited to one occasion, in the case of Mr Woodhave, in 1971 and Mr Hepurker from 1977 onwards; Mr Woodhave has said that there were a couple of occasions when he used it in the 1960s but that was not consistent with his witness summary in which it was said he used it frequently in that period. Whilst he is unlikely to be wrong about his 1971 visit as it was a memorable occasion, though one about which his evidence has not been entirely consistent, the change in his evidence as to the 1960s usage leads me doubt whether he has a real recollection of this time; he was seeking to recall two evenings almost 60 years ago.

187. I acknowledge that the Claimant has not provided witness evidence dealing with this entrance prior to 1974. Mr Woodhave's single journey through Ship's Entry does not prove that the gates was always open; he could have used the push bar to exit the Grey's Court gate. The evidence points to the fact that Balmбра's would from time to time have left the Cloth Market gate open, as they did in later years. Once Sir John Fitzgerald Ltd took over in 1974, there is the evidence of Mr Horgan that he not only inspected the gate to ensure that it was kept closed but took steps to stop Balmбра's behaviour, as is evidenced by the 1976 and 1984-1986 and 1989 correspondence which he produced. In addition there are daytime photographs taken in 1975 and 1977 from which it appears that the gate was closed.

188. Walter Clark's hearsay evidence demonstrated no more than that the gate was open when he visited the film club and that on one occasion, several years after he first visited the club, he used Ship's Entry to access Grey's Court. It is telling that this was the first occasion upon which he realised that he could reach Grey Street via Ships Entry and that he did not recall those who are not associated with the club using the alley. In the case of other witnesses who had no reason to know whether or not Ship's Entry provided passage between Grey's Court and Cloth Market or were not particularly acquainted with the location, I have not given weight to a lack in their knowledge as to the use of the alley on the basis that it is not evidence that others did not know. In the case of Mr Clark, however, this should be given some weight as he was a regular user of the Cloth Market entrance to Ship's Entry in the 1950s and 60s as part of a club whose members also used it for club nights. He was in a position to notice if the public in general were using the alley and to discover that it led to Grey's Court. If the alley was being used by members of the public or was known as a cut through, that is

something which it might be expected would have come to his attention either by personal observation or from other members of the club. The Defendants also rely upon Mr Hepurker who, it will be recalled, had difficulty in identifying that it was Ship's Entry which he had used, apart from the other problems with his evidence.

189. In answer to this limited evidence is that of Mr Berg, who worked daily at Grey's Club casino, from 1966 to 1978 and was clear that the gate to the entrance to Grey's Court was locked and was only used by the L'Aragosta Restaurant and its staff; it was an indication of his even-handedness that he accepted that he could not say it was not used by the public when he was not there. Once Sir John Fitzgerald Ltd took over in 1974 there is the evidence of Mr Horgan that he inspected the alley regularly to see that it was secure and that the metal gates at either end were kept closed. The public were not permitted to use the alley. If he found a gate propped open he would close it.

Findings 1960-80 as to the use of Ship's Entry

190. The witness evidence concerning Ship's Entry in the period 1962 to 1980 was heavily weighted in favour of the Claimant. I am not satisfied that there was general public use of the route in this period and am satisfied that the gate at the Grey's Court end was locked against entry but could be opened by the staff of L'Aragosta with a key and those using the push bar from inside the Dog's Leg. Although Mr Berg's evidence relates to the period 1966 to 1978, had the gate been left open from 1974 there is the evidence of Mr Horgan that this is something which he would have stopped. I accept his evidence about inspection and ensuring that the alley was secure and the gates shut in view of his actions in relation to the Cloth Market gate and his response to Bass's activities at the other end of the alley.

191. Clearly there were times when Bass used the alley as if they had greater rights than one of emergency escape. I accept Mr Woodhave's account of using the alley on one occasion in 1971. Even allowing for the activities of Bass, Mr Hepurker has not persuaded me that he was making use of the alley in the period to 1980. There will have been occasions when there were opportunities for members of the public to use the alley for passage, not only because of Bass's behaviour but also because someone might have left a gate open, but in the period to 1980 these will have been few in the light of Mr Horgan's vigilance; the efficacy of his vigilance is supported by the limited witness evidence that anyone was using the alley at this time.

192. The correspondence between Mr Horgan, and his solicitors, and Bass and their solicitors, is contemporary evidence that Mr Horgan did keep an eye on what was going on at the Balmbra's end of the alley and when, for example Bass left dustbins there, undertook building works, or ejected customers into the alley or the push bar closing on the gate was broken, he did something about it. As the gate had a push bar closing mechanism, the closing of the gate by him would inevitably result in it being locked. Mr Horgan told me, and in the light of documentary evidence of his attention to the events in Ship's Entry I accept, that on his regular journeys along the Cloth Market to visit his other establishments he kept an eye on White Hart Yard and Ship's Entry and if he found a gate open when it should not have been he would close it. It must follow that any tenants in the alley must have had keys to effect entry to avoid being locked out when the gate was closed; there can have been few tenants during this period, save for Mr Clark's club and L'Aragosta, which had access from the Grey's Court end. The last census entry is dated 1939, and the last trade directory entry for 10 Cloth Market and Ship's Entry is dated 1968; it records the presence of the café, a law stationers and a bookseller.

1980-90

193. For the period 1980 to 1990 the Defendants rely upon the evidence of Mr Aziz in relation to White Hart Yard, but he was talking about a different alley. In relation to both ways the Defendants rely upon Mr Guclu, Mr Hepurker, Mr Malhotra, Mr Khanna, 3 witnesses who worked at Santino's and Mr Islam. I have explained why I need to be cautious accepting the evidence of the first three, Mr Khanna is far from independent of Mr Malhotra and there are reasons for doubting the accuracy of the evidence of Adriano Addis, Mr Pizzuti, and Mr Islam; see the relevant entries in the Appendices. There were 2 others working at Santino's, Enzo Arceri who said that between 1983 and 1986 he used White Hart Yard day and night, and Sergio Addis who did not recall if the yard was open or not. If, as suggested by Adriano Addis, White Hart Yard was being used by himself and members of the public in the evening like any city street, it is surprising that his brother Sergio, who was working with him, had no recollection of himself using the yard, or at least being aware that it was available. I bear in mind that all these witnesses are providing a recollection of a fleeting part of nights out in Newcastle many years ago. Further, Mr Arceri and Sergio Addis cannot be correct in their recollection that they could enter Ship's Entry from the Cloth Market by pushing the gate open; the swing of the gate had been reversed by their period at Santino's.

194. Mr Horgan claims that throughout this period the Cloth Market gates were kept locked at night and that is something which he checked. His letter from 1979 is still relevant in relation to this period. His evidence is supported by Edward Berg for the period 1980 to 1982 and those who took over the business from him, Mrs McBeth and her daughter Ms Foster, as well as Mr Robinson and Mr Wright who worked at the club. Whilst the accounts of

Mrs McBeth and Mr Wright were hearsay, they were consistent with those of Ms Foster and Mr Robinson to the effect that the Cloth Market gates were kept shut to keep the revellers on the Bigg Market away from Grey's Club. The evidence is so consistent on this point and according with logic, given the evidence as to the comparison of the Bigg Market and Club clientele, that the fact that Mr Wright says that the gates were locked during the day does not lead me to discount his other evidence as to the locking of the gates. His evidence spans the period when the Cloth Market gates were open during the day and a time when they were kept locked throughout. It is likely that his recollection of the daytime locking of the yard relates to the latter period.

195. There was also evidence from Mr Dodd and Mr Pickstone who recall the gates at the Cloth Market being locked at night, both of whom spent a considerable period of time in street opposite the gates, and Mr Hopper who said he had a clear recollection of the Cloth Market gates being open during the day and closed at night and this continued into the early 90s.

196. By this time, 1980, the Grey's Court security gates must have been removed and the entrance open, as explained when considering Mr Berg's evidence on the locking of these gates.

197. Mr Horgan also gave evidence that Ship's Entry was kept secure in this period. His evidence as to taking steps to stop the misuse of the alley by Bass and its customers is corroborated by the correspondence he produced for the period 1984 to 1986 concerning Bass doing building works in the alley; the dispute concerned Bass's private rights over the alley in which Mr Horgan involved solicitors and counsel and there is correspondence in which he said in terms that there was no public right of way. There is 1989 correspondence containing a complaint that Balmбра's customers were being ejected into the alley through the fire doors and had broken the fire escape

mechanism on the security gate, the purpose of which he described in his letter was *“to stop the public going into the alley.”* Bass said it would take the necessary steps to redress the problem. All this activity points to Mr Horgan being at pains keep the alley secure and the public out, as well as Bass other than to the extent permitted under the 1962 licence. The evidence of his attention to these events supports his account of regularly inspecting the alley and I accept that he did. Given the particular problems he came across, it is likely that he would have been all the more vigilant to monitor what was happening at the site.

198. I prefer the evidence of the Claimant’s witnesses concerning the presence of locked gates in relation to both White Hart Yard and Ship’s Entry. As regards the former there were sound reasons for keeping the gates at the Cloth Market closed. These were witnesses who had daily dealings with the gates and can be expected to know that they were locked. It will be recalled that Ms Foster said that on her Sunday nights out in Newcastle she was in the habit of looking through the gap in the Cloth Market gates to see that all was well at the Grey’s Court end. Given her responsibility for Grey’s Club at that time, I have no doubt that she did this as a matter of routine.

199. As to Mr Horgan, it is clear from the correspondence that he was adroit to see that Ship’s Entry was kept secure and that is a further indication that I should accept that he adopted the same approach in relation to White Hart Yard. It may be that from time to time someone forgot to lock the Cloth Market gate which would have enabled the public to use the yard as a cut through as there were no gates at the Grey’s Court end. The only independent witness who gave clear evidence of having used White Hart Yard himself was Enzo Arceri. I accept his evidence that he did on occasion use White Hart Yard at night but do not accept that this was a frequent occurrence in the

light of the evidence I have accepted as to the gates. It is clear that Balmбра's misused Ship's Entry in such way that their patrons were able to gain access but I do not accept that this persisted for long during Sir John Fitzgerald's ownership after Mr Horgan's intervention

200. The employees of Santino's who used Ship's Entry are in a different category. They could access it from the restaurant and had access through the gate. Most deal with a narrow period of time, 1983-1986, much of it when Mr Horgan was having considerable trouble with Bass. It is unlikely that at a time he was causing solicitors' letters to be sent to Bass and obtaining counsel's opinion he would have been permitting the free access from the Cloth Market which is suggested by the Santino's staff. I accept that on the occasions they went to Grey's Club they would have used Ship's Entry, either via the rear entrance to Santino's or through the Cloth Market gate and could exit the fire door at the other end. They could return provided they left the door at Grey's Court open or someone else had done so. In view of the Claimant's evidence, however, I do not accept that it was always open, on the contrary, I have been persuaded that it was usually locked shut. Indeed, I was shown a photograph of Grey's Court taken in 1988 showing the gate to Ship's Entry shut, which given the push bar mechanism would have caused it to be locked from the outside.

Findings for the period 1980-90 as to the use of White Hart Yard and Ship's Entry

201. I find that between 1980 and 1990 the Cloth Market gates to White Hart Yard were, in general, kept locked at night. The Ship's Entry gates were also usually locked shut but were opened by, and to accommodate, the employees of Santino's at the Cloth Market end and L'Aragosta at Grey's

Court. It is striking that none of the Santino's witnesses said that they left the Cloth Market gate open, yet they had considerable control over whether it was open or shut. In addition, the employees from Santino's, from whom I heard, used the Grey's Court exit to visit Grey's Casino.

202. There were occasions in 1989 when Balmбра's ejected customers into the alley from their fire doors and around that time the push bar mechanism on the Cloth Market gate broke. Such behaviour was noticed by Mr Horgan and stopped. In view of the presence of locked gates at either end of the alley, albeit that one or other may have been occasionally left open, I do not accept the account of the Defendants' witnesses that it was commonly used by the public to pass between the Cloth Market and Grey's Court. Had there been such public use it would have come to Mr Horgan's attention and yet his evidence was that he had never seen any unauthorised people using the alley; he was not, of course, speaking about his evidence as to the presence of builders at that time.

203. It is not disputed by the Claimants that during the day White Hart Yard was passable by the public. I reject, however, the assertion that either White

Hart Yard or Ship's Entry were used by the public in general to pass at will between the Cloth Market and Grey's Court whenever they chose at night and that Ship's Entry was used in such a manner during the day. Such passage as was possible was contingent on gates be left open, which in on the evidence cannot have occurred for protracted periods.

1990 onwards

204. There is a greater volume of witness evidence concerning the period from 1990 onwards. Apart from the witnesses Mr Aziz, Mr Guclu, Mr

Malhotra, Mr Khanna, Mr Islam, upon whose evidence I have already remarked, the Defendants called Moet Bondi, in respect of both ways and Geoffrey Robinson, John Wade, Timothy Whiting, Mark Collett, Samantha Ludlow and Dana Shepherd in respect of White Hart Yard.

205. These witnesses clearly had memories of using the ways they described which were genuine. It is only the accuracy of the extent of their use which is in doubt. Mr Bondi talked of using White Hart Yard quite frequently when coming out of Grey's Club late at night in the period 1993 to 1999 and seeing groups of people there. After 2000 locked gates appeared at both ends. His recollection of the timing of the arrival of locked gates at the Grey's Court end cannot be accurate. He said he had used Ship's Entry a few times in that period. There were gates but they were never locked.

206. Mr Robinson claimed to have used White Hart Yard as a cut through at night between 1993 and 1999, but though he did not recall gates he accepted that if there were closed gates he would have moved on to another route. Mr Wade and Mr Whiting both gave evidence they used White Hart Yard as a cut through between 1995 to 2000 when out drinking at night and this would be several times a week. Neither recollected any gates but also said they used other routes between the Cloth Market and Grey Street, depending where they wanted to drink. Mr Collett, who lived in White Hart Yard from 1988 until the Ladhars opened Bubbles, recalled that there were no gates on the yard till the opening of Bubbles but accepted that he may have forgotten the presence of gates because he didn't remember. Samantha Ludlow and Dana Shephard said they used White Hart Yard between 7.00pm and 2am when they went drinking in the area between 1996 and 2005.

207. There is compelling evidence from the Claimant's witnesses to the effect that White Hart Yard was controlled by gates at the Cloth Market end which

were locked at night and Ship's Entry was controlled by locked gates at both ends. Some are witnesses who deal with earlier periods as well as the situation post 1990 whose evidence I regard as reliable in relation to White Hart Yard, namely Mr Robinson and Mr Scott and Mr Hopper and to the extent that it was supported by the evidence of others who worked at Grey's Club at the time, Mr Wright. Mr Hopper had a particular reason to remember White Hart Yard as in 1990 and 1991 he worked for Bridgewater to examine ways of improving its appearance and in 1990 and 1991 he did some design work on 11-13 Grey Street in connection with the installation of a fire escape. I shall deal with his recollection of a locked intermediate gate separately.

208. In addition to the earlier witnesses, there is the evidence of Mr Gould of Bridgewater, owner from 1990 to 1997, who had an interest in keeping the gates shut and saw that they were, but accepted that it was left to the tenants to open, shut and lock the gates to suit their needs. Very early on in the Bridgewater ownership of Ship's Entry there was the dispute with Bass which carried on until the final injunction in November 1994 and which resulted in Balmbra's having to obtain a different fire exit due to losing its access to the alley as a fire escape. I heard from Mr Winskell about the dealings with Bass and that film was obtained of Bass's unlawful use of the alley. He said that the gates were locked to prevent Bass using it as an emergency exit, on two occasions. The first was when a breach of the interim injunction was alleged and the second when Bridgewater and Bass were unable to come to terms on a permanent licence to use the alley.

209. Mr Fleming had a good reason to remember White Hart Yard in view of his professional involvement in drawing plans in 1989 for Sir John Fitzgerald Ltd, his design work for Bridgewater in 1990/91 and Mr and Mrs

Giacomini in 1995/6 and a feasibility study of the yard in 2000. He recalled the gates at the Cloth Market entrance which, he said, were kept secure and opened for his survey in 1990 and subsequent visits. He also worked on Ship's Entry in 1989 and 1990 and the gates at both ends were locked at the time. Like Mr Hopper, he also recalled a barred intermediate gate which had to be opened for his survey. His evidence as to the presence of a wooden door on the inside of the Cloth Market undercroft would explain Grace McCombie's comment that two houses could be seen in the alley if the gate was open

210. Mr McIlwraith recalled the Cloth Market gates were closed during the day in the period 1997 to 2001, and in 2001 the Cloth Market entrance to Ship's Entry was boarded up. He also had a reason to remember the yard due to his project work as a student and a 2001 commission from the Ladhars; a 2002 photograph shows what appears to be a blue door at the entrance to the Cloth Market, although there was the evidence from Michael Ladhar that the blue door was replaced and the entrance eventually boarded up and screwed shut. Dr Balal Aljibouri's recollection is based upon working at the takeaway at 16 Cloth Market on a daily basis from 1997 and as owner from 2004 to 2015. In the latter capacity he had good reason to lock the Cloth Market gates to prevent the trouble his business had suffered from vandals. In that light, it is also likely that he was sensitive to occasions when the gates were not locked, hence his heated discussions with Tommy Wright.
211. The evidence from Northumbria Police concerning the locked Cloth Market gates at the time of the fire in February 2001 is very good evidence of both the presence of the gates and that they were locked.

212. Finally, there was the evidence of Michael and David Ladhar. Given Michael's involvement with Bubbles, he was well placed to recall the

controls placed on the Cloth Market entrance from 2001. He was a patently honest witness describing his almost daily experience of working at Bubbles and I accept his evidence. The steel gates were opened only when Bubbles was opened or to take in deliveries. After Bubbles closed in 2003, the gates were kept locked except for deliveries. The key was on the same ring as the cellar key, which confirms the evidence on this subject from Tommy Wright, though there is evidence from Dr Aljibouri that this was not always done. There was also the No Entry signs with the caption about trespassers and no right of way. The photographs show this was present by 2002, Michael Ladhar recalls that it was present when he started working at White Hart Yard. I also accept his evidence of the presence of a blue door to Ship's Entry which was replaced after it was smashed in and after a further attack the entrance was boarded up and screwed shut.

213. At the Grey's Court end the Ladhars both say that the doors which are now in place were installed in 2007 in order to make a smoking area for Diamonds. Dave Ladhar's statement indicated that additional gates were added in 2012; these arrangements were in evidence on the site view. Michael Ladhar said that there were no gates at that end, to his recollection, when he started working at White Hart Yard.

214. As regards Ship's Entry there was the unchallenged evidence of Mr and Mrs Robinson that between 2001 and 2009 the gate at Grey's Court was kept shut with a locking mechanism. Mrs Robinson recalled there was a gate just to the Cloth Market side of the fire exit onto Ship's Entry from the rear of her premises though she did not know if it was locked as she never tried to get through it. In addition, there was the evidence of Mr Steedman for the period from 2001/2 onwards to the effect that it was necessary to

manipulate the lock at the Grey's Court gate to reach a blocked drain in the Dog's Leg.

215. I have not placed weight on the evidence of Mr Murphy and Mr Davison concerning locked gates for the reasons I gave when considering their evidence, other than Mr Davison's clear recollection that the Grey's Court gate to Ship's Entry was locked on the couple of occasions when he used the alley.

Findings 1990s onwards as to the use of White Hart Yard and Ship's Entry

216. I shall first deal with the location of gates. The evidence at the Grey's Court end is all one way, there were no gates up to 2000. Mr Bondi was the only witness who said that there were gates at this location after 2000 but before the Ladhar's bought Grey's Club, which puts it at pre August 2001. He must be mistaken as Tracey Foster, who was running the club at the time prior to the Ladhar takeover said there were no gates at that end in her day. The Ladhars say they installed gates in 2007 to deal with the smoking ban. As they would have had a reason to install the gates at that time and, in a sense, it is evidence contrary to their interest, I accept this evidence and find that the Grey's Court entry remained ungated between 1980 and 2007 but doors were installed in that year to make a smoking area and gates in 2012.

217. There are photographs of the Cloth Market gate taken in 1975 and 2000 which is clearly the same gate. Mr Horgan identified that gate as having been present throughout his company's ownership of the yard. Ms Foster identified the gates shown on the photograph taken in 2000 as having been

there throughout her time at Grey's Club, Mr Gould said these gates were in place during his company's ownership, 2000 to 2007, Mr McIlwraith saw them when he was first involved professionally with the yard in 2001 and Michael Ladhar also said these gates were in place until 2001 when they were changed for the steel gates. The latter are still in place. I am satisfied that White Hart Yard continued to be gated at the Cloth Market end throughout the 1990s by the wooden gates identified and that in 2001 these were changed for the steel gates installed by the Claimant.

218. The Grey's Court gate into Ship's Entry is also seen on photographs going back to 1988. The identical gate is still at this location. There was evidence that this gate was present throughout the 1990s and beyond. By way of example, see the evidence of Mr Gould, Mr Fleming, Mr Hopper, Mr Davison, Mr Giacomini and Mr Steedman. Indeed, the gate was identified as being present by Mr Berg from the time of his recollection in 1964 and Mr Horgan from 1974. Mr Jude thought the gate dated back to the 1962 licence to Bass whereas Mr Penrice dated it to the early 1990s, on the basis that this was when a fire escape into Ship's Entry was installed at 11-13 Grey's Court; a further example of his drawing of an unsafe inference. I prefer Mr Jude's evidence as to the dating of the gate both because the 1962 licence for emergency access referred to proposed gates and the witness evidence and photographs show they pre-date the 1990s and date back to the 1960s. I find that throughout the 1990s to date the metal gate shown on the 1988 photograph had been fitted at the Grey's Court entrance.

219. There is no dispute that the old wrought iron gate was fitted at the Cloth Market entrance throughout the period of the 1990s. No-one has commented on the wooden door behind this gate. Mr Fleming recalled the door in 1990. There appears to be a door in this location on a 1996 photograph which Mr

Morgan asked me to find was the continuing arrangement at the end of the alley at the conclusion of the dispute with Bass. The presence of a door may have been relevant to the question as to whether or not the wrought iron gate was locked during this period, for why keep the gate closed if there is a closed door beyond? This has not been explored in the evidence.

220. I do not accept that the door shown on the 1996 photograph can be the same door as was fitted to the frame, the remains of which can still be seen in the undercroft. It looks to be a plywood door with a similar surround, the sort of barrier one sees to close off an area whilst building works are taking place.

Further, it doesn't resemble the door at the Cloth Market entrance in 2002. The subject matter of the picture shows that it was taken on the day of the Blaydon Road Race, run on the 9th June each year in homage to the song The Blaydon Races, the date featuring in the second line of the lyric. It cannot have remained in place for long as Mr Giacomini, the tenant of 10 Cloth Market from 1996 to 1998, did not refer to the existence of a door but a gate.

221. On the question as to whether there was some other door in the undercroft which was kept shut, I am not satisfied that the wooden gate referred to by Mr Fleming and Mr Horgan presented a barrier to use of the alley in the 1990s. It is unlikely that the door was kept shut whilst Balmбра's had the use of the alley as a fire escape, until the end of 1994, as it was the wrought iron gate to which the push bar was fitted. Further, had the alley been closed off by a door, Mr Giacomini would not have experienced people entering the alley to urinate on occasions that the gate had not been shut properly.

222. There is evidence of the intermediate gate from Mr Fleming as at 1990, Mr Hopper 1990 to 1991, Mr Giacomini 1996-1998 and Mrs Robinson, March 2001 to 2007. Dave Ladhar's evidence is that the gate was in place in 2001 when Easteye purchased Ship's Entry . It was padlocked shut but

opened when Diamonds was open as the alley served as a fire escape route from the club. The gate is shown on a photograph taken in 2002. Mr Gould had originally claimed that he recalled the gate but in evidence said that he only recalled two gates at either end of the alley. His final evidence on this gate was that he didn't recall if it was there or not. He had no recollection of causing the intermediate gate to be installed. He said he did not install any gates. Mr Winskell, said he did not see this gate when dealing with the complaint against Bass; he only recalled two gates. He described seeing Balmбра's customers travelling in the direction of Grey's Court on the 1993/4 surveillance video. Of the Defendants' witnesses, Mr Malhotra said that the gate first appeared in the period 2000 to 2007 when he was considering putting together a landholding in the area.

223. The fact that Mr Fleming did not mention the gate in his 1990 dilapidations report and Mr Hopper did not show the gate on his 1991 drawing does call into question their recollection of the presence of a gate which, they say, was unlocked to enable them to examine the buildings in the alley. The fact that they both recall a gate and had a reason to remember its presence is some support for its existence at that time. Mr Giacomini couldn't recall whether the gate he was talking about was present in the 1980s or 90s, albeit he remembered a gate which he could squeeze through and was rusty; the description does not accord with the gate shown on the 2002 photograph, it is a vague recollection. Mr Winskell's focus was on the Cloth Market end of the alley. Albeit he remembered two gates, provided an intermediate gate was open, there would be no reason for him to notice it. Mr Gould's recollection as to the presence of the gate changed as he gave evidence. Mr Malhotra has not proved a reliable witness in other respects.

224. In order to weigh the evidence as to the existence of the gate it is helpful to look at what was happening as regards Ship's Entry in 1991. On 2nd May 1991 Bridgewater granted Easteye and Stanley Casinos 125 year leases of Grey's Club and Casino which appeared to include a right of way over Ship's Entry. At the same time there was the ongoing dispute with Bass concerning the use of the alley which was, at that stage, their emergency exit both to the Cloth Market and Grey's Court under the 1962 licence.

225. On 11th November 1991, Bridgewater sold 11-13 Grey Street to Patrick Murphy. Mr Hopper worked for Bridgewater prior to, and Mr Murphy after, the sale. Part of his work involved the installation of a fire escape into the alley from the rear of 13 Grey Street. He said that Mr Murphy told him that Mr Gould had said that he had a right of escape towards Grey's Court. With that in mind he designed the fire door so that it opened to the west, i.e.

blocking the path to the Cloth Market. Mr Hopper's plan for the new fire escape and door is dated May 1991, i.e. before the sale, and shows the fire door opening as Mr Hopper said in evidence. There is some support in Mr Hopper's account of being told that the escape was to be towards Grey's Court in that a later owner of 11-13 Grey Street, Mrs Robinson was of the same understanding. Although she does not identify the source of that information, it may well have come from the previous owner, Mr Murphy.

Nevertheless, Mr Hopper's drawing shows the fire escape arrangements from no.13 into the alley and it could be expected that it would show the gate which barred access to the Cloth Market as this is directly relevant to these arrangements. Further, why would he need to be told by Mr Murphy that the fire escape was to the east if the escape in the other direction was barred by a locked gate? I am wary of accepting the accuracy of a reported conversation almost thirty years after the event. Nevertheless, it is an objective fact that the door was installed to open clockwise which is

consistent with Mr Hopper being told that escape was to be to the east and Mrs Robinson believed that this was her route of escape.

226. As 11-13 Grey Street was to be split off from the remainder of the Bridgewater land, and the means of escape from the rear fire door was intended to be towards Grey's Court, it would be logical to gate off the boundary between the conveyed and the retained property. The fact that Easteye had a right of way over Ship's Entry under the 1991 lease does not undermine the logic of taking such a step. The Club would have had to obtain access through the Grey's Court gate in any event, so one further gate would not make a difference to them. Set against this, however, is that at the time the alley was an emergency exit in both directions for Balmбра's. The presence of a locked gate would be inconsistent with such use. Further, Mr Gould was aware that the alley was an emergency access. Balmбра's could not operate without the access. Had it been cut off in 1991 one would expect that in the course of the dispute with Bridgewater, Bass would have raised this as an issue. Furthermore, a temporary licence to use Ship's Entry as an emergency exit was granted in November 1994, which is inconsistent with a locked gate preventing passage half way down the alley.

227. The explanation for the presence of the gate, put forward by Mr Malhotra, is that it was installed by Easteye in the early part of the period 2000 to 2007 when he was investigating acquiring a land holding in the area. Mrs Robinson purchased from Mr Murphy on 23 March 2001. Easteye did not acquire Ship's Entry until 7th August 2001. Whilst Mrs Robinson does not say that she recalls the presence of the gate throughout her ownership, nor does she say that it was installed during that period. She refers to the presence of the gate to support the assertion that her right of fire escape did

not include the route to the Cloth Market. Since she was saying that was the position throughout her ownership, her reliance on the gate in this context suggests that it too was present throughout. Her evidence went unchallenged because the Defendants chose not to call for her for cross-examination.

228. Whilst the matter the matter is finely balanced, it is unlikely that Mr Gould would have installed a gate which was kept locked across Balmbra's emergency exit in 1990 or 1991 and that it was in place when the 1994 licence was granted to Bass. On any view, it was not a gate demarcating a boundary, for Bridgewater retained the whole of Ship's Entry throughout. The fact that Mr Fleming and Mr Hopper did not refer to the gate in contemporaneous documents is a better indication of what they observed than a recollection going back 20 years. Mr Fleming was again working at 16 to 10 Cloth Market in 1995/6, this time for Mr Giacomini, and again in 2000. It may be that his recollection of the intermediate gate dates from his involvement at either of those times.

229. I am not satisfied that the gate was installed by 1990, or indeed 1994. As to when the gate was installed, none of the 3 post-1991 owners say that it was they who installed it and we have not heard from Mr Murphy, who took over the works for the installation of the fire escape. All owners had an interest in installing a gate if they wished to prevent the owners of 11-13 Grey Street using the western end of the alley, or in the case of Mr Gould, preventing Balmbra's using the eastern end of the alley whilst at the same time not needing to interfere with L'Aragosta's use of the Grey's Court gate. Mr Murphy may have taken over the task of installing the gate as part of the works around the fire escape. I do not know when that work was completed but note that the planning permission was not obtained until 1992. Mr Hopper's recollection of the gate may relate to the time of the construction of

the fire escape, which included a substantial staircase, as he was working for Mr Murphy by then.

230. Mrs Robinson's evidence is of some assistance in view of the significance she placed on the gate in relation to belief as to the direction of her right of fire escape. This appears to date the gate to the time by which she purchased her property. That would put the installation of the gate at a time between 1994 and 23rd March 2001, before Easteye's ownership. This would be consistent with Mr Giacomini's vague recollection of a gate, which I see no reason for him to have concocted or imagined.

231. On balance, despite Mr Gould's lack of recollection, it is likely that the gate was installed in Bridgewater's period of ownership. There would be a strong motive for installing it to prevent Balmbra's exiting to the east, despite the injunction, as there is no evidence that there had been any problem with those at 11-13 Grey Street misusing the Cloth Market end. Nevertheless, on the evidence it is not possible to determine whether the gate was installed by Bridgewater or Mr Murphy. I am able to find, however, that it was installed between the end of 1994 and the end of Mr Giacomini's tenancy in 1998. It follows that I reject Mr Malhotra's account of the gate being installed after Easteye had purchased or that he was able to use the alley whilst it was in their ownership.

232. The question which then arises is as to use by the public notwithstanding the presence of gates.

Conclusions as to public use of White Hart Yard

233. Between 1979 and 2007 the public were able to enter the yard from the Grey's Court end at all times. The reasons for closing the Cloth Market gates at night did not change throughout the 1990s, namely the desire of Grey's

Club to prevent those using the Bigg Market accessing the club. The fact that this continued throughout the 1990s is supported by the hearsay statement from the late Dave Ladhar concerning his conflict with Mr Wright about opening the steel gates to Bubbles customers in 2001. Albeit that this only appears in the hearsay statement it would be a curious detail to concoct.

234. The change in ownership of the yard in 1990 does not appear to have altered the freeholder's view as to the need to lock the gates at night. Mr Gould told me that he wanted to restrict entry by people who were drunk and other goings-on in a relatively dark area so was insistent that the gates were kept shut, this was checked by his company relatively frequently and generally that happened. By his reference to locking taking place in such circumstances it is likely that his motive was to keep the gates locked at night.
235. Against that background, I am faced with evidence from independent sources both that the yard was used as a cut through at night and that the gates were locked. Evidence in support of the cut through comes from Mr Bondi, Mr Wade, Mr Whiting, Ms Ludlow, Ms Shephard, Ms Ludlow and Mr Collett, though the last accepted that he may have forgotten about the wooden gates, when shown a photograph, and added that he could not remember. Mr Guclu, Mr Malhotra, Mr Khanna, Mr Islam and Mr Aziz also claimed to use the yard as a cut through in this period though I have identified doubts as to the reliability of their evidence.
236. The independent evidence as to the locking of the gates comes from Mr Gould, Tracey Foster, Margaret McBeth, Mr Wright, Mr McIlwraith, Mr Hopper, Mr Fleming, Dr Aljibouri and the Northumbria Police report dated 6th February 2001. Not only did these witnesses recall the gates

being locked but they each had a reason to see that they were or had a particular reason to

be examining the yard at the time of this observation. In addition there is the evidence of Mr Robinson, and Mr Scott, who have connections to the Ladhar companies but did not strike me as compromised by that fact.

237. In order to look at the situation vis a vis gates in the 1990s it is of assistance to look at what happened thereafter. The solid wooden gates were replaced by steel gates in 2001. There had to be a reason for changing the gates and I accept the evidence of Michael Ladhar and his father that the gates were installed in connection with Bubbles. They decorated the internal area of the yard and installed the gates to make it more attractive to the passing trade. If it were the case that the solid gates at the Cloth Market were always open, there would be no need to change the type of gating as passers by could see in anyway. That is a further indication that the old Cloth Market gates were kept shut at night prior to their replacement by the steel gates.

238. It is not disputed that Bubbles closed after about 2 years. I accept Mr Ladhar's explanation that it was not a success, for it is difficult to see why it would close in such a short time otherwise. I also accept his evidence that the gates were locked when Bubbles was not open; that evidence is supported by Mr Collett who lived in the yard and Mr Bondi, On the Defendants' side, only Mr Malhotra and Mr Islam suggest they continued to use the yard as a cut through in the 2000s. Michael Ladhar was a more reliable witness in that he did not suffer from the same shortcomings as these two witnesses and was supported in large degree by those who continued to work at the club under the Ladhar stewardship and Dr Aljibouri; the evidence of the latter concerning his request for the

gates to be opened at night to increase his trade, and its refusal, is further indication of the Ladhars' resolve to prevent access from the Cloth Market. Had it been the case that these gates were left open there would have been no need for such a request. Accordingly, I find that the steel gates were locked at all times save for the period between 2001 and 2003 when they were opened at night to enable customers to visit Bubbles. The tenants of the yard had keys to operate the gates, but as at 2001 they were very few in number, probably just Mr Collett and a bookbinder.

239. Until 2007 it was possible for the public to walk from Grey's Court to the Cloth Market entrance. If, therefore, the gates were open on occasion, they could pass through. It would have been possible to pass through at night between 2001 and 2003, whilst Bubbles was open. At other times such passage will have been dependent on whether the Cloth Market gates were locked. As it seemed to me the independent witnesses had a genuine recollection of using the yard as a cut through in the 1990s and it is difficult to conceive how these witnesses are mistaken, it is likely that there were times when Cloth Market gates must have been open. The fact, however, that they were able to do so does not undermine the evidence of the witnesses who described the gates as being locked. These recollections are not mutually inconsistent in view of what I have heard about who was left to lock the gates and the fact that the gates will have been locked some of the time but not all of the time.

240. Mr Gould said that the tenants had keys to the gates, as did Mr Davison. Ms Foster thought that it was the tenants who locked the gates at night. The fact that the public were able to use the Cloth Market entrance at night because the gates were open shows that the tenants did not always lock the gates; none of the Defendants' witnesses suggest that they

opened the gates to pass through, all say they do not recall any gates or if there were any they were open. Conversely, the fact that Mr Gould said that the gates were usually found to be shut on regular checking, and the evidence of others, such as Ms Foster and the staff of Grey's Club, who spent a good deal longer at this location than those who were simply passing through, indicates that the gates were usually shut at night. It is likely that on these occasions the gates were also locked as the object of shutting the gates was to keep the public out.

241. Mr Davison seems not to have supervised the locking of gates during his ownership between 1997 and 2001 and left it to his tenants to lock up; he described them as hardly blue chip tenants, who were prepared to pay a little bit for dilapidated leaky buildings. That may suggest that the arrangements as regards locking the gate were more lax in this period. Set against that is the fact that Grey's Club was not in this category of tenant and its owners, up to 1999, regarded it as important that the gates were locked at night. In addition, Dr Aljibouri recalled the gates being locked when he came to work in the late afternoon from 1997 and there is the 2001 police report of locked gates at the time of the fire.
242. Mr McIlwraith recalled the gate was shut at all times from 1997 save when Bubbles was open. It is likely this was his experience after Easteye purchased in 2001 as he had a distinct recollection of someone called Jeff opening the gates for him during day time visits. His recollection of the gates being closed during the day prior to that time was not based on his direct involvement with the yard and is in conflict, certainly for the period 1997 to 1999 with Ms Foster. The evidence of the gates being locked at night in the period leading up to the 2001 purchase by the Ladhars lends support to Dave

Ladhar's statement that he purchased the yard from Mr Davison after approaching him for permission to open the Cloth Market gates in the evening to attract customers, which is a further indication that they were kept shut. On balance, it is likely that the pattern of shutting the gates in Bridgewater's era was replicated whilst Mr Davison was the owner; clearly such tenants as were left would want the gates open during the day whilst they were trading.

243. After Easteye purchased in 2001, on the evidence of Michael Ladhar, which I accept, the steel gates were padlocked shut save when Bubbles was open for trading; the lock was later changed to a combination lock. The tenants of the yard had keys as did the owner of the takeaway at no 16 Cloth Market and the operators of Grey's Club. After Bubbles closed, the gates were kept locked and only opened to service the tenants, such as to take in deliveries and, as can be seen from the photographs, take out the bins. It appears that by 2004 there were only 2 people with responsibility for locking the gates, Mr Wright and Dr Aljibouri, for if left unlocked each would accuse the other of being responsible for the lapse; had there been other tenants with keys at the time the net of blame would necessarily have been cast more widely.
244. I am satisfied that when Dr Aljibouri took over the takeaway in 2004 his view was that the gates had to be kept locked in view of the vandalism his premises had suffered. He did, however, want to attract trade from Grey's Club at quiet times. That may lead to an inference that he would open the gates to let people through, though he was not questioned to this effect. The fact that both he and Michael Ladhar recall him asking for permission to open the gates at these times is an indication that he did not keep them open unilaterally and that they were indeed locked shut. After

2007, the Grey's Court doors were installed, and from that time onwards, there was no public access into the yard other than to customers, but they entered through the club.

245. Michael Ladhar also gave evidence as to the presence of Highway Act notices in the yard which he thought were there when he first worked at the club in 2000. Mr Penrice suggested that they were installed at a later period, but I have already explained my doubts as to whether he was in a position to reach such a conclusion since they appear on a March 2002 photograph. The notices are likely to have been put up at a time at which the public could use the yard as a passage. The installation of the steel gates in 2001 prevented passage during the day and limited it to Bubbles' opening hours. Thus the notices were probably put up prior to this period whilst the public still had daytime use of the yard. On this basis I prefer Mr Ladhar's evidence to that of Mr Penrice and find that the notices were on display by 2000.

Ships Entry from 1990 onwards

246. None of the Defendants' witnesses for this period, Mr Malhotra, Mr Khanna, Mr Islam, Mr Bondi and Mr Gibson claim to have made regular use of the alley at this time. Mr Gibson's original position was that there had been numerous visits to Grey's Club via Ship's Entry at which time there was no gate at the Grey's Court end. On questioning, however, it transpired that there had been only two visits and he was not paying attention to whether the Grey's Court gate may have been opened using the push bar as he was with a group of people. His evidence highlights the lack of probative force of evidence as to occasional usage over a period of several years when set against clear evidence of the presence of closed gates. On its own, such evidence is not persuasive that there was public usage sufficient to bring it

home to the landowner that a public right was being claimed. Further, even if they are correct in claiming that the gates were open during their visits, it does not follow that they were always open. There is some support for the assertion that the gates were sometimes open in that there are two daytime photographs, showing the Cloth Market and Grey's Court gates open. There is also a 1994 photograph in which the Cloth Market gate is half open.

247. There is a considerable body of evidence which points to both ends of the alley being closed for large parts of the 1990s and 2000s. Mr Fleming and Mr Hopper both recall both gates being locked shut in 1990 and 1991 respectively during their inspections. Peter Robinson, who worked at Grey's Club said the Grey's Court gates were always shut and that until 4 years ago he was unaware where the alley led as he thought it was just the back entrance of the restaurant at 11 Grey Street; I put him in the category of witnesses whose lack of knowledge on this subject should be given weight given his lengthy association with the location.

248. Mr Gould, for the period 1990 to 1997 recalled that Ship's Entry was closed to the public and he was concerned to see that it was. He engaged in a dispute ranging over 4 years to prevent Balmbra's trespassing in the alley which led to the termination of Bass's licence and the locking of the gates to prevent its use by Balmbra's. Mr Winskell said that the gates to the alley were locked to prevent Balmbra's access on two occasions. The first followed a breach of the interim injunction when the gates were padlocked shut. The second was at the end of the temporary licence on 12 December 1994 when the parties were unable to agree terms on a more permanent arrangement. He did not identify the method of locking at that stage but it must have been something which prevented Bass being able to open the gates with the push bar, as the object was to deny them an emergency exit.

Ultimately, on my finding, the intermediate gate was installed in the alley before the end of Mr Giacomini's time at Café Fabio.

249. Mr Davison, the next owner, also recalled the Grey's Court gate being locked. Mr Giacomini, who had experience of both ends of the alley, having worked at L'Aragosta in the 1980s and run Café Fabio at 10 Cloth Market from 1996 to 1998, recalled both gates being closed and that on occasions when the Cloth Market gate had not been shut properly people had entered the alley to urinate and he would shout at them to leave. Mr McIlwraith said he recalled a door at the Cloth Market entrance to Ship's Entry in 2001/2 and the alley was overgrown with foliage and almost impossible to pass along. At this stage only the door at the Grey's Court end had a fire closer. He also recalled the boarding up of the alley. Mr Steadman and Mrs Robinson both recall that the Grey's Court gate had to be unlocked in order to unblock the drain in the Dog's Leg from 2001 and 2000 respectively and Mrs Robinson recalled the presence of the intermediate gate during her ownership which commenced in 2001.

250. There is a photograph from 2002 showing the Cloth Market entry covered by a blue door and a later photograph showing it covered by an unpainted board. A 1996 photograph appears to show a closed plywood door over the entrance to the Cloth Market and there is the evidence of Grace McCombie, set out in the 1992 Pevsner, to the effect that there were two buildings in the alley which could only be seen when "*the gate*" was open.

251. David Ladhar said that after 2001, the Cloth Market entrance was locked, only used by short term tenants and boarded up when they left. Michael Ladhar referred to the impassable state of the alley by 2001 and the installation of a door which had to be replaced due to vandalism and,

following further damage, was boarded up. The 2002 photograph of the blue door supports Michael Ladhar's evidence in this respect and was not challenged. It follows that Mr Islam's claim that the alley was not closed off until 2008 cannot be correct.

252. If Mr Malhotra, Khanna and Bondi did indeed use the alley in the 1990s, it cannot have been for the entire period they claim. Mr Malhotra and Mr Khanna said they used it together, Mr Malhotra's dates are 1990 to 1995. That was the period when Mr Gould was taking active steps to restrict the use of the alley to an emergency exit and ultimately to close it all together. After 12 December 1994 the alley gates were locked to prevent use by Balmбра's for an unspecified period. They would have been able to use the alley whilst Balmбра's were allowing customers into the alley, which on the history of that dispute appears to have been in 1990 and again in 1992/3. After the 1993 interim injunction, the only allegation of breach concerned taking in a delivery through the alley, not allowing customers to enter or leaving the gate open. In view of the fact that Mr Contini, the tenant at 10 Cloth Market had complained about noise from Balmбра's customers in 1990, he is hardly likely to have left the gate open. There are likely to have been fewer opportunities to access the alley from Grey's Court in the light of the evidence I have heard about locking and, unlike at the other end, no third party who sought to misuse the alley. It would not have been in the interests of L'Aragosta to leave the gate open as it led to their store room and back door. They had a strong motive to keep the public out during the night especially if, as happened by Balmбра's, it was used as a public convenience.

253. Mr Bondi's recollection also covers a few visits over a lengthy period which started when Bridgewater and Bass were litigating over the use of the alley, the locking of the gates in response to Bass's breach of the injunction

and Mr Giacomini's 2 years at Café Fabio. Even if he did manage a few visits, for much of the period in which he claims use I am satisfied that the gates at both ends of the alley were locked shut.

254. However the Cloth Market gate was secured against Balmbra's, this form of closure must have been temporary for by 1996 Mr Giacomini, the then tenant of 10 Cloth Market, said that it could be opened with the push bar. Whilst it was kept shut, occasionally people got into the alley to urinate if the gate had not been shut properly, and he used to shout at them to leave. Mr Giacomini had a clear motive to prevent the public entering the alley, which led to the side door to his restaurant, particularly given the behaviour which he described, and I accept his evidence about this.

Summary of conclusions as to public user

255. It follows from my findings as to the locking of the Cloth Market gates and the Grey's Court gates that in the modern era:

White Hart Yard

- a. From 1965 to 1979 the public could only use the yard as an access during the day as the gates at both ends were locked at night. Such use during the day time will have been necessary as there were businesses in the yard whose customers would need access. I also accept that some members of the public, for example Mr Cussins and Mr Khanna will have used the yard at these times to pass between the Cloth Market and Grey Street.
- b. From 1979 until 2001, the public could use the yard as a cut through during the day. At night they could enter from Grey's Court but could not exit onto Cloth Market and there was no entry

from Cloth Market at all due the closure of the gates. There were occasions when passage at night was possible as there were times when a tenant omitted to close the gate but in the main, the gates were locked shut and there was no evening passage available. There is no evidence as to when the evening lock up took place and it may have varied to accommodate the tenants, but I am satisfied that the Cloth Market gates were usually locked overnight.

- c. Starting with the opening of Bubbles in 2001, the public could use both entrances of the yard when Bubbles was open but not otherwise. Further, by 2000 there were Highways Act notices in the yard. From 2003 the steel gates were locked shut and passage was not possible. Thereafter there were occasions when the gates were left open in error, but these were few. From 2007 it has not been possible for the public to enter either end of the yard due to the presence of doors at the Grey's Court end and the steel gates at the Cloth Market.

Ship's Entry

- d. Prior to the modern era there were gates at either end of the alley. I am not satisfied that it was used as a cut through in the period from the mid 1950s to 1960s.
- e. The gate at the Grey's Court end was probably a replacement gate fitted for Balmbra's benefit to comply with fire regulations. For the same reason the wrought iron gate, which had been at the Cloth Market since the late 19th century was altered by the addition of a push bar closer and reversing the swing of the gate so that it opened outwards from hinges set further back towards the undercroft.

- f. From the time of the fitting of the push bars in the period from the mid 1960s to 1990 the Grey's Court and Cloth Market gates were usually kept shut and locked by the push bar mechanism save when the tenants who used the alley required entry and exit. There will have been times when the Cloth Market gates were left open, whether by accident, or in the case of Balmbra's by design, but Mr Horgan frequently checked his premises on the Cloth Market and when he saw the gate propped open he would close it. I am not satisfied that the public were using Ship's Entry as a cut through in this period.
- g. Between 1990 to 2002 the gates at both ends of Ship's Entry were usually locked shut save on the odd occasion when someone did not close the gate properly and during the times in 1991 and 1992/3 that Balmbra's acted in breach of their licence. The gates at both ends were locked on two occasions in such a way that Balmbra's could not open them in 1994. From 1996 to 1998 Mr Giacomini ensured the Cloth Market gate was kept closed and warned off members of the public whom he found in the alley. Before the end of Mr Giacomini's occupation the intermediate gate was installed. In addition, the inner door to the alley was also closed from time to time although there is no evidence as to whether it was locked. In 2002 a blue door was placed over the Cloth Market entrance preventing entry and shortly thereafter the doorway was boarded over. The Defendants' evidence of use during this period is in any event scant, and their case that the public used the alley at will is not made out. It would not have been possible due to the presence of locked gates.

Factual findings relevant to private use

256. There has been no evidence that the tenants of L'Aragosta used the exit from the rear of no 11 into the alley save to visit their store cupboard and to pass from that door to the Grey's Court gate. Accordingly, it has not been proved that the tenants of no. 11 have ever used the way from the rear door of the restaurant to the Cloth Market exit.

257. At the time of the transfer to Mr Murphy in 1991, the part of 11-13 adjacent to Ship's Entry was vacant and had been for many years. At the time of the transfer and for at least 3 years prior thereto, which is a reasonable time for enquiry, there can have been no user of the exit which now serves as the current fire door, or a door in the immediate vicinity as a fire exit, or the suspended fire escapes, there was no-one there to use them. The rear of 13 Grey Street was dilapidated to the extent that access to the second floor and above was blocked by a roof collapse. Mrs Robinson, who purchased from Mr. Murphy believed that her right of fire escape from that door was to Grey's Court alone.

258. Shortly prior to the transfer the first floor over L'Aragosta had been tenanted to S. Aikman & Robertson, but they had no access to the L'Aragosta rear exit. Nor is there evidence that this tenant had access to the door which now serves as the fire door into the alley or the suspended fire escapes on the south face of the building. I accept that Mr Pizzuti used the alley to go from the back door of Santino's to the rear of L'Aragosta when he wanted to borrow something.

259. Mr Hopper was involved in the design of a fire escape into Ship's Entry from the rear of 13 Grey Street. He was first instructed by Mr Gould of Bridgewater and, after the sale of 11-13 Grey Street, by Mr

Murphy the purchaser. Whilst working on the design for Bridgewater, Mr Hopper was told by Mr Murphy that Mr Gould had told him that the route of escape from the new fire door was to be towards Ship's Entry. Mr Hopper designed the door to open clockwise as a result. At some time between 1994 and 1998 the intermediate gate was installed in the alley.

260. There is bulkhead lighting along the alley, but there is no evidence as to by whom and when this was installed. The alley was an emergency exit for Balmбра's between 1962 and 1994 and there is evidence that in 1984 Balmбра's affixed wiring to the buildings on the other side of the alley for emergency lighting. Bass would not have needed to install lighting if it already existed. It may be that it is the product of Bass's works in the alley. Whether or not it was, its presence is consistent with the Balmбра's need and, therefore, does not establish that it was installed to assist the occupiers of 11-13 Grey Street in their use of the passage in emergencies or at any other times.

Contentions on the law

261. In view of my factual conclusions it is not necessary to consider the parties' legal submission in relation to every permutation of the facts which each argue the evidence supports. I shall start by looking at the arguments which were common to both White Hart Yard and Ship's Entry.

262. The parties, by which I mean the active parties, i.e. the Claimant and Defendants, not the neutral third party, agree the following propositions of law:

- a. User by licence is user by right and not as of right;
- b. Licence can be given unilaterally;
- c. The question as to whether licence has been given is answered by reference to an objective view of the landowner's conduct not the subjective state of mind of the user of the land; **R v Oxfordshire County Council ex parte Sunningwell Parrish Council [2000] 1 AC 335** per Lord Hoffman at pp354B-356E.
- d. Licence can be implied;
- e. Mere inaction does not give rise to an implied licence to use land;
- f. The locking of a gate on the way is notice to users that the use of the land is with the landowner's permission.
- g. Leaving open a gate during the day but locking it at night will be sufficient interruption to evidence an absence of intention to dedicate; see **R (Beresford) v Sunderland City Council [2004] 1 AC 889** per Lord Walker at 83 (occasional closure of the land to all-comers will suffice). Interruption for these purposes can be very modest, for example the locking of a gate for a day a year in **British Museum Trustees v Finnis (1883) 5 C&P 640**, referred to by Mr Pryor. Erecting a sign indicating that there is no public right of way, described by Mr Pryor as a 'Highways Act sign' also proves the absence of an intention to dedicate; section 31(3) Highways Act 1980.
- h. For the purposes of section 31 of the Highways Act 1980 an intention not to dedicate requires evidence of an overt act on the part of the landowner such as to come to the attention of the public who used the way to demonstrate the absence of intention - **Regina (Godmanchester Town Council) v Secretary**

of State for the Environment, Food and Rural Affairs [2008] 1 AC 221
per Lord Hoffman at 254B.

- i. A tolerated trespasser is nevertheless a trespasser. Use of the land by such an individual is not by licence and is thus as of right.

263. In addition, the parties agree that which has to be proved to establish public and private rights of way, as set out in paragraph 17, above, and following.

264. In view of my factual conclusions as to the historic and modern periods that would be an end to the Defendants' case as to public rights of way. They have not proved uninterrupted use by the public as of right in either period.

Nevertheless, in case that is considered too simplistic an approach and in deference to the thorough way in which the case was prepared I shall consider the key arguments.

265. Mr Laurence says that the Defendants' case at common law is fatally flawed. The Defendants' case at its highest is that users of both ways were tolerated trespassers. In order to make out the case at common law the Defendants have to satisfy the court, by inference from the long user, that there has been an act of dedication by the highway owner coupled with an intention to dedicate. He referred me to **Regina (Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs [2008] 1 AC 221** where at [6] Lord Hoffman said:

“As a matter of experience and common sense, however, dedication is not usually the most likely explanation for long user by the public, any more than a lost modern grant is the most likely explanation for long user of a private right of way. People do dedicate land as public highways, particularly

in laying out building schemes. It is however hard to believe that many of the cartways, bridle paths and footpaths in rural areas owe their origin to a conscious act of dedication. Tolerance, good nature, ignorance or inertia on the part of landowners over many years are more likely explanations.”

266. Mr Laurence argues that the only arguable claim here is that under section 31 of the Highways Act 1980, but that too cannot succeed because the Defendants have not identified a 20 year period from the time the right was called into question to establish the intention deemed under that section; he acknowledges that the tolerated trespasser point would not assist the claimant under the Act as the intention to dedicate is deemed. He referred me to **Fairey v Southampton CC [1956] 2 Q.B. 439** where Denning LJ said in relation to the calculation of the 20 year period, at 456:

“The thing to do is to find the finishing point and then count back 20 years. This means that in this case we have to find the time when the right of the public to use the way was first “brought into question by notice as aforesaid or otherwise” within section 1(6) of the Act.” (*He was referring to the predecessor to section 31 in the Rights of Way Act 1932*)

267. It is argued that those claiming the public right have the burden of proving at least 20 years use as would reasonably be regarded as the assertion of a public right. If they do, the owner will be taken to have acquiesced unless the owner can claim one of the vitiating circumstances, such as permission; see **R (Lewis) v Redcar & Cleveland BC (No. 2) [2010] 2 AC 70** per Lord Hope at [67]. There is, thus, an evidential burden on the landowner at that stage to produce evidence of the vitiating circumstances; **Welford v Graham [2017] UKUT 0297 (TCC)** see per Morgan J at [43] to [46]. Where the landowner discharges the evidential burden, the legal burden of disproving the relevant circumstance is on those who claim the right;

Gardner v Hodgson's Kingston Brewery Co [1903] AC 229 at 238. It is essential, therefore, that the claimant knows precisely what 20 year period is relied upon so that it can seek to establish that use was by implied permission, or indeed be able to investigate and challenge, effectively, what use there was.

268. The importance of establishing when the right is called into question is highlighted by the case of **De Rothschild v Buckinghamshire County Council (1957) 8 P& CR 317** where a pathway running across a farm was used by the public from 1891 to 1914, when it was closed off with a padlocked gate. The public forcibly removed the padlock and continued to use the path until it was requisitioned in 1940, after which there was no sufficient evidence of user. It was held that whether the public right was called into question in 1914 or 1948, there was no period of 20 years immediately before the right was called into question when the public had used the path as of right without interruption. It follows, says Mr Laurence, that you cannot prove the requisite period of user without first establishing the date of calling into question.

269. I was also referred to **Applegarth v Secretary of State for the Environment, Transport and the Regions [2002] 1 P& CR 9**, a decision of Munby J, where it was held that the question as to whether the right has been brought into question is one of fact and degree and that the burden of proving the lack of intention to dedicate is on the person seeking to displace the presumption of dedication. In the case of Ship's Entry, even if I found it was not gated, the right was brought into question when the landowner rebuffed Bass's attempts to use Ship's Entry.

270. Dealing with White Hart Yard, Mr Laurence accepts that the public would have used the yard as there is evidence of the presence of businesses

which would have attracted the public and required access during business hours. The very presence of the shops acts as an invitation to the public to enter the yard. He placed the users in 4 categories. The first is the tenants who will have had express or implied rights to access the let properties. The second is the employees of a tenant who can take advantage of that tenant's rights. The third group was those who entered at the implied invitation of the tenant; this group encompassed actual customers, those who were merely window shopping and users who entered with a fixed intention of using it as a short cut but who changed their mind and decided to enter a shop. The fourth group entered the yard with the fixed intention of using it as through route only, which remained unchanged.

271. Mr Laurence said the question for decision was whether the tenants' invitation extended to category 4 users. His answer was that it would be absurd if it did not. It was always possible that a regular user of the yard solely for transit may decide to use the commercial premises. If, for example, for 143 days they used the yard as a cut through but on day 144 they visited a bar to purchase a drink, it could not reasonably be said that they were trespassers for 143 days and an invitee on day 144. The tenants have an interest in every passer-by as they are all potential customers.

272. Dealing with the gates, he said that it didn't matter whether they were locked or not, a shut gate across a highway is an intimation of an absence of public rights, it is a message to the public to keep out. This was very much a secondary case as the Claimant's primary contention is that on balance the gates were locked from time to time. He underpinned the point by reference to **Herrick v Kidner [2010] 3 All ER 771**. That was a case in which it was held that the placing of a brick pillared gateway which covered half a public footpath and with an openable gate, which enabled the public to pass, was

nevertheless an interference with the highway as the public had a right to pass over the entirety of the footpath. The keeping of a closed but unlocked gate over the ways in this case amounted to an interference.

273. My Pryor did not explain why the user upon which he relied should not be ascribed to tolerance or indifference as opposed to an intention to dedicate. Whilst he said he was relying upon common law dedication his submissions were directed at establishing dedication under the 1980 Act. Central to his argument was the proposition that anyone who entered White Hart Yard for a purpose other than visiting the commercial premises was a tolerated trespasser. If that individual, however, decided once inside the yard to visit one of the shops they ceased to be a trespasser, or someone without permission. Mr Laurence's category 4 visitors could not have permission.

274. The owner of an alleyway which was a busy city centre cut-through would be aware that there were different types of user. Some would be welcome, others undesirable. Owners are not interested in issuing a standing invitation to everyone during business hours. For example, they would not want delirious or disappointed football fans from another local city who stopped off for a few drinks in the Bigg Market coming through the yard. He says that the suggestion that there is a unilateral invitation to the public at large is to ignore real life and ignores the ratio of **ex p Sunningwell (above)**. The fact that the use of the yard is made more desirable to visitors by the presence of shops is no more to be treated as evidence of implied permission than was the provision of benches in **Beresford (above)**. There it was held that the cutting of grass and provision of benches on a piece of the council land used by the public for recreation, which encouraged public use, were not indicative of the grant of a revocable licence for such use. In the absence of

any other evidence from which a licence could be inferred, the public use was as of right.

275. It is said that there is no need to identify the date the right is put in issue. Taking White Hart Yard as an example, the evidence shows that there was unrestricted public user for the 20 years prior to 1934. Given the nature of the location, an inner city cut-through, it must be assumed that such user continued until it was brought into question. Thus, whenever that was, and the latest date is 1965, there must have been 20 years use. **De Rothschild** is to be distinguished on its facts because it was a country lane where the user was likely to have stopped. **Applegarth** is distinguished on the basis that it only decides that the actions of a tenant suffice to bring a right into question but does not detract from the Defendants' case based on the inference that the right must have been brought into question at some time.

276. Mr Pryor distinguished **Herrick v Kidner** as that was a case where there was an existing public footpath in respect of which any blocking is an interference. In this case he is contending that the way itself, in this case Ship's Entry, was deemed dedicated subject to users having to open the gate. He did not make a like submission in relation to the Cloth Market gates. In the face of objection from Mr Laurence that this is not how the Defendants' case had been put until his closing submissions he said it was a very unlikely finding on the evidence and not his primary point. In support of his submission he relied upon **Davies v Stephens (1836) 7 C&P 570**, **Bateman v Burge (1834) 6 C&P 391** and **Fisher v Prowse (1862) 2 B&S 770**.

277. **Davies** was an action in which the jury was directed that a gate across a footpath tended to show that it was not a public highway but was not conclusive as it may be been dedicated subject to the presence of the gate for enclosing cattle. **Bateman** is a case about a footpath with a stone stile across

it and in **Fisher** the owners of properties which existed at the time of dedication of the highway were entitled to retain a raised cellar flap and a set of steps to the house, the highway being dedicated subject to these features.

278. It was argued, in reliance on **Davies and Lewis v Thomas [1950]**, that in the case of an unlocked gate the inference is not clear and will be fact dependent as the gate may have been erected to control stray animals. Mr Pryor suggested that the Ship's Entry gate may have been installed to prevent stray dogs entering the alley.

Contentions unique to Ship's Entry

The charity point

279. In relation to Ship's Entry the Claimant argued that for the period to 1974 there was no capable grantor because 10 Cloth Market was owned by the Moulton Charity. At common law, where land was held for a public or statutory purpose, and dedication was incompatible with that purpose, the landowner could not validly dedicate any interest in their land. The rule is preserved in S.31(8) of the Highways Act 1980. Mr Laurence referred to Tudor on Charities, 10th Edition, pp. 6 and 18 for the proposition that a charity is an institution whose purposes are exclusively charitable and that for a purpose to be charitable it must be for the benefit of the public or a section of the public.

280. There is a mechanism by which a charity can dispose of an interest in land, to be found in the Charitable Trusts Amendment Act 1855, superseded in this respect, as from 1st January 1961, by the Charities Act 1960. The former provides:

“XXIX. Restrictions of Charges and Leases of Charity Estates.

It shall not be lawful for the Trustees or Persons acting in the Administration of any Charity to make or grant, otherwise than with the express Authority of Parliament, under any Act already passed or which may hereafter be passed, or of a Court or Judge of competent Jurisdiction, or according to a Scheme legally established, or with the Approval of the Board, any Sale, Mortgage, or Charge of the Charity Estate, or any Lease thereof in reversion after more than Three Years of any existing Term, or for any Term of Life, or in consideration wholly or in part of any Fine, or for any Term of Years exceeding Twenty-one Years.”

The equivalent provision in the 1960 Act provides:

“29. Subject to the exceptions provided for by this section, no property forming part of the permanent endowment of a charity shall, without an order of the court or of the Commissioners, be mortgaged or charged by way of security for the repayment of money borrowed, nor, in the case of land in England or Wales, be sold, leased or otherwise disposed of.”

I am asked to construe “charge” in the wide sense of encumbering the land, which would include granting a way over the land, and it is said that

“otherwise disposed of” has a similarly wide meaning. **Fell v The Official Trustee of Charity Lands [1898] 2 ChD 44** is relied upon in relation to the meaning of ‘charge’ and **Housden & another v Conservators of Wimbledon and Putney Commons [2008] 1 WLR 1172** for the meaning of the latter. This is said to be consistent with the legislative intent of such provisions which, in relation to the 1855 Act was explained by Chadwick LJ in **Bayoumi v Women’s Total Abstinence Union Ltd [2004] Ch 46** at [33]

as being “*to protect the objects of an endowed charity from an improvident disposition of land held by charitable trustees.*” It is common ground that “the Board” referred to in the 1885 Act is a reference to the Charity Commissioners.

281. Mr Laurence says that the fact that there is a mechanism for the disposal of interests in the land is irrelevant to the fact of dedication, actual or deemed, as dedication is incompatible with the public purpose. Alternatively, if the trustees lack the power to do something without permission a disposal without such permission must of its nature be incompatible with the public or statutory purpose. This is a case where there has been no permission. Permission of the Charity Commissioners cannot be inferred as they will have known nothing about the use of Ship’s Entry; reliance is placed on **Oakley v Boston [1976] QB 270**.

282. Mr Pryor argues that the charities argument can only be relevant to common law dedication. It is irrelevant to dedication under the 1980 Act due to the absence of a requirement to prove dedication. The meaning of the word ‘*charge*’ in the 1855 Act must be restricted to the grant of securities over property. The words “*otherwise disposed of*” in the 1960 Act do not extend to the grant of rights of way; he also relies on **Oakley v Boston** for this proposition where at pp 276H to p.277C Megaw LJ said:

“I return to the plaintiffs’ first ground. The plaintiffs concede that since 1858 an incumbent has had statutory powers, subject to certain consents, to sell or convey in exchange or by way of partition, or otherwise dispose of, glebe land. [Section 1 of the Ecclesiastical Leasing Act 1858](#) so provides. To that extent, says counsel, the judge was right in the passage which I have cited from his judgment as to power “to sell, convey or exchange” and so forth.

But, counsel submits, such statutory power did not include a power to grant an easement...

“I would for myself accept, for the purposes of this appeal, that a mere power to sell or convey or otherwise dispose of land would not be sufficient if the person so empowered was not also empowered to grant an easement over the land. To that extent I agree with the argument of counsel for the plaintiffs.”

Mr Pryor says that the fact that the fact that the Court of Appeal held that there was a power to grant an easement in that case resulted from an expansive construction of “*other property*” in reliance upon the provisions of an earlier Act concerning the powers of an ecclesiastical corporation to grant easements. **Fell (above)** was a case where the Court of Appeal made it clear that “charge” is to be construed in the sense of a security over property. **Housden (above)** can be distinguished because the case concerned easements over land which, for a number of reasons are different in character to public rights of way.

283. A further point taken is that there is a distinction to be made between the purpose of a charity, in this case the relief of poverty by the distribution of an annuity of £15 per annum between a particular class of the poorest persons of the parish, and the activities undertaken by the charity to achieve its purpose, namely letting property to obtain an income to fund the annuity. A public right to has to be prevented by physical or direct obstruction before it can be said that the grant of a public right of way is incompatible with the public purpose for which the land is held. Mr Pryor referred to **R (Newhaven Port Properties Ltd) v East Sussex County Council [2015]**

AC 1547 and **British Transport Commission v Westmorland CC [1958] AC 126** in support of this proposition. He argues that the distribution of income from rents to the poor is not interfered with by dedicating a public highway over the rented property, these are not incompatible activities.

284. A closing argument based upon the powers of the trustees under the Settled Land Act 1925 was abandoned by Mr Pryor in subsequent written submissions dated 18th December 2019.

285. I received additional submissions following judgment of the Supreme Court in **R (on the application of Lancashire County Council) v Secretary of State for the Environment, Food and Rural Affairs [2019] UKSC 58**. Mr Laurence argues that the case establishes that the doctrine of statutory incompatibility put forward in **Newhaven (above)** is not confined to statutory undertakers and emphasises the primacy of the construction of the statutory provision. He says that as the 1885 and 1960 Acts, when properly construed, required the trustees to obtain consent to dedicate a highway for public use there is necessary incompatibility between a purported unconsented dedication and the statutory requirement for consent. Where incompatibility turns on consent, the factual inquiry which was a feature of the decision in **Westmorland (above)** is not appropriate, the only question is whether the consent was obtained.

286. Mr Pryor responded that **Lancashire** was irrelevant to this case on the issue of statutory incompatibility. The Supreme Court were largely concerned with the correct interpretation of the majority of that court in the case of **Newhaven**. The incompatibility test to apply in this case is that set out in **Westmorland**, the court must be satisfied on the facts that the disputed use would be incompatible with the statutory or public purpose.

287. Yet further submissions were received following the decision in **R (on the application of Preeti Pereira) v Environment and Traffic Adjudicators & London Borough of Southwark [2020] EWHC 811 (Admin)**. I need not dwell on these submissions as they both acknowledged that this case was an example of the application of the legal principles to which the parties referred in their closing arguments. Mr Laurence took the opportunity of emphasising that the overt acts which gave rise to a licence to users of the yard included the tenant shop keepers opening and closing their shops, thus inviting users during business hours, and the opening and closing of the gates.

The private rights claim.

288. The Defendants' case is based on the assertion that at the time of the conveyance of 11-13 Grey Street to Mr Murphy on 11th November 1991 there was actual or permissive user of Ship's Entry by the tenants of L'Aragosta, enjoyed with or reputed to be enjoyed with no. 11, which will have passed to Mr Murphy under the general words implied into conveyances by s.62 of the Law of Property Act 1925. Although Mr Pryor originally argued that such rights had passed to Mr Murphy under the rule in **Wheeldon v Burrows (above)**, he accepted in his supplemental submissions of 10th December 2019 that the rule did not apply in the light of **Kent v Kavanagh (above)** as there had not been common occupation during the time upon which reliance is placed.

289. The claim for a right of fire escape along Ship's Entry from the fire door in no. 13 to the Cloth Market is put both on the basis of the operation of S.62 of the 1925 Act and in reliance upon **Wheeldon v Burrows**. In relation to

s.62 the Defendants claim that there was similar actual or permissive user enjoyed, or reputed to be enjoyed, with no. 13 Grey Street at the time of the conveyance. This route of fire escape was enjoyed by the part of 13 Grey Street which was in common occupation, was apparent at the time of the 1991 conveyance and was reasonably necessary for the enjoyment of the conveyed property.

290. Mr Pryor placed great significance on the absence of the interim gate at the time of the 1991 transfer. Without that gate Ship's Entry could be passed in either direction from the fire door in no 13. There would be no sense in restricting those escaping from the door to going towards Grey's Court, for that may require them to pass under the part of the building which is on fire.

291. The Claimant's response to this claim is very much based on the facts. Mr Morgan, who dealt with the Claimant's final submissions on this issue, said there is no evidence of any use by 11 or 13 Grey Street to pass along Ship's Entry to the Cloth Market. At the time of the 1991 conveyance, and for a goodly time before, the evidence points to quite the opposite. Furthermore, an access to the Cloth Market is not reasonably necessary for the enjoyment of 13 Grey Street; it has perfectly good access directly onto the street and from the existing fire door in Ships Entry into Grey's Court.

292. I asked Mr Morgan why, in the light of his argument, the Claimant accepted the right of fire escape from the fire door into the alley at no 13 in the direction of Grey's Court. He said that the Claimant must accept that at the time of the 1991 transfer there was a common intention that new arrangements for exit in case of a fire, which Mr Hopper designed, would provide a fire exit in that direction. Accordingly, whilst the First and Second Defendants cannot establish any user to support their claims under s.62 and

Wheeldon v Burrows, the transfer must have included an implied easement to this effect based on the common intention of the parties. He helpfully referred me to **Linvale Investment Ltd v Walker [2016] 2 P. & C.R. 12** as an example of a case where such an implication was made in the absence of user necessary to establish the existence of a quasi- easement at the time of transfer. He argued that the evidence pointed to a common intention that there was only to be exit towards Grey's Court because (a) Mr Hopper had been told that Mr Gould has said that was to be the direction for emergency exit, which had been passed on by Mr Murphy (b) Mrs Robinson, the purchaser from Mr Murphy also believed that was the limit of her right of way and (c) the installation of the interim gate prior to or shortly after the transfer is an indication of such intention and negatives any intention that there would be a right to use the alley to the west of the gate.

293. The Claimant takes issue with the assertion that it is sufficient for the purposes of s.62 to show that the claimed rights were “reputed” to be enjoyed with the conveyed land. This was an argument which first appeared in Mr Pryor’s additional submissions of 10 December 2020 and the Claimant, rightly, objected that the submission went beyond what had been permitted. Although Mr Pryor did not use the words “reputed to be enjoyed with” in his submissions, he referred to a passage in the judgment of Luxmoore J in **Clarke v Barnes [1929] 2 Ch 368** where the words appear. I was referred to **Gale on Easements (20th Edition) chapter 3-46** which points out that the words do not appear in that form in s.62 and what was probably meant was that the right was considered to be enjoyed with benefitted land.

Discussion and conclusion on the legal submissions

The public highway claim

294. A claim based on common law dedication is fatally flawed, even if the two ways were used by members of the public without permission. White Hart Yard was tenanted well into the 1990s, albeit the number of tenants was much reduced from the 1980s onwards. In such circumstances the users would have fallen into Mr Laurence's 4 categories. The first 3 did have permission; the tenants unless prevented were entitled to visit their premises at all times as would be the case with their invitees. As regards Ship's Entry, whilst tenanted by businesses which sought passing trade it was in the same position as White Hart Yard. It seems to have lost its commercial tenants at an earlier stage but those using the yard as a cut through thereafter would be properly regarded as tolerated trespassers.

295. It is only the category 4 users who Mr Pryor can categorise as using the ways without permission. In circumstances where the way was used by category 1 to 3 users during business hours, it would not be practical for the landowner to weed out those in category 4. If there was such use it is much more likely to be explained by tolerance, good nature, ignorance or inertia than an intention to dedicate. That, however, must be the height of his case. I do not accept that category 4 users were trespassers unless they entered the yard for the purpose of visiting one of the businesses.

296. A landlord of an arcade type property comprised of shops and business looking for custom from the public has an interest in footfall. A busy arcade is likely to be more attractive to tenants than one which is moribund. By letting premises for purposes which encourages the public to visit, the landlord gives implied licence to the public to pass through during trading

hours. Mr Pryor's suggestion that the visitor who intends to pass through but decides, once in the yard, to visit a shop enters as a trespasser but becomes a lawful visitor at the point of that decision does not reflect what happens in the real world. Both the landlord and the businesses in the yard have an interest in such people visiting the yard in the hope that they will make such a decision. I do not, however, go so far as to say that there is an implied invitation to use the yard outside business hours i.e. to look into the windows of closed shops, but that was not the Claimant's case. Had there been use out of business hours, such users would have fallen into the category of tolerated trespassers.

297. The claim under the 1980 Act gives rise to, what appear to be, novel points. The first is as to whether the person claiming the public right has to identify a date from which the 20 years is calculated retrospectively. The second is whether S.31(8) of the 1980 Act prevents the operation of s 31 in relation to land held by a charity.

The date of calling into question point

298. I agree with Mr Laurence that the Defendants must prove the date from which the 20 year period is to be back calculated. I do not accept, however, that this is to be deduced from the unfairness to the landowner in facing a claim which cannot be properly investigated. The doctrine "once a highway" always a highway can, indeed, have harsh consequences for a landowner who was unaware of its existence when acquiring the land. But this is the natural consequence of the wording of the statute which sets the material period as 20 years before the calling into question of the right. It is, for practical

purposes, also the natural consequence of the decision in **Fairey (above)** which permits the proof of any 20 year period, however far it is buried in antiquity. This was recognised by Parker LJ in the judgment in **Fairey** where, commenting on his conclusion that the predecessor to s. 31 of the 1980 Act was not caught by the presumption that an Act does not have retrospective effect, he said at 467:

“I appreciate that, as Stable J. pointed out, this interpretation may in certain circumstances produce consequences which are hard and even extraordinary, but in my judgment the language of the Act taken as a whole is sufficiently clear to rebut the presumption.”

299. The reason the Defendants here have to identify the date of calling into question is that they have to prove the 20 years use of right in the 20 years preceding that date. That is what section 31 of the 1980 Act requires. As Denning LJ said in **Fairey** at 456, “*the thing to do is find the finishing point and then count back 20 years.*” Whilst it is the case that the question of the date of bringing into question is one of fact and degree, see **Applegarth (supra)**, it cannot be overlooked that it is for the Defendants to produce such evidence as they can to establish the relevant date. There can be several dates of calling into question, for example the locking of a gate or displaying a Highways Act sign, and the court has to look at the 20 year period before each to determine whether the requisite public user has been proved. If the best they can do is, as in this case, to point to the first date they are aware that the way was gated, that is the factual basis of the case which the Claimant is asked to meet and upon which the court to adjudicate. If they cannot prove 20 years of user as of right in that period, they have failed to prove their case.

300. It is no answer to say that those claiming the existence of the right of way will not necessarily know the date of the first calling into question, for example because they are unaware of the date of the installation of a gate. The date of calling into question they must prove is in relation to the period of public use claimed. If the right was already called into question in that period they cannot prove the 20 years of use and the claim will of necessity fail. The difficulty this appears to cause where there is no direct evidence of use but the claim is entirely reliant on inference, as in the Defendants' case on historic user, is illusory. Taking the Cloth Market gates on White Hart Yard as an example. I have found that they were in place in the early 1960s and locked at night. There is no evidence that this was not the case going back to the 19th Century, albeit the gates may have been renewed from time to time. Unless the Defendants can point to a time when such gates were not present and locked or that they were left open, they cannot prove by inference that there was public user as of right. They do not fail because they cannot prove the date of first calling into question but because they cannot prove the requisite user.

301. Quite apart from the statutory requirement as to determining a date of calling into question, there is practical reason why the Defendants cannot absolve themselves from identifying a date. If the Defendants were permitted to do so they could, effectively, place on the Claimant an evidential burden to show that there was no 20 year period ending between 1934 and 1965 in which use had been enjoyed as of right without having made out a prima facie case that there had been any calling into question in that period preceded by the period of 20 years user upon which they rely.

302. There is a further reason why the Defendants cannot succeed on their ambulatory date of calling into question. If they had proved that there was 20

years of user as of right up to 1934 but cannot prove when after that date the 20 year period must end, save for the year 1965, they are asking the court to find that there was no interruption in user within whatever 20 year period can be relied upon other than by the calling into question of the right. **De Rothschild (above)** is of relevance here for even if they can prove 20 years user up to 1934 it will avail the Defendants not unless they can show that such user continued up to the date of calling into question such that they prove 20 years user immediately before that date. The court is in no position to make such a finding. There are any number of reasons why user may have been interrupted without being called into question; I give examples in my findings on the facts. Indeed, it may have been interrupted before 1934 or the right called into question sufficiently frequently since 1867 for the public never to have had 20 years uninterrupted user.

The Charity Point

303. There are two distinct matters to consider. The first is whether the charity trustees required the consent of the commissioners to dedicate a public highway over the trust property. The second is as to whether such a disposal is one to which section 31(8) of the 1980 Act applies.

304. There is a further point which neither party raised and which arises from the difference in wording between section 1 of the Rights of Way Act 1932 and section 31 of the Highways Act 1980. The 1932 Act has an additional proviso which rebuts deemed dedication which applies where:

“during such period of twenty years there was not at any time any person in possession of such land capable of dedicating such way.”

This was not replicated in either the Highways Act 1959, which by its long title was an amending Act, or the 1980 Act. The omission of these words becomes significant when considering the section 31(8) point.

305. Dealing first with the meaning of ‘charge’ in the 1855 Act. The meaning contended for by the Claimant, i.e. any burden on the land, is not to be found in either Stroud’s Judicial Dictionary 9th Ed or Jowitt’s Dictionary of English Law. As applied to property, both suggest that a charge is a security on property, though it has a wider meaning than a mortgage or lien.

306. I cannot find support in the judgment in **Fell (above)** alone for the proposition that this word includes any burdening of the charity estate, including the dedication of a right of way, though the case does tell us that “charge” is to be construed as a general word, i.e. it is intended to encompass a number of different types of dealing with the charity estate.

307. **Fell** was concerned with charity trustees who obtained £3,000 of advances from a bank to cover a deficit between the charity’s income and expenditure with the intention of recouping the advance out of future charity income. They were trustees for one year at a time and not trustees of the future income of the trust. A time came when they were required to repay the advances and they sought to recover these sums from the charity. One of the arguments ranged against them was they were not entitled to contract for loans and charge the property of the trust without the sanction of the Charity Commissioners. Rigby LJ held that the trustees in looking to reimburse themselves out of the future income of the trust had intended to charge the property of the trust. It is in this context that he said that “charge” is a general word unlike “sale” and “mortgage”. Lindley MR, at p.54 described what they were claiming was an equitable lien over the trust property for their

expenditure which was caught by s.29. In both judgements the ‘charge’ is being construed as meaning an informal security.

308. There are two relevant canons of statutory construction which need to be considered. The first is that the mischief which a statute is intended to prevent is part of the context which can be taken into account in construing its meaning; see **Bennion on Statutory Interpretation 7th Ed Ch 24.3**. The second is that as the purpose of a statute is generally to affect a change in the law, it is legitimate to look at the previous law as an aid to construction; **Bennion, Ch 24.5**. The section heading can also be used as an aid to construction provided due account is given to the fact that its function is to provide a brief account of the material it governs; **Bennion, Ch 16.7**. Section 29 is problematic in this respect as it is headed “*Restrictions of Charges and Leases of Charity Estates*” whereas the section also deals with sales. The heading seems to encompass within “*Charges*” disposals by way of sale or mortgage.

309. It follows from **Bayoumi (above)** that the purpose of section 29 of the 1855 Act was to protect charities from improvident disposals of their assets. **Tudor on Charities, 10th Ed, Ch 17-042** tells us that before the 1855 Act a disposition of charity land was voidable unless it was established that it was for the benefit of the charity. The change in the law brought about by the Act was that certain disposals, instead of being voidable, became void if made without permission. As the word “*Charges*” in the section heading seems to include disposals of the charity estate by sale and mortgage, that word as used in the body of the section in the singular must include other disposals. The section does not refer to a charge on the property but of the property. It is the giving of some right over the property short of, or other than, a sale or mortgage, as was the case of the equitable lien in **Fell**. If a dedication of a

right of way can amount to a disposal of the charity estate, in this its land, construing the word “charge” to include such a disposal, which could, but will not necessarily, devalue the charity estate would fit with the mischief the act was designed to prevent and the change in the law affected by the 1855 Act. Indeed, this is a question common to both the application of the 1855 and the Charities Act 1960.

310. In **Housden & another v Conservators of Wimbledon and Putney Common** [2008] 1 WLR 1172 the court considered section 35 of the Wimbledon and Putney Commons Act 1871 which provided that:

“It shall not be lawful for the conservators, except as in this Act expressed, to sell, lease, grant or in any manner dispose of any part of the commons.”

There was an issue as to whether a claim to a prescriptive easement of way over Putney and Wimbledon Common was defeated due to the lack of the conservators’ power to make such a grant.

Mummery LJ said, at 22:

“I accept that section 35 is a very wide prohibition against alienation of the commons by the conservators. I also agree that there is a sense in which the grant of an easement over land is disposing of part of it. It is a disposal of a right over land which form [*sic*] the commons. There is a parcel of rights and interests in that land.”

He went on to hold at [26] that the grant was not prohibited by the section because the prohibition was against disposal of the commons which was not so much a reference to rights and interests in land as the physical area of open space.

311. In the light of this extract from **Housden**, I accept that the grant of an easement over land is a disposal. Mr Pryor said that the extract from **Oakley**, quoted above at paragraph 280, prevents such a conclusion, but it is important to take into account Megaw LJ's words "*for the purposes of this appeal*" in accepting the plaintiff's argument as to the ambit of a power to "*sell, convey or exchange*". His acceptance was limited to the argument in the appeal and was not intended to be of wider application.

312. In contrast to the position in **Housden**, the dedication of a public right of way over the land does affect the rights and interests in land. Further, it is closely analogous to the grant of an easement. Accordingly, set in the context of the mischief which the 1855 Act seeks to prevent and the change from the previous law, the word "charge" in the 1855 Act is to be construed as including the type of disposal to which Mummery LJ was referring, the disposal of a right over the land.

313. Section 29 of the 1960 Act is differently worded to its predecessor. It specifically prohibits a disposal of the land without consent. I do not accept

Mr Pryor's distinction between private and public rights of way are relevant to the construction to be placed on the section. Mummery LJ's rationale for treating the grant of an easement as a disposal of part is that it is a giving up of part of a parcel of rights and interests in the land. The most fundamental right of the landowner is to exclude the world from their land. By dedicating a way over the land in favour of the public there is a disposal of the absolute right of exclusion, albeit only to the extent necessary for the public exercise of the right of way. In the context of the mischief which the Act is intended

to prevent, section 29, properly construed, prohibits the dedication of a right of way over charity land without consent.

314. This leads to the question as to whether the dedication of a right of way over Ship's Entry for the period it was owned by a charity is prevented by the operation of section 31(8) of the 1980 Act and section 1(7) of the 1932 Act applies.

315. In **Newhaven (above)** Lord Neuberger PSC said at 78

“The case law therefore needs to be examined with care. In English law public rights of way are created by dedication by the owner of the land, whether express, implied or deemed, and by acceptance by the public, usually in the form of user: *Sunningwell* [2000] 1 AC 335 , 351H-353B, per Lord Hoffmann; *Megarry & Wade, The Law of Real Property* , 9th ed (2019), para 26-035. In such cases, the legal capacity of the landowner to dedicate land for that purpose is a relevant consideration; if the owner had no such power, there could be no dedication. [Section 1 of the Rights of Way Act 1932](#) (now [section 31\(1\) of the Highways Act 1980](#)) provided for deemed dedication resulting from 20 years of uninterrupted user unless there was sufficient evidence that the owner had no intention to dedicate. In this context where dedication is implied through user, the owner's ability to dedicate remains relevant. This was stated expressly in [section 1\(7\)](#) of the 1932 Act and now [section 31\(8\)](#) of the 1980 Act):

“Nothing in this section affects any incapacity of a corporation or other body or person in possession of land for public or statutory purposes to dedicate a way over

that land as a highway if the existence of a highway would be incompatible with those purposes.”

Thus, in *British Transport Commission v Westmorland County Council* [1958] AC 126, in which a county council sought to assert a public right of way on a footpath across a bridge over a railway line, the issue was whether the railway owners could be deemed to have dedicated the path. The House of Lords held that the question whether the power to dedicate was incompatible with the owner’s statutory objects was a question of fact and was to be assessed by reference to what could reasonably be foreseen.”

316. Lord Neuberger did not refer to the additional proviso in section 1 of the Rights of Way Act 1932 in this passage, which provides that there is no deemed dedication where there was no-one in occupation capable of dedicating such a way. In consequence, there is no discussion as to the significance of its omission in the 1959 and 1980 Highways Acts.
317. **In Jaques v Secretary of State for the Environment [1995] JPL 1031** at 1039 Laws J held that the proviso only applied if there was no-one in possession capable of dedicating, which was the position in **Jaques** as the occupier was a requisitioning authority. He thought it did not prevent dedication where a tenant was in possession as he could dedicate with the agreement of the landlord. On the facts of **Jaques** that was obiter. Another explanation for the second proviso, and one which I prefer, is that it sought to replicate the common law of lost modern grant on which much of section 1 of the 1932 Act is modelled. At common law the presumption of the grant of an easement cannot be made if the notional grantor did not have power to make the grant; **Barker v Richardson 4 B & Ald 579**. The occupier who requires

consent to grant, such as the incumbent in respect of glebe land, falls within this category; **Oakley v Boston [1976] QB 270**. The effect of the second proviso is that up to the repeal of section 1 of the 1932 Act by the Highways Act 1959, the trustees of the Moulton Charity did not have capacity to dedicate a highway over Ship's Entry. The deeming provision in section 1 of the Act does not apply for that reason alone. The permission of the charity commissioners cannot be inferred as they will have known nothing about the use of Ship's Entry; see **Oakley** per Megaw LJ at 280.

318. It is clear from Lord Neuberger's judgment in **Newhaven** that section 31(8) of the 1980 Act preserves the common law rule that where the absence of capacity arises because the power to dedicate is incompatible with the statutory or public purpose there can be no deemed dedication. Mr Laurence argues that the section must operate to prevent a deemed dedication by the trustees because they did not have consent to dedicate. However, the disapplication of the presumption solely on the grounds that the occupier had no power to dedicate, for example, because they needed permission, went with the repeal of section 1 of the 1932 Act. Accordingly, when looking at capacity for the purposes of section 31(8) the focus is on incompatibility. It is irrelevant that the occupant did not have power to dedicate otherwise.

319. Section 1(7) of the Rights of Way Act 1932, and now Section 38(1) of the 1980 Act only prevents a deemed dedication where the secondary use would preclude the landowner from using the land for the purpose for which it is held. If the land can be used for the statutory or public purpose consistently with the secondary use, there is no bar to

dedication; **Westmorland (above)** per Viscount Simonds at p. 142. The test of incompatibility is one of fact and is judged by what can be reasonably foreseen and guarded against, not that which is possible but improbable; see p 143/4.

320. The approach to incompatibility in **Westmorland**, which, according to Viscount Simonds at p 142, had pertained for over 100 years is unaffected, in relation to highways, by **Newhaven**. In the latter case it was recognised that in the case of public rights of way where 20 years of user deems dedication unless there is evidence that the owner had no intention to dedicate, the owner's ability to dedicate remains relevant. Hence the decision in **Westmorland** that the question whether the power to dedicate was incompatible with the owner's statutory objects was one of fact, to be assessed by what could reasonably be foreseen.

321. I do not accept Mr Laurence's submission that, in effect, **Westmorland** has been eclipsed by **Newhaven** with the consequence that in deciding the section 38(1) issue I should focus on statutory interpretation, which is difficult in a public purpose incompatibility case in any event. Essentially, he says I should not treat the investigation of incompatibility as a factual inquiry. I disagree. **Newhaven** was a case concerning the registration of land as a town or village green under s 15 of the Commons Act 2006 which had been acquired and maintained under a succession of Acts from 1874. There is no requirement for dedication under the 2006 Act, thus the issue of capacity did not arise. The question of incompatibility turned upon whether the statutory purpose for which the acquisition of the land had been authorised was compatible with its registration under section 15

of the 2006 Act. The determination of whether the 2006 Act or those governing the acquisition took primacy was therefore one determined by statutory construction and does not depend on the “*legal theory that underpins the rules of acquisitive easements.*” See **Newhaven** per Lord Neuberger PSC at 91-93. **Lancashire (above)** does not say otherwise, indeed it is clear from the judgments that **Westmorland** is to be followed in cases such as this; see per Lords Carnwath and Sales SCJs at [47], [68] and [55].

322. I agree with Mr Pryor that in relation to the period following the Highways Act 1959 it is a question of fact as to whether, having regard to circumstances as can reasonably be foreseen, the existence of a right of way is incompatible with the purposes of the charity, namely to hold the trust property for the benefit of a particular class of the poor. It has been said that the existence of such a way may devalue the property but there is no evidence about this. Equally, it could be said that the placing of the burden of maintaining the way on the highway authority, would be of some benefit. Given the absence of evidence on this point I am not satisfied that the case on incompatibility is made out

The presence of unlocked gates

323. The authorities relied upon by Mr Pryor establish that what would otherwise be an interference with a public highway if it post-dated dedication is not a bar to the dedication of a highway with such a feature already in existence. **Herrick v Kidner (above)** casts no doubt upon the soundness of this proposition. That was a case of an existing highway where even quite minor interference is impermissible as the public are entitled to use the highway to its fullest extent.

324. What inference one is to draw from unlocked gates in any case is fact sensitive. As a general proposition, however, I regard closed, albeit unlocked, gates in a city centre location as an indication that what lies beyond is private property. The inference is even stronger if the landowner takes it upon themselves to keep the gates open some times and close them at others. In this case, anyone facing the formidable gates at the Cloth Market entrance to White Hart Yard, or the gates which worked in tandem with the high level grille, when closed, would undoubtedly conclude that the yard was shut and they were not to enter. The same goes for the gates at the two ends of Ship's Entry. The suggestion that these gates may have been in place to exclude stray dogs as opposed to people is fanciful.

The private right of way claim

325. There are 3 ways in which the transfer to Mr Murphy, whilst silent as a right of way over Ship's Entry, could have transferred such a right, under section 62 of the Law of Property Act 1925, the rule in *Wheeldon v Burrows* or by implication based on the common intention of the parties. The first two methods look backwards for uses which amount to quasi-easements. The third method is forward-looking, being concerned as to the contemplated use of the transferred property.

326. I set out the relevant principles for the application of section 62 of the Law of Property Act 1925 and the rule in *Wheeldon v Burrows* at paragraphs 23 and 24, above. In **Nickerson v Barrowclough [1981] Ch 426** Eveleigh LJ said, at 446:

“[Section 62](#) is a conveyancing section; it passes only that which actually exists already, be it, for example, a right of easement, or be it an advantage actually enjoyed. In some cases that which is enjoyed is enjoyed by the

exercise of the general right of ownership, and may become a particular legal right of some kind in the purchaser. None the less, the section envisages something which exists and is seen to be enjoyed either as a specific right in itself, or as an advantage in fact.”

In **Wheeldon v Burrows [1879] L.R. 12 Ch. D. 3**, Thesiger LJ said at p.49:

“We have had a considerable number of cases cited to us, and out of them I think that two propositions may be stated as what I may call the general rules governing cases of this kind. The first of these rules is, that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean *quasi* easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted. The second proposition is that, if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant...

Both of the general rules which I have mentioned are founded upon a maxim which is as well established by authority as it is consonant to reason and common sense, viz., that a grantor shall not derogate from his grant.”

The common feature of implication by section 62 and *Wheeldon v Burrows* is that the enjoyment of the benefit over the servient land, or quasi- easement, has to have existed at the time of conveyance and for such an easement to exist it must have been used.

327. **Wood v Waddington [2015] 2 P.& C.R. 11** was a case in which modest use was proved but an issue arose as to whether it was sufficient for

the purposes of section 62. Relying upon **Nickerson** (above), Lewison LJ said, at 52/53

“52. Where there has been no use at all within a reasonable period preceding the date of the conveyance (whether or not there had been use outside that period) it is clear that s.62 cannot operate to create an easement: I do not accept Mr Karas’ submission to the contrary...

53. But on the judge’s findings of fact the claimed route from point D to Old Dinton Road had been used once a month in the period immediately preceding the transfers. On the face of it that is both apparent use and a regular pattern of use.”

328. In **Sovmots Investments Ltd v Secretary of State for the Environment** [1979] A.C. 144 Lord Wilberforce said of *Wheeldon v Burrows*, at 169:

“ for the rule to apply there must be actual, and apparent, use and enjoyment at the time of the grant.”

This statement, though obiter in the context of the decision in **Sovmots** has been held to be authoritative and one which ought to be followed: see per Roch LJ in **Payne v Inwood** [1997] 74 P&CR 42 at 47. It was acknowledged in **Payne** that the existence of the quasi-easement can be proved by evidence of user or a state of affairs which indicates its existence, see per Roch LJ at p.47.

329. In **Wood** (above) Lewison LJ considered what the court is looking for and during what period. He said, at 49:

“What, then, of the extent of use? In *Green v Ashco Horticulturalist Ltd* [1966] 1 W.L.R. 889 at [898] Cross J said:

“One ought not, I think, in a case like this to confine oneself to a single moment of time — when possibly there might have been no user at all. One ought to look at a reasonable period of time before the grant in question in order to see whether there was anything over that period which could be called a pattern of regular user in any particular way or ways.”

50. In *Costagliola v English* (1969) 210 E.G. 1425 Megarry J said that:

“One must look at a reasonable period of time before the conveyance was made to see if there were any apparent or regular user.”

51. Both these passages were approved by this court in Pretoria Warehousing Co Ltd v Shelton (Unreported 21 June 1993)”

330. I agree with the Claimant that it is not sufficient to prove that the way was reputed to be enjoyed with the servient land and that **Clarke v Barnes** does not have this effect. **Gale** must be correct in suggesting that Luxmoore J was not introducing a new test. Luxmoore J stated the correct test when quoting from the section. He said, at p.380, section 62 “*operates to grant to the purchaser...any privilege which was reputed to exist or which was in fact being enjoyed with the property conveyed at the time of conveyance.*” He was clear that these are different tests. The reference “*to reputed to be enjoyed*” follows his recording that the track was not being used at the date of the

conveyance as the tenant had given up occupation by that time. He could not find that it was being enjoyed at the time of the conveyance, hence he found for the defendant on the basis of it being a right which was, as per the words of the section “*reputed or known as part or parcel or appurtenant to the land.*” There still needs to have been user to establish the quasieasement of way which is reputed to be appurtenant to the land, as was the case in **Clarke**.

331. An example of the application of the provision concerning reputed quasi-easements is to be found in the unreported decision of Sir Robert Megarry VC in **Newman v Jones**, 22 March 1982, applied by Aldous J in **Handel v St Stephens Close Ltd** [1984] 1 E.G.L.R. 70 at 71. **Newman** concerned the rights of the owner of a flat to park on the land occupied by the apartment block. The tenants had the right “*with or without motorcars and other vehicles at all times and for all purposes in connection with the permitted user of the flats to go pass and re-pass over and along the road or driveway leading or adjacent to the block of flats*”. The Vice Chancellor said:

“In my opinion, where there is a block of flats, and the tenants in general regularly park their cars within the curtilage of the block, the liberty, privilege, easement, right or advantage of being allowed to do this will rapidly become regarded as being something which appertains or is reputed to appertain to each of the flats in the block, and as being reputed appurtenant to each of those flats. Accordingly, on the grant of a lease of one of the flats, I think that section 62(2) of the Law of Property Act 1925 will operate to give the lessee an easement of car parking appurtenant to his leasehold. I do not think that it matters whether the previous occupant of the particular flat did or did not park their car within the curtilage of the block, or, indeed, whether they had any car. In all ordinary cases the

reputation will be that of a right of parking which goes with each of the flats, for there will be no reason for one lessee to have greater rights than another in this respect. The question, “can the tenants park their cars round the block?” would receive a simple yes, and not an answer which distinguished between one flat and another on the basis of whether previous occupants of the flat in question had been accustomed to park their cars round the block.”

332. In this case there is no evidence of user for a reasonable time before the grant to support the existence of a quasi- easement, whether by pointing to actual user or a state of affairs from which the existence of the claimed quasi- easement can be inferred. In relation to the right of fire escape I accept that it will only be used intermittently at most and possibly not at all. Use as a fire escape must include being treated as a recognised route of escape.

333. As regards no. 11, there is no evidence that L’Aragosta used the alley beyond its store room. User by the occupants of Santino’s to visit L’Aragosta, for example to borrow items, is not evidence of use by the occupants of the latter. The fact that Bridgewater granted the Club and Casino rights to pass over Ship’s Entry is not evidence that it was used by

L’Aragosta. The Defendants have not pointed to any evidence to show that L’Aragosta, at any time, used the alley towards the Cloth Market as a fire escape.

334. There is a reference in a letter dated 3rd October 1984 from Maughan & Hall, the solicitors to Sir John Fitzgerald Limited, to the lease of 11 Grey

Street containing a right to pass on foot only along the “*passageway*” for the purposes of fire escape, but whether that right survived beyond that time is unknown and this was not something upon which Mr Pryor placed reliance. The claim under section 62 for a general right of way from the back door of number 11 or a right of fire escape from that door to the Cloth Market cannot succeed due to the absence of the requisite user or evidence of the benefit reputed to be appurtenant to that property. The building over the restaurant did not communicate with the ground floor of no. 11 and can therefore never have had use of its rear door. Accordingly, it cannot have acquired a right of way from no. 11.

335. There will have been a time when Ship’s Entry served the suspended fire escape which is said in Mr Fleming’s 1990 dilapidations report to have served the second floor over the alley to the rear of 13 Grey Street. I agree with Mr Pryor that anyone using that escape would need the option to go in either direction along the alley in order to have a route of escape from the main conflagration. The likelihood is that the whole of the alley served as a means of escape at that time. Accordingly, a purchaser in those circumstances could rely upon section 62 of the Law of Property Act 1925 to imply a right of fire escape in either direction. That would be the case even if some time had passed between the last tenant leaving and the purchase.

336. In this case, however, whether such an arrangement for fire escape had existed, the purchaser was buying a very different building. It was derelict. The floor served by the fire escape was noted in the Grey Street Initiative in 1988 to be inaccessible due to the collapse of the ceiling. There was no evidence that after the building had fallen into a derelict state, which given the level for decay must have been

substantially before 1988, use was being made of the western end of Ship's Entry as part of the fire escape arrangements for no. 13 by anyone.

337. Section 62 does not “*resurrect mere memories of past rights*” which were no longer appurtenant at the time of conveyance; **Penn v Wilkins (1974) 236 EG 203** per Megarry J. Accordingly, when deciding what is a reasonable time over which to consider the fact of use, following **Green**, the fact that the purpose of the building has changed must be relevant. The reasonable period in the present case goes back to the time during which the rear of 11-13 Grey Street became derelict and had no utility other than for development. It should not stretch back to the time when it had a different purpose as a lettable and tenanted building, the appurtenant rights to which were “*mere memories*”. In view of the absence of evidence as to use at the time of the conveyance or a reasonable period prior thereto, or even that there was at that time reputed to be the benefit of general passage or for fire escape towards the Cloth Market appurtenant to the building, the case for the implied grant based on section 62 cannot succeed.

338. If there was evidence that Bridgewater had used the alley as a fire exit from the rear of no.13 at the time of sale, I would have had little difficulty in concluding that it was capable of amounting to a quasi-easement which was continuous and apparent and necessary for the reasonable enjoyment of the land granted. I would then need to consider the interplay between that conclusion and Mr Morgan's argument concerning the common intention as

to the route of fire exit at the time of sale. For completeness, I do not consider that general passage along Ship's Entry from the fire door to no. 13

to the Cloth Market was reasonably necessary for the enjoyment of the conveyed property at the time of the 1991 sale. There is, however, no evidence that Bridgewater used the alley to the west as a fire exit from no.13. The evidence points the other way. At a time prior to the sale, Mr Hopper was commissioned to design a fire escape and door which, I accept, was, to the knowledge of the purchaser, intended to lead onto an escape route towards Grey's Court. The case founded on *Wheeldon v Burrows* fails on the absence of proven use by the grantor.

339. In my response to my question as to the basis of the Claimant's concession as to the right of fire escape towards Grey's Court, Mr Morgan indicated that this may arise from an implied easement to give effect to the common intention of the parties; there was an oblique reference to the doctrine of implication by common intention in the claimant's opening skeleton. In his closing address and written submissions Mr Pryor relied upon section 62 and *Wheeldon v Burrows* alone. The Defendants' pleaded case, paragraph 35 of the Re-Amended Counterclaim, alleged a common intention implied right of fire escape from the rear door of the restaurant onto Ship's Entry but did not specify in which direction. No similar allegation was made in relation to the door from the back of no. 13. A claim was also made for a right of fire escape by prescription, paragraph 37 of the pleading, but that was not pursued at trial.

340. Mr Laurence and Mr Morgan clearly prepared their closing written submissions on the basis that there may be an argument as to implication on the grounds of common intention but having checked the Live Note transcript and Mr Pryor's written submissions, that

argument was not raised. I am reticent in deciding a case on an argument which the Defendants have

not raised and certainly in respect of one which has not been pleaded. It is notable that the submissions concerning the effect of **Linvale (above)**, and the provision of a copy of that authority, was in my response to my question as to the basis of the Claimant's concession as to the right of fire escape towards Grey's Court. and despite the volumes of authority to which I was referred, I was not referred to any on common intention implied grant, other than Linvale.

341. As it will make no difference, and for completeness, I will deal with the pleaded case that there was an implied right of fire escape towards the Cloth Market arising from the fact that no. 11 was a restaurant until 1998 for which a fire escape in that direction was reasonably necessary.

342. As to the relevant law the following propositions can be stated:

- a. The law will readily imply the grant or reservation of such easements as may be necessary to give effect to the common intention of the parties to a grant of real property; see **Pwllbach Colliery Co Ltd v Woodman [1915] A.C. 634** per Lord Parker at 646
- b. "There are therefore two hurdles which the grantee must surmount. He must establish a common intention as to some definite and particular user. Then he must show that the easements he claims are necessary to give effect to it." **Stafford & Anor v Lee & Anor [1993] 65 P. & C.R. 172** per Nourse LJ at 175 and **Pwllbach** at 646.

- c. "...an implied grant had to be based on more than merely reasonableness or usual practice ..., but had to be necessary for the use and enjoyment of the right granted in the way contemplated by the parties." **Donovan and another v Rana and another [2014] EWCA Civ 99** per Vos LJ, as he then was, at [33].

343. The restaurant premises had an access directly onto Grey Street as well as the door to the rear which was close to the emergency exit into Grey's Court. There is no evidence that the restaurant treated the route to the Cloth Market as part of their necessary means of emergency escape. The dilemma, envisaged by Mr Pryor, of escapees wishing to avoid travelling towards a burning building is clearly applicable to the door to the rear of no. 13 because, other than Ship's Entry, there was no other route for escape. That does not arise in relation to the restaurant where the alternative was available. The Defendants, therefore, have two difficulties. The availability of a route of escape through the Cloth Market exit was not necessary for the use of no. 11 as a restaurant. The second difficulty, unlike the classic Pwllbach case where the grant is for a contemplated user, in this case there was an established use and no evidence that the restaurant used or needed to use the western end of

Ship's Entry as an emergency escape at the time of the conveyance. In those circumstances, there is no reason why the parties ought to have contemplated that implication of the right was necessary for the restaurant to continue its use of no. 11.

344. In the light of the above I do not find that the owner of 11-13 Grey Street has a right of fire escape from the rear fire doors of 13 or 11 Grey

Street to the Cloth Market or a general right of way along Ship's Entry beyond the intermediate gate.

User in the 20 years before the right was called into question

White Hart Yard

345. On my findings of fact there were locked gates at the Cloth Market end of White Hart Yard as at 2001 when Bubbles opened. After 2001 the gates were only opened at night between 2001 and 2003 and thereafter have been kept locked save for immediate access. In addition, since 2007 there have been locked doors and, later additional gates at the Grey's Court end. Mr Pryor's tentative suggestion that the first calling into question was as late as 2007 cannot assist the Defendants.

346. Based on a calling into question when the Bubbles gates and Highway Act notice were first known to be present, 2000, the 20 year period stretches back to 1980. My findings as to the use of the yard in the period are that it was not generally open to the public. It was open during the day, whilst there were businesses to which the public had resort. Save where there were some occasional lapses by tenants in not closing the Cloth Market gate and some period in the mid 1990s when they were even less fastidious in locking the gates, on the majority of nights in that 20 years period the gates were locked. Those who wished to use the yard as a cut through, and there has been plenty of evidence from people who said they would use it on a night out if available, were excluded. The Defendants have not proved that they used the yard as of right and without interruption in that period. There was permissive public use during business hours. Use outside business hours was largely prevented by the gates. Further, the closed gating was the clearest evidence that the landowner had no intention of dedicating the yard as a way.

347. It is pointless analysing further potential dates upon which the right was brought into question in the modern period as I am satisfied that the yard was locked at night at both ends in this period up to about 1979 and at the Cloth Market end throughout, give or take periodic lapses. The case based upon the modern era, both at common law and the 1980 Act must fail.

348. As regards the historic era, there is no evidence when the right was called into question other than 1965. There is no evidence from which I can be satisfied that the public used the yard as of right in the 20 years stretching back to 1945. The likelihood is that there were gates at each end which were locked as that was the situation in 1965 and the property fulfilled largely the same function and was in the same ownership.

349. More fundamentally, I have not been persuaded that the yard was open to public use outside business hours from 1867 onwards as the Defendants have not satisfied me that this was an open yard. The case based upon an ambulatory date for calling into question must fail on that factual basis alone, even if it were open to the Defendants to succeed on such a case, which they are not. Accordingly, the claim to the existence of a public right of way of White Hart Yard fails.

Ship's Entry

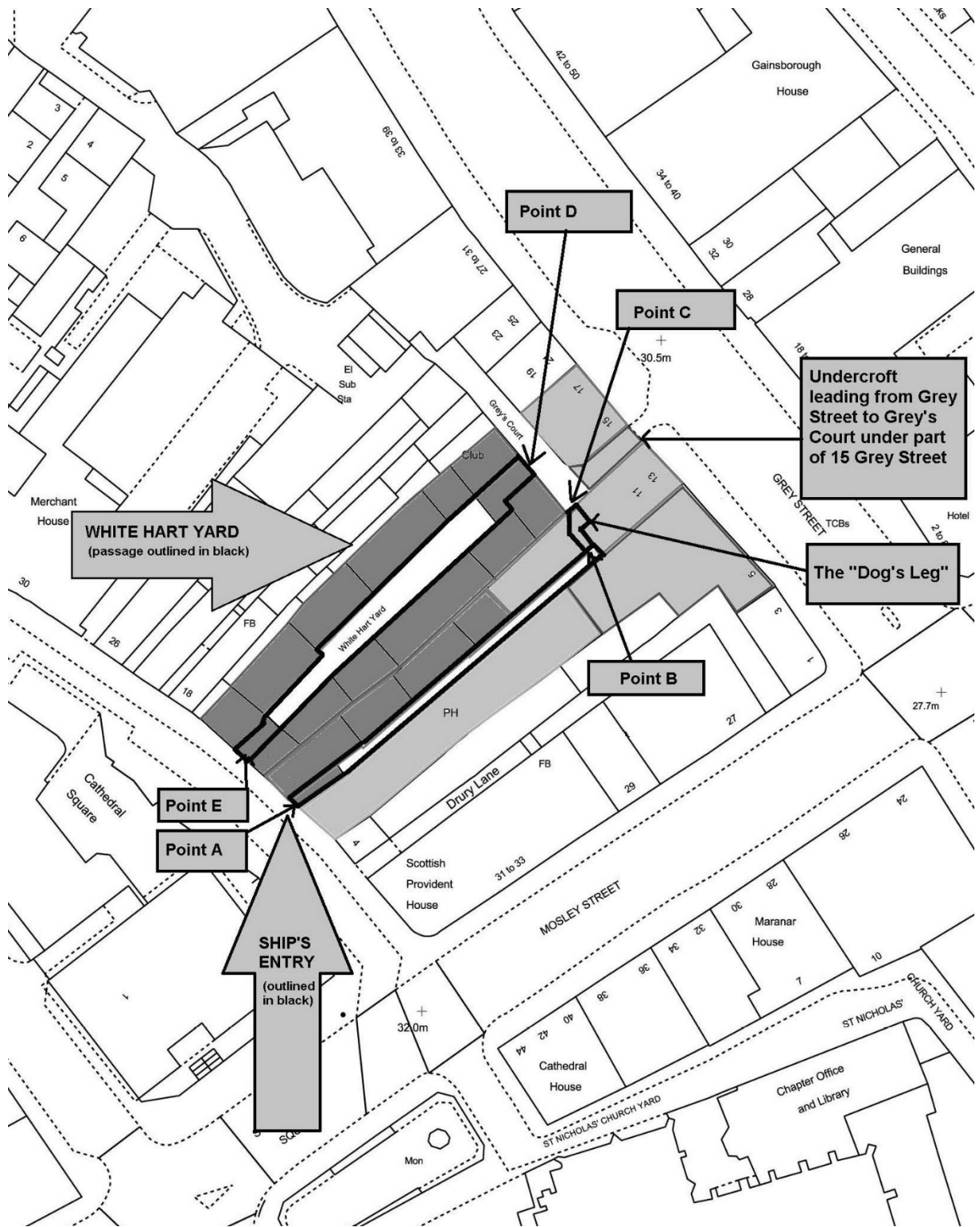
350. The date of calling into question in the modern era can be no later than 2002, based on my factual conclusions, so I look at the period back to 1982. What can be seen in that period is that although Bass, in the guise of Balmbra's, were abusing their access to the alley, the landowner was taking steps to stop them, both in the 1980s and 1990s, which were successful, with periodic lapses, for a period up to 1994 when the gate at the Cloth Market, at least, was padlocked leaving Balmbra's with no adequate fire exit. At the

Grey's Court end of the alley there was a locked gate throughout this period. The presence of closed gates was sufficient indication by the landowner that it had no intention to dedicate; although there has been argument as to whether gates which were closed but not locked could negative an intention to dedicate, in this case as both gates had emergency push bar devices, these will have automatically prevented the gates being opened from the street when the gates were closed.

351. If I was to treat the padlocking in 1994 as the bringing of the right into question, the Defendants still have the difficulty that the gate at the Grey's Court end was locked, albeit that someone who had got into the alley could use the push bar to exit. In any event, I have accepted evidence that both gates were locked during Bridgewater's ownership, back to 1990, and in the ownership of Sir John Fitzgerald, which extends back to 1974. It goes beyond that for the Grey's Court gate was locked certainly back to 1966. There is no reason to believe that it was not locked before that and more importantly the Defendants cannot make out their case based upon the inference that there was open public use of the alley unless they prove that it was open, but there is no basis for me to draw such an inference. In fact, there is evidence of the presence of a gate going back as far as 1934 at the latest. There is no period of 20 years from any potential event bringing the right into question to which the Defendants can point in which the public used Ship's Entry as of right and the case based on the modern era fails.

352. The case based upon historic user is dependent upon an interpretation of the 1883 plan which I have rejected. As I do not accept that there is evidence of open passage through the alley between Grey's Court and the Cloth Market, the claim for a right of way based on the historic era must also fail.

APPENDIX A



APPENDIX B

White Hart Yard

The Defendants' post 1970 evidence

1. Peter Cussins (1972-1985) is the executive chairman of a large builder, Cussins Ltd. In the period 1972 to 1985 the company's offices were located on Grainger Street. During that time he would walk through White Hart Yard on his way from his offices to Grey Street. He would occasionally go to Grey's Club in the evening via White Hart Yard. He said the yard was always open to the public. In cross-examination he accepted that his use of the yard was principally during business hours and that the occasional evening visit to Grey's Club was limited to the period 1972 to 1976. He knew Mr Horgan and accepted that he would have had a better recollection as to the use of the yard in the evening as his, Mr Cussins', evidence was principally concerned with the use of the yard during the day. He was a patently honest witness though the accuracy of his evidence is in question.
2. Syed Aziz (1973-early 1990s) is the director of a group of companies which operates restaurants. Some of his family are partners in the Rajah restaurant at 18 Cloth Market. He had not been down White Hart Yard himself but claimed that members of staff frequently mentioned that they used it to get from the staff accommodation to Grey's Club. He was referring to a period between 1973 to the early 1990s. He said the staff would go out of the back door of 18 Cloth Market and through the lane, meaning White Hart Yard, into Grey Street. In cross-examination he accepted that the back door from number 18 did not lead into White Hart Yard but another lane which leads to Grey's Court. Accordingly, the evidence of Mr Aziz is lacking in both weight and relevance.

3. Kemal Guclu (1980-2000) has worked in, and now owns, a number of catering establishments in the Bigg Market/ Grey Street area. His knowledge of the area dates from 1980 when he lived at 37 Groat Market, where he worked when a student. At the same time, he worked at Lasers Wine Bar which is on the corner of Grey Street and Mosley Street. He claimed that he had frequently used White Hart Yard to pass from Lasers to the Groat Market, both during the day and late at night. After his graduation he continued to be interested in catering premises in the Groat Market and opened a number of businesses in this area. As a result, he maintained his knowledge of White Hart Yard to 2000 and beyond. He said the yard was still open to the public in 2000. The locking of the yard since then has had an impact on his business in the Cloth Market in that the flow of the public has been cut off.
4. I have doubts about the reliability of Mr Guclu's evidence. First, because his business connection with Mr Malhotra was not revealed until cross-examination and he sought to make light of his dependence upon Mr Malhotra's goodwill in relation to the lease of premises which he entered into at about the time he made a statement; his continued tenure of the relevant property, 7 Grey Street, is, on his evidence, dependent upon Mr Malhotra's continued assent. Secondly, he gave a wholly improbable reason for favouring a route from Lasers Wine Bar which took him through White Hart Yard. He claimed that this was his preferred route as it avoided him being seen in public wearing scruffy clothes. In fact, there is a more direct route to the Groat Market from the back of Lasers Wine Bar through Drury Lane, which would have avoided use of the main street altogether. Taking the route he described would have brought him along Grey Street, a major public road for some considerable distance.

These factors lead me to accord limited weight to the evidence of this witness.

5. Levent Hepurker (1977-1985) said he was asked to be a witness in this case by his friend Mr Guclu. He speaks of the period between 1977 and 1985 when he used to go drinking with his friends, including Mr Guclu in the Bigg Market and Cloth Market area. His witness statement referred to there being passages between Bigg Market/Cloth Market and Grey Street which he and other members of the public used without anything blocking their passage. He had difficulty when cross-examined in identifying which alleyways he used. Eventually he named White Hart Yard as he had revisited the area for the purposes of giving his evidence. His description of the yard as containing the backs of buildings did not accord with its actual appearance and it did not seem that he was able to discount the suggestion that he may have been using Old George Yard, Heywood's Court or Drury Lane. His evidence is, as a result, of limited weight.
6. Jagmohan Malhotra (1981-2000) claimed that between 1981 and 1983 he and a group of six or seven others, including Sunil Khanna, would regularly spend the evening together passing between the Bigg Market and Grey Street using White Hart Yard. He said the yard was busier in the evening than during the daytime. He recalled no gates and there was no obstruction to such use. From 1983 to 1988 he would pass through White Hart Yard during the daytime. On most weekends he continued to use White Hart Yard in the evening. This continued until about 1985, aside from sporadic nights out until the early 2000s.
7. He told me that his current planning application to develop the Malhotra properties in this area does not require rights of way over White Hart

Yard or Ship's Entry but he regards them as a very important link in the circuit from Grey Street to the Cloth Market which he wishes to restore as part of a £40 million development. He was certain that in the earlier part of the period covered by his evidence his use of White Hart Yard was at night because it was after 6 o'clock when he finished work.

8. In cross-examination Mr Malhotra was faced with a decision of the First Tier Tribunal (Tax Chamber) in which his explanation concerning an invoice from his company, which he had a part in issuing, was disbelieved. That on its own would not cause me to disbelieve the evidence he gave to me. There were two respects, however, in which his evidence did not ring true. They both relate to Ship's Entry.
9. Mr Malhotra claimed that he had a meeting with the late Dave Ladhar, the correspondence suggests it was on 22 September 2017, at which Mr Ladhar had agreed to his company putting a doorway from Balmbra's into Ship's Entry to use the access to the Cloth Market. The correspondence which follows this meeting runs contrary to this contention. On 22 September 2017 Mr Tubman, on behalf of the Malhotra companies, sent an email to Barry Ladhar (Dave's nephew), referring to the meeting that morning, in which he said he had instructed a contractor to undertake the work; he did not claim in the email that this was agreed. Mr Ladhar's email response of the same day states that he agrees that it would be beneficial to work together but that at the meeting he had said that Ship's Entry was in the ownership of his family and requested that no work be done until a firm agreement had been reached. Mr Malhotra's response was an email about 7 minutes later saying that he did not require any permission, agreement or consent from Mr Ladhar (to do the works).

10. Mr Malhotra explained his response on the basis that Mr Ladhar had agreed to the works at the meeting earlier that day. That is not, however, what he says in his email. The more likely explanation for his stance is that which was suggested to him by Mr Morgan, namely that he believed, he now knows incorrectly, that he owned Ship's Entry or had an unrestricted private right to its use. The explanation he gave to me as to the contents of the correspondence was designed to give the impression that he always appreciated that he needed Mr Ladhar's agreement to use Ship's Entry and thus steer me away from concluding that his motive for making claims over the way are to enhance his development, as opposed to a belief that they had any legitimacy.
11. The answers concerning the 22 September 2017 meeting followed a series of questions about his 2011 planning permission, the scheme of which had included Ship's Entry within the land to be developed. It was being suggested at the time that he thought he owned Ship's Entry and was pursuing this claim as he believed that failure would undermine his proposed development. Mr Malhotra purported not to know what was in the plans concerning Ship's Entry, as this was a matter dealt with by the architects. He claimed to be seeing the scheme which showed the incorporation of Ship's Entry into the development for the first time when being questioned about it; I note that there are numerous references to Ship's Entry in the case for scheme prepared by his designers, which also states that his company owns part of Ship's Entry. I regard it as highly improbable that he had not seen the scheme till the trial given the value attached to the development and his expressed interest in restoring what he called the circuit. It is much more likely that he paid careful attention to what the development entailed, including the use to be made of Ship's Entry. This is supported by the fact that when, in connection with his later

development proposals, there was a desire to break into Ship's Entry from Balmбра's, he personally was at the meeting at which, he claims, there was discussion about this subject. In view of these observations I need to be cautious before accepting Mr Malhotra's evidence in the absence of objective support.

12.Sunil Khanna (1979-2000) supported the evidence of Mr Malhotra. He was adamant that from 1979 to 2000 he and Mr Malhotra used White Hart Yard. In his statement he said he used it up until midnight and sometimes later, though in evidence he said when they used to meet after work at 8.30 to 9.00 pm they used the alley to go from the bottom of the Cloth Market to Grey Street. He was not challenged on his use of the yard in the day to transport goods from his vehicle in Grey Street to stalls on the Bigg Market.

13.Mr Khanna denied that the fact that he owed Mr Malhotra £600,000 meant he owed him a favour. I heard from Mr Malhotra that not only was £600,000 owing but that he had given up the charge which secured that debt to assist Mr Khanna to refinance. That could be a motive to give evidence favourable to Mr Malhotra but so could the bonds of friendship between them. He denied that he was motivated by either. He did not accept the suggestion that he owed Mr Malhotra a favour for the financial support he had received. Objectively, this seems unlikely and leads me to question his candour.

14.A number of witnesses who owned or worked at Santino's Restaurant which was located in 10 Cloth Market gave evidence that they used White Hart Yard during the day and night and that if there were any gates they were always open. Enzo Arceri said this was the position between 1983

and 86 and that other people used the yard. If he was at Santino's he would go to Grey's Club via Ship's Entry but if he was walking down the Cloth Market he would use White Hart Yard.

15. Sergio Addis, who worked at Santino's between 1983 and 1985 did not recall if White Hart Yard was open or not. His brother Adriano Addis, who operated the restaurant between 1983 and 1986, and continued to visit to 1989 said he and members of the public used White Hart Yard like any city street. When cross-examined about his assertion that he used White Hart Yard in the evening he said he always knew it was open because the pubs on the Bigg Market were popular and people cut through the yard to Grey Street. He said he was not looking every minute. He agreed with Mr Laurence, however, that given he was working in the restaurant in the evening, the operators of Grey's Club were more likely to be right in saying that the gate at the Cloth Market end of the yard was kept closed to stop people from the Bigg Market going down White Hart Yard. He later said he had never been stopped from going through White Hart Yard by a closed gate, but the fact that in evidence he described the use of the yard by reference to that of the public at a time when he is likely to have been working within Santino's, and not his own experience of usage, is an indication that his recollection relies heavily on what he believes would have happened rather than his personal knowledge.

16. Franco Pizzuti, who was a chef at Santino's from 1982 to 1986, said in his statement that he regularly walked through White Hart Yard during the day and at night and many other people used it as well. In crossexamination he accepted that he did not know if it was closed to the general public, especially in the evenings as he only used it once or twice,

which is a marked departure from the impression given by his statement and casts doubt upon the accuracy of his evidence.

17. The operator of the restaurant at 15 Grey Street, Mohammed Islam (1989-2008) provided a statement that from 1989 he travelled from his restaurant along White Hart Yard and that members of the public used it as well. He also said that he received his deliveries via White Hart Yard to the back of his restaurant. About 10 years prior to making his statement, which would be about 2008 the owners of Diamonds night club closed off the yard, it was about the time the smoking ban came in. In evidence he accepted that there were gates at the Cloth Market end of the yard but said they were open at night. When it was pointed out to him that the police found the gate locked when attending a fire in February 2001, he said that he was “*not very often going and coming*” but that when he wanted to visit his friend at his restaurant in the Bigg Market the gate was open. The evidence as to the receipt of deliveries changed in that in cross-examination he said they came in from Grey Street via Grey’s Court.

18. Moet Bondi (1993-2000/07), the operator of the Vineyard at 1-3 Grey Street, formerly Lasers, said that since he opened the Vineyard in 1993 he was familiar with White Hart Yard which he used very often, quite late at night, after coming out of Grey’s Club. He often saw groups of people using it. After 2000 locked gates appeared at each end of the yard. Nevertheless, when he was cross-examined he said that he asked the owners of Grey’s Club why the gates had been locked. They replied that there were problems with people using the lane for drugs. He did not recall who told him this but it was the people who operated the casino, this was before the new company bought it and it became Diamonds. The

Ladhars bought Easteye in 1999. If Mr Bondi received this information from the previous owners before the purchase this will have been 1999 or earlier. Diamonds did not arrive until 2007. It was also notable that Mr Bondi was unable to give any description of what was in White Hart Yard, which is something he may have been expected to be able to do if he had been a frequent user of that route. Accordingly, the accuracy of Mr Bondi's recollection is in doubt.

19. Geoffrey Robinson (1993-1999) was working as a bank clerk at RBS in Grey Street when he was approached to give evidence in this case. He recalled using White Hart Yard as a cut through at night. He did not recall the Cloth Market gates to the Yard being closed but accepted that if they were he would not have thought anything of it but moved on to another route to get to Grey Street. Thus, his evidence does not negate the presence of locked gates on some occasions.

20. John Wade (1995-2000) provided a statement in which he said that from 1995 to about 2000 he would visit the pubs in Bigg Market and Grey Street two or three times per week. He generally used White Hart Yard to pass between Grey Street and the Bigg Market. In cross-examination he admitted that he and Mr Malhotra own a building together in Newcastle City Centre. He said he first spoke to Mr Malhotra in 2018. The topic of the Bigg Market and Grey Street came up in conversation at some stage. He indicated that he had been a student in Newcastle in 1991 so that his recollection may go back that far, but he thought it was greater for the 5 years to 2000. In cross-examination he accepted that he used other routes from the Bigg Market to Grey Street, it all depended upon which pub he was coming from and where he was going. He freely accepted that this was the case. He had no recollection of ever seeing gates at the Cloth

Market end of the yard or they being closed, but qualified his response by referring to the length of time which has passed since the period of his recollection. Mr Wade struck me as a candid witness but one who was first asked to recollect events at least 18 years after the fact with the difficulties this creates in ensuring accuracy.

21. Timothy Whiting (1995-2000) produced a two paragraph statement saying that he is a friend of John Wade and he would go out at night in Newcastle about once a week, often with Mr Wade. His knowledge of White Hart Yard was similar to that of Mr Wade. It was always open. He stopped using it in about 2000. He had no recollection of gates at the Cloth Market end or any closed gates. In response to my questions he said that typically he would use High Bridge as a route between the Bigg Market and Grey Street but he would also use White Hart Yard. He said that he, and people generally, regarded the Bigg Market as including the Cloth and Groat Markets. Although his statement did not reveal that he was in business with Mr Wade, and knew that the latter was in business with Mr Malhotra, until asked about this in cross-examination he did not strike me as a partial witness.

22. Mark Collett (1998-2003) had lived at 6 White Hart Yard, he thinks from about 1998 until after the Ladhars opened Bubbles. He also ran an artists' studio called Fusion Arts in Moulton House at 10 Cloth Market, which occupied the whole of that building other than Java Jim, the coffee shop at the front; that is the building which abuts the Cloth Market end of Ship's Entry. His statement indicated that White Hart Yard was always open at the Grey's Court end. When he started living there it was open at the Cloth Market. The Bigg Market was at its height at that time. Anyone could use the yard. The pedestrian traffic was largely made up of couples looking for a place to "*have a snog*". Initially, he and the bookbinder were the only occupants of the yard but when a night club called Bubbles

started operating gates at the Cloth Market end were locked at times and open when Bubbles was trading.

23. In cross-examination Mr Collett said he only recalled the metal gates from the Cloth Market, these being the gates that were locked in connection with Bubbles. Even shown photographs of the wooden gates taken in 1975 and 2000 he could not recall their presence. He was asked about a police report of a fire at the yard in 2001, before Easteye became owners and the installation of the metal gates, in which the presence of locked gates were described. Ultimately, when asked whether he would accept that the evidence as to the presence the gates shown on the photographs was correct and that he had simply forgotten, he said “*Sure. I mean, I don’t remember.*” He said he usually accessed the yard from Cloth Market and didn’t recall restricted access or having a key but added that he was not saying he didn’t have a key, it was just something he did not recall. Although Mr Collett had first appeared very clear as to the lack of restriction on access from the Cloth Market, when challenged by apparently contradictory evidence he was prepared to make concessions, which is an indication of his honesty but also his difficulties with recollection.

24. Samantha Ludlow and Dana Shephard gave evidence that they went drinking in the Grey Street and Bigg Market area from 1996 to 2005. They both said they used White Hart Yard as a cut through on many occasions between 7pm and 2am. Both denied noticing any gates or restriction in passing from the Cloth Market to White Hart Yard. Ms Shephard accepted in cross-examination that it was possible that the times she had used the yard were in the relatively early evening as she could not recall at what time of day she went through the yard. Ms Ludlow accepted

that on her evidence she was walking down White Hart Yard an average of 50 times a year for 10 years, to 2005. In all that period, in reference to the Cloth Market end, she can remember that the gates were not there or were open. She accepted, however, that if she had come upon a locked gate at White Hart Yard she would not have thought anything of it and would have got across to Grey Street by a different route. There is a conflict between these witnesses and the evidence that the Ladhars installed steel gates at the Cloth Market entrance which were locked save to give access to Bubbles during the evening in the period 2001 to 2003 and thereafter remained locked. I will look at that when considering the evidence as a whole. Ms Ludlow and Ms Shephard struck me as witnesses doing their best to recall their use of White Hart Yard but, again, their recollection as to such use is made long after the event.

The Claimant's post 1970 evidence.

25. I have already considered the evidence of Messrs Horgan, Fleming, Steedman and Berg above in the body of the judgment. The remainder of the evidence from the Claimant's witnesses dealt with the period from the 1960s onward.

26. Mr Berg had told me that he sold Grey's Club to David McBeth in about 1982. I heard evidence from Mr McBeth's daughter, Tracey Foster (1982-1999). She said she worked at the club from 1982 and managed it following her father's heart attack until it was sold. During her time at the club there were solid wooden gates at the Cloth Market entrance but no gates at the Grey's Court end. She worked at the club from about 9.00pm in the evening to cashing up time at 2.45 to 3.00am. She would come in

to do accounts on Mondays to Fridays between 9.00am to 2.00pm. During the day the gates at the Cloth Market end of White Hart Yard were generally open. Her office overlooked the yard but she rarely saw anyone there. When she arrived at work at 9pm the gates to the Cloth Market were locked and they were also locked when she left after cashing up. She would have been concerned if people were walking about in the yard.

27. On her night off, Sunday, she would often go to town with her girlfriends and visit the Bigg Market. When passing White Hart Yard, the gates were padlocked. She used to look through the gap between the doors to check all was okay at the Grey's Club end of the yard, the club being closed on Sundays. She also used to visit the club's cellar which was accessed from White Hart Yard. When she did so, the gates at the Cloth Market end were locked. She identified the gates that she was referring to as those shown on a photograph taken in 2000, which shows two red wooden gates at the entrance to the yard.

28. Miss Foster also confirmed that a statement given by her mother, Mrs Margaret McBeth (1982-1999), and admitted under the Civil Evidence Act, correctly reflected what her mother had told her. In her statement she said that she confirmed that it was correct as far as she recalls but in cross-examination put it slightly differently, saying that she presumes that what her mother had put down was correct. Miss Foster was an honest and straightforward witness whose account of events is based upon her daily involvement with the land at White Hart Yard over a very extended period; it has not been disputed that the McBeths operated the club until it was sold to the Ladhars in 1999.

29. The hearsay statement from Margaret McBeth largely replicates that which was said by her daughter concerning the time at which the Cloth Market gates were locked. She said that she did not know who locked the gates and presumed it was one of the tenants who ran a business at the Cloth Market end. She added that closure of the gates was important as they wished to stop the Bigg Market younger crowd coming into White Hart Yard. She recalls the gates were generally open during the daytime and her husband, David, went that way to go to the bank on Collingwood Street. There were no gates at the Grey's Court end in her family's ownership. Whilst I must give less weight to a hearsay statement, it is corroborated by Ms Foster's evidence. Further, the explanation for the desire to have the gates locked is a rational one given that, on the evidence I have heard, the Bigg Market drinkers were a more raucous crowd than the more mature patrons attracted by Grey's Club. Accordingly, Mrs Macbeth's statement should be given some weight.

30. There was further evidence from an employee of Grey's Club. Peter Robinson (1980 to date). He worked for Mr and Mrs McBeth at the club. He said he moved to the centre of town in about 1980 and started working for the McBeths at that stage. He worked in the cloakroom, later becoming a DJ on Tuesday to Saturday nights. He continued in that capacity until about 2015 when he took on caretaking duties for the properties at that location owned by the Ladhar group. He also worked for other clubs as a DJ. His route to work from home took him from Clayton Street West, which is to the west of the Bigg Market, to Grey's Club. He worked from 9:45pm leaving work at about 2:30am. He always entered the club through Grey's Court. His route from home took him along High Bridge or Mosley Street. There was no access directly from the Cloth Market at that time.

31. Mr Robinson recalled that there were large wooden gates at the Cloth Market end of the yard until the Ladhar group took over in the early 2000's. They opened Bubbles, attempting to attract a different audience to the older clientele of Grey's Club. They revamped the yard at that stage and replaced the old wooden Cloth Market gates with steel gates. The new gates were opened with Bubbles and locked after it closed each night. In answering questions to Mr Pryor there appeared to be some confusion as to which gates were installed when Bubbles opened. This arose from what Mr Robinson said was an error in paragraph 11 of the statement where he had referred to the Grey's Court end of the yard whereas he had intended to refer to the Cloth Market end.

Notwithstanding the confusion, it was clear from the rest of his evidence that the wooden gates and replacement steel gates which he described as having being locked were those at the Cloth Market end.

32. The account given by Mr Robinson and Miss Foster and her mother is supported to a large degree by the evidence of Thomas Wright (mid 1980s to 2015), whose statement was admitted under the Civil Evidence Act. He started work as a doorman at Grey's Club in the 1980s for the McBeth family, moved into management in the mid-1990s and retired in May 2015. He said that during his hours of work as a doorman the gates from the Bigg Market were always locked. Bigg Market customers were troublesome and this helped to keep them away from Grey's Club. This arrangement remained in place except for a couple of years when the Ladhars opened Bubbles in the basement of Grey's Club, when the gates were opened whilst it was Bubbles was but locked after closing. He helped Tracey McBeth after her father became ill, taking in deliveries in the morning and watching over the cleaners and bottling-up staff. He was

responsible for the deliveries which came to the club from the Bigg Market entrance at White Hart Yard. There was a key to the Bigg Market gates with the cellar keys. He used the key to lock the gates after deliveries, which were made in the mornings. That remained the case throughout the time he was responsible for deliveries between the mid-1990s to 2015. I take into account that Mr Wright has not been subject cross-examination and that his evidence diverges for the period from the mid-1990s to 2001 from those witnesses who say that the gates were open during the daytime, including Miss Foster, whose evidence extends to 1999.

33. William Hopper (1980-1991) is an architect who did some design work for Mr Gould of Bridgewater Limited, between 1990 and 1991 at White Hart Yard and Ship's Entry, and for a subsequent owner of 11-13 Grey Street. His evidence largely relates to Ship's Entry, but he said that the location of his office and his work resulted in him having a knowledge of the area from 1980 onwards. His recollection was that until purchased by Mr Gould, White Hart Yard was open during the day but at night he recalled the Cloth Market gates were closed. The gates were the wooden gates shown on the photographs. He also said he recalled gates at the Grey's Court which can be seen under the No Parking sign in a photograph taken in 1975. He did not specify for how much of his period of knowledge the gates were present.

34. In Terence Scott (1982-2002) and Keith Dodd I heard from two doormen who had worked in the Cloth Market and Bigg Market areas. Mr Scott said he worked as a doorman in Newcastle from 1982, including at a number of bars around the Bigg Market and Cloth Market and had worked at Yells from about 1992 to 1997. He also worked as a taxi

driver in Newcastle. He said that when working at Yells he was directly facing the Cloth Market entrance to White Hart Yard. He worked from 6.00pm to 2.00am. At all the time he was on duty in those years the doors, which can be seen on the 2000 photograph, were kept shut and locked with a padlock. He said the area of the town was busy with drinkers and had a bad reputation for being a trouble spot. He recalled that the wooden doors at the Cloth Market end of the yard were replaced by the steel gates when the Ladhars bought it and opened Bubbles. He was still working in the Bigg Market at the time. Mr Scott was extensively cross-examined about his assertion that he did not know what was behind the doors at the Cloth Market and that it was a way through to Grey's Court. He maintained throughout that he had not been down that lane although he had visited Grey's Club at odd times because it was open late and his security company have looked after Grey's Club for 15 years. Mr Scott pointed out that there are a number of locked accesses from the Cloth Market. He was only in the area at night both as a doorman and a taxi driver as his business catered for the night time crowd.

35. I do not consider it as surprising as was suggested by Mr Pryor that Mr Scott did not know for a considerable period that the Cloth Market entrance to White Hart Yard led to Grey's Court. If the doors had always been locked when he was there and he had not been in the yard he would not necessarily know to where it led. There are, as he said, a number of locked entrances from the Cloth and Bigg Market. He is correct in that assertion as the site visit demonstrated. Mr Scott was also cross-examined as to his connection with the Ladhars for whom one of his companies provides doormen, but the insinuation that he had tailored his evidence to assist his clients, to which this line of questioning may give rise, was not

followed through. I do not regard his answers concerning a lack of knowledge as to the existence of a cut through as a reason for disbelieving his evidence. He was in that group of witnesses with a longstanding working knowledge of the Cloth Market entrance to the yard.

36.Mr Dodd (1987-1994) has worked as a doorman from 1987, since which time he said that he has worked at various establishments around the Bigg Market. He worked outside a club known as Bentley's from about 1987 until 1990 when it became Yell. He has worked at Yell and Balmbra's, just filling in. In his witness statement he said that the doors shown in the 2000 photograph were kept shut and padlocked when he worked in the area. He did not know that there was a lane leading from those doors to Grey's Court. He assumed it was a service yard for the Cloth Market properties.

Mr Dodd said he worked in the Cloth Market at night, from 7.00pm onwards until the change in the licensing laws in about 2004 when his work started later in the evening. Mr Pryor asked him about the various activities connected with working as a doorman which he suggested would have caused Mr Dodd to be in the Cloth Market during the daytime. He gave a credible explanation as to why,

for example, starting a new job at licensed premises would not involve a daytime visit. He accepted that in his visits to central Newcastle he would occasionally walk up the Cloth and Bigg Market but he never noticed the Cloth Market doors to be open. He said he had not been to Grey's Club. Just as in the case Mr Scott I do not regard it as improbable that he would not know that the

Cloth Market entrance to White Hart Yard led to Grey's Court.

Accordingly, Mr Pryor's attempt to discredit this witness on those grounds falls away.

37.John Pickstone (1981-1983) is an accountant who works for the Ladhar Group. He attended Newcastle College between 1981 and 1983. He said that following classes he used to get a lift from his father who worked at

the Royal Bank of Scotland, 31 Grey Street. He would use White Hart Yard as a shortcut to his father's office. He recalled that the yard was sometimes closed off forcing him to walk via High Bridge or Mosley Street. In cross-examination he said that he would be coming through the yard after college at about 4.30pm. When asked if he could recall the yard being closed at 4.30pm he said he couldn't recall the exact times. He explained that there were occasions when he was late because he was in a rush to come from college and the gates to the yard were closed. I bear in mind that he was recalling events almost 40 years ago but he seemed to have a clear recollection that there were times when his passage through the yard was obstructed.

38. Joseph Gould (1990-1997), whose company Bridgewater Estates Ltd, owned White Hart Yard between 1990 and 1997, said that the Cloth Market end of the yard was gated throughout Bridgewater's ownership using gates already installed. These were those shown in the 2000 photograph. The gates were controlled by tenants. They were locked shut from time to time and, so far as he believed, only open when the tenants' business required access. He was certain that Grey's Club and Hart Hairdressers, the latter having premises at the rear of the doorway to the yard, had keys. Nevertheless, he acknowledged that in his first statement for this case he was incorrect in his recollection that there were also gates at the Grey's Court entrance. He explained his company had a sizeable property investment portfolio and he could not recall much concerning White Hart Yard. His recollection as to Ship's Entry was better due to problems that his company had encountered with the owners of Balmбра's.

39. I asked Mr Gould as to his knowledge of what was going on in White Hart Yard. He told me that at the time his offices were around the corner from the yard at Collingwood Buildings. He visited the site at least once a month and often walked past on his way to work. He had numerous conversations with architects, council planners and tenants concerning the yard as he was trying to assemble a development scheme for the area. In answer to Mr Pryor he accepted that the tenants were left to open and close the gates because of the hours they worked but added that they did close the gates. When pressed for more detail, he said *“we checked that the gates were shut at night at relatively frequent intervals. We wanted to restrict people who perhaps are inebriated and other goings-on which might have happened in a relatively dark area. So we were always insistent that at night after close of business and whenever possible, these gates were shut, and generally that happened.”*

40. Iain Murphy (1990s to early 2000s) is an architect who started practice on The Side in Newcastle in 1993. He used to call in at a shop called Photoline which is opposite the Cloth Market entrance to White Hart Yard. He also frequented Grey’s Club in the 1990s and early 2000’s. His evidence was to the effect that the Cloth Market entrance to White Hart Yard must have been closed for otherwise it would have become known to him as a way through to Grey’s Club. Further, had it been open, individuals coming from the Cloth Market would have been able to queue jump those waiting to enter Grey’s Club, which would have been a source of trouble. He always used Mosley Street or High Bridge to pass between Grey Street and the Cloth Market. During his frequent visits to Photoline he didn’t recall there being an access from Grey Street through White Hart Yard.

41. I do not gain much assistance from Mr Murphy's evidence in relation to White Hart Yard. Both his evidence in chief and in cross-examination resulted in the impression that he was in the habit of using particular routes to pass between Grey Street and the Cloth Market and because he was unaware of a possible passage through White Hart Yard he presumes that none can have existed. The fact that information did not come to his attention as to the availability of the yard to break that habit is not evidence that such information did not exist. I should add that it was suggested in cross-examination that there was something untoward in that his statement did not reveal that he had worked for the Ladhars. He told me that he was known in Newcastle as a care home designer. He had also worked for the Malhotras, who also owned care homes and they would have known who else he worked for. He was not challenged on that assertion. In those circumstances it cannot be fairly inferred that he was trying to hide his connection to the Ladhars from anyone.

42. The Claimant called three witnesses whose recollections as to the use of White Hart Yard commenced in 1997, Stephen Davison (1997-2001), Simon McIlwraith and Belal Aljibouri. Mr Davison and his wife purchased 10 to 16 Cloth market from Bridgewater Estates Ltd in 1997 hoping to develop the property. He said he soon realised that the task was too great for him and he therefore sold the property in 2001 to Easteye. He said there were always gates on the Cloth Market end of White Hart Yard during his ownership. These were kept locked and the tenants had keys to take in deliveries. As far as he was aware the yard was not left open for the public. When questioned about the locking of the gates, however, he said that he didn't personally have a key. The tenants had keys but they were not what you might describe as blue-chip tenants.

There were just people who wanted to pay a little bit in order to use buildings which he recognised were dilapidated and leaked. He left them to their own devices as to when and whether they opened and closed the gates. The overall impression I gained from Mr Davison's evidence was that he was preoccupied with the difficulties concerning the development and didn't pay much attention to what his tenants were doing. Thus, I cannot place reliance upon his evidence concerning the locking of these gates at White Hart Yard.

43. Simon McIlwraith (1997-2002) is an interior designer. He studied commercial design in Newcastle from 1997. He told me that part of his course involved bar and restaurant design projects in the Bigg Market area. He recalled that the gates of the Cloth Market entrance to White Hart Yard were closed during the day. That was the position up to 2001 when his professional involvement with the yard commenced. At that stage he had meetings at the yard with planners and an architect; by this stage he was working for the Ladhars. These were daytime meetings. The gates were closed and he was let into the property by a gentleman called Jeff who was employed by the Ladhars. He visited Bubbles in the evening on a few occasions at which point the gates were open. He continued undertaking work involving the yard after the closure of Bubbles. He said the gates remained locked following the closure.

44. Mr McIlwraith appeared to have a clear recollection of the gates being closed at the time of his meetings. He recalled that the gates were originally the wooden gates seen on the 2000 photograph and these change to metal gates by 2002. It is difficult to explain why he should have a recollection of Jeff letting him into the property if that is not what had occurred. He did not start his professional involvement with the yard

until 2001, thus his recollection from 1997 to 2001 as to the locking of the gates was gained in passing, and for that reason is less likely to be accurate.

45. Dr Belal Aljibouri (1997-2015) started employment at a takeaway food shop at 16 Cloth market in 1997, working a few evenings per week while studying for his PhD. He said that when he turned up for work at 5.00pm the gates to the yard were closed. At what time they had been closed he did not know. In 2004 he took over the lease of the takeaway operating it under the then existing name of Sicily. By then the wooden gates had been changed for the steel gates. Whilst he was an employee, the business owner, Mr Arslam had a key for the padlock which secured the gates and when he took over the business he got the key. He said there were a couple of years when the management of Grey's Club opened the gates to get customers in that way but this created trouble for him as he had smashed windows and there were attempts to kick in the door. At first he appeared to be saying that this was at the time Bubbles was open but later in his evidence he said that the Bubbles customers came in the Grey's Court entry as the Cloth Market gates were locked and the damage to the premises was after he took over in 2004.

46. Whilst he was the owner of the business between 2004 and 2015 he worked there throughout the day and he kept the gate locked shut save to take in deliveries or put the rubbish out. He recalled the padlock went missing so often that there was a padlock welded on but that was later changed to a combination lock. His premises, which included the shop adjacent to the gates had a side entrance in White Hart Yard. He experienced trouble from people smashing his windows and kicking down the door where they faced into White Hart Yard. He regarded

leaving open of the gates was a security risk and resulted in people using the yard as a toilet. He had some heated discussions with Tommy Wright, the manager of Grey's Club, when their staff left the gates open or unlocked; he was aware that Grey's Club had a key. He said Mr Wright also wanted the gates locked but would not accept responsibility when this did not occur. He accepted that he had asked Mr Ladhar to leave the gate open at a time that business was quiet as he hoped that customers would come from Grey's Club to use his takeaway. He said Mr Ladhar refused.

47. Dr Aljibouri's evidence concerning when it was that Grey's Club opened the Cloth Market gates to draw in customers is not consistent with the Ladhars' evidence and I take this into account when considering his evidence. Nevertheless, in other respects he seemed to have a good recollection of his time at White Hart Yard, as one might expect given that he worked adjacent to the Cloth Market gate for 8 years. Further, it is difficult to see why he would have asked Michael Ladhar if he could leave open the gates on some nights if they were open anyway.

48. The Defendants had intended to call Peter Willis who had provided them with a signed statement stating that for 3 to 5 years, at some unspecified time, he had traded as a bookbinder from premises in White Hart Yard relying on passing trade. In that time, the yard was open both at night and during the day. Mr Willis did not attend the trial. In the event the Defendants did not seek to enforce his attendance or rely upon his statement. The Claimant, however, did seek to rely upon a handwritten note of a conversation between Mr Willis and Gillian Tatt, the Claimant's solicitor. The note records that he said he was at White Hart Yard for a couple of years. There was only a nightclub there, nothing else. There

were no gates at Grey's Court, he couldn't remember any gates at the Cloth Market although his partner, who must have been present during the interview, interjected that there were. He said if there were gates, they would have been shut at night. Everyone would have had to come in the back entry after 5.00pm. As he thought about it, the club entrance was that way so the gates must have been shut at 5-ish. What is clear from the note is that Mr Willis had a shaky recollection as to the presence, or otherwise, of gates at the Cloth Market so this evidence does not take the case any further.

49. The Claimant relied upon a Northumbria Police incident log dated the 6 February 2001. This recorded that a call had been received from 16 Cloth Market, Peakza Texas, which was the then name of the takeaway, or a phonetic version thereof, at which Dr Aljibouri worked, reporting that there was a fire amongst rubbish which had been left adjacent to large bins in the alley which leads from the Cloth Market down to Grey's Club. The log states "*The Cloth Market end is secured by a wooden gate which was locked from the O/S with a padlock.*" It states that the fire service had to force entry to the yard. Voices had been heard from the yard and the fire brigade treated this as a malicious ignition. Attendance at the yard by the police and fire service was timed at shortly after 3.00 am. This is relied upon by the Claimant as good evidence of the locking of these gates at night.

50. The shares in Easteye were purchased from the McBeth family by a Ladhar family holding company in 1999. At that stage they had a lease of Grey's Club, but the freehold of White Hart Yard was still owned by the Davisons. I heard from Michael Ladhar (1999 to date) a director of

Easteye and read the hearsay statement from his late father Dave Ladhar. They deal with the period from 2000 onwards.

51.The evidence of Dave Ladhar (1999-2019) was that the purchase of Easteye was completed in December 1999 and the freehold of the whole of White Hart Yard purchased from Mr Davison in 2001; the purchase was completed on 7 August 2001. Following the acquisition of Easteye, initially he left things to carry on as they had been under the McBeths, retaining the same staff. Mr Ladhar, senior, wanted to open up the top, western end, of the yard, to tap in to the Bigg Market crowd. At that stage it was closed off. He approached Steve Davison to see about opening up the yard in the evenings and it was as a result of that approach that the purchase of the freehold came about .

52.He recalled there were wooden gates, as shown on the 2000 photographs, at the Bigg Market end of the yard in 2001. He did not recall any gates at the other end. Tommy Wright, whom he described as the long-standing manager of Grey's Club, who was kept on, was strongly against opening up on the Bigg Market side as he thought this would attract the wrong crowd with an adverse impact on Grey's Club. In the light of Mr Wright's objections he hit upon the idea of opening a separate discotheque in the basement of Grey's Club which was to be accessed from the Cloth Market entrance, thus avoid customers mixing with Grey's Club patrons. This was achieved after the freehold was purchased, possibly in the course of the purchase. The new discotheque was called Bubbles. In order to tempt customers to visit Bubbles, the wooden gates were replaced with what he calls wrought iron gates, though they are in fact steel. Lighting was installed and the walls whitewashed. He said that anyone using the yard who was not visiting Bubbles would be removed by the doormen.

Bubbles was not a success and closed after a couple of years. It attracted unruly customers as Mr Wright had predicted.

53. The steel gates at the Cloth Market entrance were secured by a padlock from the outset. Those tenants who needed access had keys as did Mr Wright who took in deliveries to Grey's Club from the Cloth Market. The gates were unlocked when Bubbles opened and locked again afterwards. The tenants who had shops fronting onto the Cloth market took their deliveries through back entrances which were inside the yard. Dr Aljibouri ran a takeaway at number 16 Cloth Market. He had a key for the padlock on the gate. There were number of run-ins between him and Mr Wright, each blaming each other when the gates had been left unlocked. Tenants of the yard also had keys but by that stage they were not many in number and even they did not remain for long. He was not advertising for tenants as he planned to develop the yard.

54. In 2007 the club Diamonds was opened in the former casino premises in Grey's Court. Grey's Club required modernisation in 2007 as it needed a smokers' area. This was provided inside White Hart Yard. Smokers have access to this area through the fire exit doors. Fire escape doors were erected which restricted access between Grey's Court and the yard. This acted as a barrier to prevent people using the smoking entrance as a way of gaining admittance to the club. In 2012 additional gates were fitted to the outer entrance of White Hart Yard at the Grey's Court End.

55. Mr Ladhar, senior, always intended to develop the whole site. The planning of this project required a report from archaeological experts. The report was commissioned from John Nolan and Grace McCombie and was produced in March 2002. Appended to the report were photographs

of both the Cloth Market and Grey's Court entrances to the yard which showed the presence of No Entry signs in the yard stating

“PRIVATE LANE” and “TRESPASSERS WILL BE PROSECUTED”. He said he did not remember those signs and they may have already been in place when the freehold was purchased or may have been fixed as part of the works associated with opening Bubbles.

56. The evidence of Michael Ladhar (2000-2009) was similar to that of his late father but he gave further detail as to the operation of Bubbles and the locking of gates. He recalled the presence of the No Entry signs shown in the archaeological report, which he thought were present throughout the period he worked at White Hart Yard. His involvement started in 2000 at which time he was 15. In 2001 he had specific jobs following the opening of Bubbles. Mr Pryor put to him that the signs were put up after 2001 but Mr Ladhar said he remembered them being there. Given that it appears in a photograph that was appended to the archaeological report which was produced in March 2002, even if the sign was not present in 2000, Mr Ladhar cannot be far out in his recollection as to their presence. He worked every evening on which Bubbles was open, which was Thursday to Monday. He was questioned in detail about his activities at the time on the basis that in his statement he said he unlocked the Cloth Market gates at about 5:30pm to admit the earlier crowd whereas following his arrival there was quite a bit of setting

up work he had to do before the premises could open for business. He said that he opened the gates at the Cloth Market entrance when he had finished getting the bar ready which could be anything between 5.30 and 7.00pm. He was adamant that the gates were always locked when he came to open up. He said he personally unlocked the padlock on the

wrought iron gates which are the same gates as are now present. The key for the padlock was on the ring with the cellar keys.

57. Michael Ladhar described the efforts he made to attract people to visit Bubbles. He put an A board outside, he handed out flyers until about 10.30pm, flashing lights were installed, there were balloons and a bubble machine, but without success. Bubbles closed at about 2.00am on Fridays and Saturdays, earlier on quiet nights. Grey's Club was closed on Sundays and Mondays. When Bubbles closed, he locked the Cloth Market gates although he occasionally asked other staff to do so. He then went to Grey's Club to help cash up. He also referred to the owner of the takeaway shop at the Cloth Market entrance, Dr Aljibouri, asking for the gates to be open later on quiet nights in order to attract business but he said this was resisted as they would otherwise have needed to have a man at that exit as trouble was frequent.

58. Bubbles closed in 2003. The Claimant extended the opening of Grey's Club to seven nights a week and acquired other licensed premises in the vicinity. In 2007 a lap dancing club, Diamonds, was opened in the old casino. At that time, 2007, he undertook a full-time MBA and worked less at Grey's Club. He also gave evidence about the doors installed to contain smokers at the Grey's Club end of the yard. These had to be fire doors as they were on the route out to Grey's Court. After Bubbles closed, the gates at the Cloth Market were padlocked shut except when tenants opened them. The takeaway 16 Cloth Market had a key. He recalled taking a shortcut through the takeaway premises after Bubbles closed to save unlocking and re-locking the gates. His involvement with the leisure portfolio of the Claimant reduced in 2009 when he focused

upon other businesses. It was his view that Bubbles had not prospered because it was difficult to coax people from the Bigg Market down White Hart Yard. Whilst Dave Ladhar's evidence had to be admitted as hearsay, his son appeared to be an honest witness who dealt well with cross-examination and supports much of what his father said. His evidence also supports the hearsay evidence from Mr Wright concerning the key for the Cloth Market gates being kept on a ring with the cellar key and the locking of the gates when Bubbles was closed.

APPENDIX C

Ship's Entry

The Defendants' lay witness evidence concerning Ship's Entry

1. The earliest recollection is that of Walter Clark (late 1950s to 1960s) It is to be recalled his evidence was in the form of a hearsay witness summary. He says he joined the Newcastle Amateur Cinematic Club in the late 1950s/ early 1960s. The club rented premises in Ship's Entry. Meetings of the club started at 7.30pm. He recalled an iron gate at the Cloth Market entrance. It was open when he arrived but he cannot say if the gate had been opened for club meetings or whether it was open at other times. Meetings finished about 10.00pm. Whilst there were people in the street

he did not recall others coming down the alley. At the time the lease was coming to an end the members tried out using Grey's Club on one occasion. To get there he walked from Ship's Entry into Grey's Court. That is the first time realised that he could get to Grey Street via the alley. There was no impediment to passing from the alley to Grey's Court, if there was a gate it may have been pushed to. A few months after the club closed, he and a few members visited Ship's Entry to see what was going on. On that occasion the Cloth Market gate was open.

2. George Wouldhave (1960s-1971) said in evidence that he had used Ship's Entry as a cut through from the Cloth Market to Grey's Court on a couple of occasions in the 1960s. On his birthday in 1971 he used the alley to go from Balmbra's to Jim's Inn up on Grey Street. He recalled the evening as he was also celebrating his wedding engagement. He does not recall there being any gate at either end of the alley. He was shown the photograph of the gate which is shown in the 1957 film but said he could not remember it. His passage was certainly not impeded by a gate. His evidence differed from his witness summary which said that he frequently used the alley in the 1960s and that on his birthday in 1971 he used the alley to visit Grey's Club. A further oddity in Mr Wouldhave's evidence was that he recalled the alley he used as being to the right of Grey's Casino, as he faced it, whereas it is well to the left. When shown a picture of the gate at the Dog's Leg he said that it was on the alleyway that leads to Drury Lane, but then corrected himself.
3. Levant Hepurker's statement (1977-85) claims that he frequently used Ship's Entry and that it was often used as a urinal. He was most unclear as to which cut through he was using when he came to give evidence. When asked which alleyway he had used he said he said it was White

Hart Yard and remembered Drury Lane. He did not identify or describe Ship's Entry at all. I have given little weight to his evidence as regards White Hart Yard for the reasons I explained. His evidence as to the use of

Ship's Entry is even more tenuous. Mr Hepurker said he was asked to give a witness statement by Mr Guclu. The latter also gave a statement claiming that he used White Hart Yard and Ship's Entry as a means of returning home from the Leazes Wine Bar on Grey Street. I have explained my misgivings about his evidence in relation to White Hart Yard and they apply equally to his account of using Ship's Entry.

4. Sunil Khanna (1979-early 2000s), who gave evidence about White Hart Yard, also said that he used Ship's Entry less often. He used it on nights out throughout the 1990s and perhaps into the 2000s; he did not specify any other period in relation to Ship's Entry in contrast to his evidence about White Hart Yard which he said he had used since 1979. He claimed he used it to pass from Balmbra's to Grey's Club or Grey's Casino. He did not recall if there were any gates but there was nothing to stop him getting through.
5. Jagmohan Malhotra (1983-2007) said he used to go with Mr Khanna and others to and from Grey's Court and Balmbra's; he described Mr Khanna as his best friend. This was in the period 1983 to 1995. He did this occasionally. There was always an open metal gate at the Grey's Court end but he does not recall a gate at the entrance to the Cloth Market. In early 2000 he was looking to assemble a landholding in the area. At that time there were gates at both ends of Ship's Entry but neither was locked. In that period, but before his acquisition of Balmbra's in 2007, the Cloth

Market gate was padlocked though the Grey's Court gate remained open. In this early 2000 to 2007 period the intermediate gate appeared but it was always open on his visits. I have already expressed my view as to Mr Malhotra's evidence, which is apparent from my review of what he said in relation to White Hart Yard and his evidence about his agreement with Dave Ladhar and lack of knowledge as to how Ship's Entry had been treated in the original development.

6. Those who operated or worked at Santino's restaurant at 10 Cloth Market gave evidence as to their use of Ship's Entry. The restaurant fronted onto the Cloth Market and had a fire exit door to the rear which opened onto Ship's Entry, further in from the iron gate which is seen on the 1957 film. Enzo Arceri said that between 1983 and 1986 he and others used the alley to pass between the Cloth Market and Grey's Court. In his statement he said he did this several times a week. In cross-examination he said that the times he would visit the alley were on his days off. Sometimes he entered the alley from the back door of the restaurant, other times he came in off Cloth Market. There was a gate at the Cloth Market end that was either open or could be pushed open.
7. Sergio Addis worked at the restaurant between 1983 and 1985. He also said that he used the alleyway in both directions in the course of his visits to Grey's Casino. He also referred to the gate at the Cloth Market being open or that it could be pushed open. At the other end of the alley he was able to get access without opening a gate. He said people from Grey's Court used to get into the alley to relieve themselves. He also said that he saw David Horgan in the alley on 4 or 5 occasions. There is one respect in which the evidence of Enzo Arceri and Sergio Addis cannot be right. They both indicated that they could enter the alley from the Cloth Market

by pushing the gate. The gate, however, opened outward to the Cloth Market at the time. If their recollection was of pushing the gate open, that must have been from the alleyway and could be achieved, even when the gate was in the locked position, by using the push bar.

8. Adriano Addis said he used Ship's Entry several times a week between 1983 and 1986, when he worked at Santino's, and less frequently from 1986 to 1989 whilst it was operated by his nephew. In his statement he said that he did not recollect there being any type of gate at either end of the alley. Under cross-examination, however, he did refer to gates. He said from the fire exit at the back of the restaurant one could go into the alleyway and, turning right, open the gate to get outside to the Bigg Market. When he was taken to the evidence of Mr Horgan as to the presence of locked gates, he said that it was a long way to the other end of the alley but he could enter the alley from the side entrance to the restaurant. When asked if he could get out of the alley by pushing the door, he said it was either pushed or it had a bolt. That was the gist of his answer as I had recorded it. Looking at the transcript of evidence I am conscious that Mr Addis may have thought he was being asked how he opened the fire exit from his premises, this was not clarified. Given the change of evidence as to his recollection of the gate at the Cloth Market end and the context in which he was asked about the ability to exit into Grey's Court I am in doubt as to whether he was sticking by his evidence that there was no gate into Grey's Court.

9. Franco Pizzuti (1982-1986) stated in his witness statement that he used the alleyway at all times of the day and night as did others who worked in the restaurant and members of the public, including Santino's customers. He did not recall if there was a gate, but if there was it was

never locked. He retreated from these broad claims under cross-examination. He said he worked in the kitchen and obtained access to the alley from the fire exit. He said that he didn't guard, by which he meant watch, whether it was used by other members of the public or not. He used the alley in the night time to visit the L'Aragosta restaurant to borrow items; he clarified

that he was talking about a time at which the restaurant was open. He was not asked how he entered the L'Aragosta, but I bear in mind that the rear entrance to the restaurant opens onto the Dog's Leg on the Ship's Entry side of the alleged gate.

10. Mohammed Islam (1989-2009) said that he used Ship's Entry far less frequently than White Hart Yard in the period commencing 1989. In view of his evidence in relation to White Hart Yard, in respect of which he said "*he was not very often going and coming,*" his visits to Ship's Entry must have been very infrequent. He said it was possible to walk the full length of the alley and that it was closed off about 10 years ago.

11. Starting in the 1990s, Moet Bondi (1993-2000) said he had used Ship's Entry a few times since 1993. There were gates on the alleyway but they were not locked. The Defendants' other evidence commencing in the 1990s was that of Clive Gibson. (1995-97). He worked for Bass as the manager of the Cooperage on the Quayside in Newcastle. In his statement he said that in 1995 and 1996 the Brewery regularly arranged managers' meetings which were generally held at Balmbra's. Following the meetings the managers would visit Grey's Club. They used Ship's Entry to pass from the Cloth Market to Grey's Court. There was a gate at the Balmbra's end fixed to the wall and he did not recall any gate at the other end. In cross-examination it transpired that there were only two

visits by him to Grey's Club from Balmbra's and the gate onto the Cloth Market was open but he was not saying it was fixed in that position. His earlier responses to questions gave the impression that he was describing many more meetings as he said some were early in the morning, others in the afternoon. When shown a 1988 photograph of the gate at the Grey's Court end of the alley, which appears to resemble the gate currently in place, and asked whether he could have got through the gate by use of the push bar, he said that as he was chatting to the other managers at the time he was not paying any interest to what was in front of him. In the light of these concessions and what appears to have been an overstatement of his use of the alley in both his written evidence and parts of his oral evidence, I cannot rely upon his assertion that there was no gate or locked gate at the exit from the Dog's Leg. I make it clear that I did not regard him as someone trying to mislead me but the shift in his evidence was an indication that he had not given careful thought to what he could recall.

The Claimant's lay witness evidence concerning Ship's Entry.

12. The Claimant's witness evidence starts in 1964. Edward Berg who it is to be recalled ran Grey's Club and Casino, said he worked at the club between 1966 and 1978 and again between 1980 and 1982. He said that Ship's Entry was closed to the general public at the Grey's Court end throughout this time. There was always a locked gate at the entrance which he identified as the current gate. It was only used by the L'Aragosta restaurant to access a storeroom and to take in deliveries. He accepted Mr Pryor's suggestion that whilst he had seen staff at the L'Aragosta going in and out of the gate when he was there, he was not in a position to say whether members of the public were using it when he

wasn't. His evidence as to the locking of the Grey's Court gate was supported by Ms Foster (1982-1999) although she accepted that she did not have much knowledge of what was happening at that gate. Mrs McBeth (1982-1999), her mother, also said in her statement that the Grey's Court gate was kept shut and was not used by the public.

13. In 1974 Sir John Fitzgerald Limited purchased 10 Cloth Market and Ship's Entry from the Moulton Charity. David Horgan (1974-1990), the managing director, spoke of the period between 1974 and 1990 when it was sold to Bridgewater Estates. He said that steps were taken to prevent public access during the company's ownership, which ended in 1990.

14. At that time to which Mr Horgan referred there were gates at either end of the alley, which can be seen on photographs taken in 1988 and 1990, in the case of the Grey's Court end, and at the Cloth Market, the still taken from the 1957 film; the 1988 and 1990 pictures show the Grey's Court gate in the closed position. There are also photographs of the Cloth Market entrance showing the gate closed. There are 1975 and 1977 photographs which Mr Horgan believes show the gate to be closed. It is likely that he is correct in that had it been open, the gate, which opens outwards, would have been visible covering the wall against which it opened, whereas the wall, but not the gate, is visible. The photographs lend support to this part of Mr Horgan's evidence.

15. Mr Horgan had no recollection of a gate about half way down the alley but he did recall a wooden doorframe and door just inside the Cloth Market entrance though he did not remember for how long it was

present. The metal gates were kept closed though they could be opened from the inside using a fire escape push bar. He regularly inspected the property to see the alley was secure. The public were not permitted to use the alley. If the gates were left propped open it could not be for long as he would have closed them. He did not see unauthorised persons in the alley on his visits. It was used by the restaurant at 10 Cloth Market as a fire escape, and L'Aragosta, the restaurant at 11 Grey Street, to access its storeroom in Ship's Entry and as a fire escape into Grey's Court. The owners of L'Aragosta also had a key to open the Grey's Court gate.

16. Mr Horgan produced documentation which evidenced his company were paying attention to what was happening in Ship's Entry and seeking to exercise control. The contents of these documents are of relevance. On 7th September 1979, Mr Simpson, the works department controller of Bass, wrote to Sir John Fitzgerald Ltd recording that Bass had emergency exit obligations from the rear of Balmbra's and complaining that the alleyway was congested with rubbish which appeared to have come from the Café (10 Cloth Market) and the Italian Restaurant further down the alley. He was worried that there could be a "*Woolworth's Fire incident*" if the alleyway was not kept clear; a reference to a fire in a Manchester Woolworths in May 1979 in which customers were trapped in the building and several died. The response to the letter was not produced.

17. This type of complaint coupled with counter allegations was not new for in a letter dated 12th October 1976 from Mr Simpson, the works department controller of Bass, he had refuted that his manager was at fault for leaving debris and dustbins in the alley. He said that Bass would repair the loose latch/wall keep of the wrought iron gate, it is unclear

whether this was a latch to keep it closed or hold it open, and that there was one dustbin in use, but in future Bass would use plastic bags which would be retained within Balmbra's and taken out through its entrance. Mr Simpson said that old doors and timber which were lying in the alley was not from their premises. The correspondence evidences that at the time it was written the alley was congested with debris to the point where Bass was concerned it was not easily passable.

18. On 21st September 1984 Mr Horgan wrote to Bass complaining that their builders had opened new doors from Balmbra's into "*this private alleyway*". He said there was no public right of way over the alley and he asked that the works be bricked up and the builders stop using the alley.

This was followed up by a solicitor's letter on 24th September. Counsel was instructed on behalf of Sir John Fitzgerald Ltd to advise them of their rights vis a vis Bass and a conference took place on 2nd October 1984. On 4th October 1984 solicitors for Bass replied to the solicitor's letter undertaking not to do further building work without prejudice to their client's rights and added that Bass had used the passageway for emergency purposes only. For much of October 1984 there was inter solicitor correspondence as to Bass's rights over the alley, they alleging that the building work was permitted by virtue of the 1962 licence.

19. Mr Horgan wrote to his company's solicitors on 29th October 1984 stating that Bass were making further openings in their wall to install an extractor fan to expel fumes into the alley and asked what action should be taken to stop it; although I have copy correspondence which does not show the writer's name, it is clear it came from Mr. Horgan for the letters in reply are to him. The following day, 30th October 1984, he wrote

stating that Bass had now put up electric cable along the length of Ship's Entry for Emergency Exit illumination and part of the wiring was on the property of his company. He asked that Bass be written to and told to remove the wiring. He added, "*Their builders trespass daily on our land.*"

20. On 31st October 1984 the company's solicitors instructed counsel saying that their client was extremely anxious about further breaches of the 1962 agreement and wished proceedings to be issued if so advised. Bass's defence seems to have been, in part, that they had been permitted to do what they had been doing over the years giving rise to some right. A letter from the company's solicitors dated 16th November 1984 responded to Bass's justification for its action saying that Mr Horgan had discussed them with the writer by phone and he had said that "*they had frequently inspected the alleyway and had complained e.g. about dustbins being left there in the past...*"

21. Counsel advised at the end of November that some attempt should be made to negotiate settlement; he indicated that as the alley was Balmбра's emergency exit there probably was an implied right to install lighting.

Inter-solicitor correspondence continued into 1986 which showed that Bass produced a draft deed of easement containing rights over the alley. Mr Horgan says it was not agreed. The end of this run of correspondence in the bundle is a March 1986 letter to Mr Horgan from his company's solicitors saying they were unable to make progress and asking if it was worth a round table conference at which both sides' barristers were present. Hostilities did not cease at that point, however, for on 24th

October 1989 Mr Horgan wrote to Bass to complain that Balmbra's was using their fire escape doors to eject difficult customers into the alley and that on busy nights customers from Balmbra's were getting into the alley, leaving litter, as were Bass, and were using it as a urinal. Bass replied that it would take the necessary steps to remedy the situation.

22.I have dwelt on this correspondence as it is an indication that Mr Horgan was paying careful attention to what was taking place in the alley, regarded it as a private space, not a public right of way, and one which he took steps to protect. This contrasts with the account given by some of those working in Santino's to the effect that there was no impediment to access from the Cloth Market and members of the public were using it as a cut through at will.

23.Keith Dodd (1987-94) worked as a doorman at Balmbra's on about eight occasions in the early 1990s. He recalled the wrought iron gate which appears on the photographs. He said he did not know that the alley ran to Grey's Court and cannot remember it being used as such. He had not seen clients of Balmbra's using the alley but did not know whether they did when he was not there. Terrence Scott (1992-1993) worked as a doorman at Balmbra's from 1992 to 1993. He also used to visit Santino's at 10 Cloth Market every 4 to 6 weeks in the mid 1980s. He did not see the gates open and did not recall Balmbra's having access to the alley when he worked there. I cannot gain much assistance from the evidence of Mr Dodd and Mr Scott in relation to Ship's Entry given their very limited dealings with this part of Cloth Market. Further, the fact that they did not know there was a route through to Grey's Court does not mean that others did not.

24. Peter Robinson (1980 to date) said that the gates at the Grey's Court end of Ship's Entry were always shut since he has worked at Grey's Club since 1980, and he still works there. The only people he saw in the alley were restaurant staff smoking just inside the gate. Until about 4 years ago he did not know that the alley led to the Cloth Market, he thought it was the back entrance to the restaurant. He accepted in questioning that he did not have any real reason to know about Ship's Entry.

25. Joseph Gould (1990-1997) of Bridgewater Estates, which purchased the land comprised in 10 Cloth Market and 11-13 Grey Street in 1990, told me the property was purchased for a development which did not proceed. The company sold 11-13 Grey Street in 1991; the purchaser was Patrick Murphy. Mr Gould did not recall what, if any, arrangements were made concerning Mr Murphy's access to Ship's Entry. 10 Cloth Market was sold in 1997 and purchased by other developers, Mr and Mrs Davidson. He said he was concerned about security and recollected that Ship's Entry was closed to the public. There was a gate at the Grey's Court end, which resembled that shown on recent photographs and a locked gate at the Cloth Market which was used by the tenant of no. 10 and by Balmbra's when they trespassed on the alley, but not otherwise. The Grey's Court gate was a fire escape for the L'Aragosta who also used it to take in deliveries. He believed that Grey's Club and Casino also had a key; that would be consistent with the lease of the club between Bridgewater and Easteye dated 2 May 1991, which appeared to grant a right of way over Ship's Entry to the tenants. In his statement he identified an intermediate steel gate as present when he purchased and said he had not fitted additional gates. When asked to look at photographs of that gate and a plan showing its location he said he could not recollect whether the gate

was there or not during his ownership. He has a memory of the presence of two gates.

26. In 1990 Bridgewater were in dispute with Bass, it being alleged that the latter was trespassing upon the alley. The course of that dispute was dealt with in greater detail by the solicitor instructed by Bridgewater, Robin Winskell (1990-1994). He said that the restaurant tenant at number 10 Cloth Market was complaining that Balmbra's were piling up bags of rubbish in the alley, occasionally propping open the gate using the bags and there was noise from their customers. Mr Gould was concerned that the tenant may rely on this behaviour to avoid paying rent. Bass were asked to desist but when they did not, video surveillance was obtained. This showed that Balmbra's customers were exiting the pub from the doors in the alley, urinating and returning to the pub. Others exited into the Cloth Market and a few customers were going towards the Grey's Court end.

27. Bass was asked to cease user as they were in breach of the 1962 licence. The dispute started in July 1990. Despite a promise to cease user they continued to do so which resulted in proceedings followed by an interim injunction on 9th December 1993 prohibiting use save in an emergency and a final order in November 1994 where, by consent, a final injunction was made prohibiting their use of Ship's Entry without the express consent of Bridgewater. Bass breached the injunction which led to the padlocking of the gates. Bass was granted a temporary licence, which must have resulted in the removal of the padlocks; that licence ended on 12th December 1994. An attempt to agree a new licence during the currency of the temporary licence failed and the gates at the end of Ship's Entry were locked and the planning and fire authorities informed.

As a result, Balmбра's had to close for many months until it obtained an alternative means of escape by purchasing an adjoining property. Mr Winskell's recollection from his inspection of the alley at the time was that there were only two gates; he said he didn't have a good recollection of whether the Grey's Court gate was locked as the focus was on the Cloth Market end.

28.To provide a time frame for the dispute with Bass, Mr Winskell produced a chronology prepared by Mr Morgan in connection with the injunction proceedings, the same Mr Morgan who appears as counsel for the Claimant in this case. There has been no objection to the use of the chronology or challenge to its accuracy. What it shows is that the first complaint about Balmбра's behaviour was in July 1990, less than a month after Bridgewater acquired Ship's Entry. A letter from Bridgewater to Bass was written on 3rd July 1990 asking them to cease use of the alleyway, at that stage there is other evidence that the complaint was of the dumping of rubbish bags in the alleyway and propping open the gate.

Later there was a complaint of Balmбра's customers getting into the alley. There were further letters of complaint in 1990 leading to a meeting with Bass who promised to cease the use and said they would place doormen on the doors.

29.At the end of 1992 and into 1993 there was evidence of Balmбра's dumping rubbish in the alley and a further letter was written. Surveillance started in September 1993 leading to proceedings and an interim injunction on 9th December 1993 restraining use of the alley save in an emergency. On 13th December 1993 Bridgewater terminated the 1962 licence. There was evidence that Bass had breached the injunction

on 31st August 1994 by taking a delivery of gas cylinders through the alley. A final injunction was granted by consent on 28th November 1994. A temporary licence to use the alley from the date of the injunction expired on 12th December 1994.

30. David Fleming (1980s-1990) said that his detailed knowledge of Ship's Entry started in the late 1980s when he was engaged by Sir John Fitzgerald Limited. Prior to then he was only aware of the gate at the Grey's Court end which he identified as that shown in the 1988 photographs. That gate was always locked. When he undertook a survey of the alley in 1989 the gates at both ends were locked. Access was provided through the ground floor of 10 Cloth Market by a contractor on site. He also found an intermediate gate at the part of the alley adjacent to the western boundary of the part of 11-13 Grey Street sold to Mr Murphy. It had to be unlocked to enable him to perform the survey. His 1989 survey plan shows the Cloth Market gate.

31. In 1990 Mr Fleming prepared a dilapidations report on White Hart Yard for Bridgewater. This included an examination of the south elevation of the buildings on the yard from Ship's Entry and of the north-facing elevation of the buildings in Grey's Court. His survey of the southern elevation did not mention the intermediate gate or that at the entrance to the Cloth Market. He noted the presence of fire escapes running horizontally along the lower section of Ship's Entry which appeared to serve the second floor and an adjacent building; these were counterbalanced stairways which dropped towards the ground when used. He recommended re-positioning the fire escape in view of the condition of these escapes.

32.As to Grey's Court he referred to the existence of a wrought iron gate forming an emergency escape/exit route from Ship's Entry; the description of the gate is surprising as the gate which is said to have been in place since the 1960s and was certainly present by 1988 is described, correctly, by Mr Jude as a mild steel fire escape gate, the wrought iron gate was at the Cloth Market end. He advised that it be redesigned and that it was essential it remain unlocked and be only used as an emergency route of escape. He said that when he undertook the 1990 survey he recalled that the gate at the Cloth Market end was locked. He also recalled an inner timber door at the inner end of the undercroft at that end of the alley.

33.He was questioned in some detail about the gates. He said that the Grey's Court gate sometimes had a chain and padlock. He had identified the intermediate gate as that shown on a 2007 photograph and he was asked why he had not referred to it in the 1990 report. He explained that the 1990 report was for the purposes of examining the external facades of all the elevations and what was required in terms of repair and renovation. He was adamant that the intermediate gate was present and that in order to do the survey had had to get the client to open it for him. He did not see anyone else using Ship's Entry whilst he was there.

34.William Hopper (1980-2013) told me that he was working as an architect from offices in the area around Grey Street and Cloth Market from spring 1980 to 2012/13. He worked on various projects on Grey Street and walked passed both sides of the block between Grey Street and Cloth Market. To his recollection Ship's Entry was closed off to the public by gates throughout. This would principally have been in daylight hours. The gate at the Grey's Court end has not changed to date. The gate at the

Cloth Market end was that shown on the 1957 photograph; that had since been removed and the entrance boarded up.

35. Mr Hopper said he worked for both Mr Gould and Mr Murphy following his purchase of 11-13 Grey Street. In 1990 he was commissioned to do some design work on 11-13 Grey Street and provide plans to improve White Hart Yard. He visited Ship's Entry in 1990 and 1991 for the purposes of his work, part of which, after Mr Murphy's purchase, was to install a fire escape into the alley for 11-13 Grey Street. I was taken to a specification of works dated 28 May 1991 and a document, from 31 July 1991, produced by Newcastle City Council as reasons for being minded to grant listed building consent, which indicate that the intention at that time was to replace the external escapes with an internal fire escape using an existing opening from 13 Grey Street into Ship's Entry. The council document also recorded that the majority of the building, the first to fourth floors of 11-13 Grey Street had been vacant for many years and the last remaining tenant, who occupied first floor offices, had moved out when the property had changed hands earlier in the year.

36. Mr Hopper indicated that he had been told by Mr Murphy that Mr Gould said that he had a right of fire escape from the rear of 11-13 Grey Street, along Ship's Entry to Grey's Court and a right of access to the boiler room. With that in mind, he designed the fire escape to open for exit to Grey's Court, that is to say that the fire door into Ship's Entry opens to the right, blocking off the section of the alley to the west. He also said that he recalled the presence of an intermediate gate which resembled that shown on the 2007 photograph, and one taken in 2002. He recalled the gate before he had been shown any photograph. It was always locked

except when he toured the building with Mr Gould. He was asked why he had not included the gate in his plan; he had shown the gate into Grey's Court. He said that it might not have been relevant to what he was drawing for number 11 and 13 but later conceded that it would be very relevant to fire escape arrangements.

37. Iain Murphy gave short evidence that whilst he visited Balmбра's in the 1990s and early 2000s he did not realise that there was an alleyway running down to Grey's Court. I have already commented in relation to his evidence that his lack of knowledge on this subject is of little weight. He also said that as far as he can recall the gate from the Cloth Market was always closed.

38. An extract from the 1992 edition of Pevsner had been put into evidence. It is relevant that this was the 1992 edition revised by, among others, the witness Grace McCombie, so there is no question of her descriptions of buildings having been carried over from a previous edition and are, accordingly, likely to be relatively contemporaneous. The author of the passage, Grace McCombie, does not wish to be involved in these proceedings.

39. In what must be a reference to a view from the Cloth Market entrance of Ship's Entry she said "*behind No. 10, two houses can be seen if the gate is open.*" It is, however, not clear whether she is referring to the wrought iron gate or the inner timber gate, as to which there has been some evidence; in addition to the witness and expert evidence about the door. It is unlikely to have been the iron gate which obscured her view as it is possible to see through the ironwork. Whether it was the gate or the door, however, this account is put forward as evidence that at some time the gate or door must have been closed. As to whether it is evidence that the

gate or door was occasionally left open it is equivocal as there is no evidence as to the circumstances in which the writer came to see the buildings. She may have asked someone to open the gates or door to view the alley or, been passing just as someone was opening, whether by unlocking or otherwise, one of the them.

40. Mr Davison (1997-2001), who, with his wife purchased Ship's Entry and White Hart Yard from Bridgewater in 1997 said that in their ownership he only went along Ship's Entry two or three of times, on one occasion with Grace McCombie. At these times, and when he was working on the roof of the adjacent premises, there were no members of the public using the alley. He said the Grey's Court gate seen on the 1988 photograph was present, though to his recollection looked somehow different, but he didn't pay it much attention. It was kept secure to prevent the public from entering. He believed that the Cloth Market gate was also secured against the public. He thought there was a key which the tenants had. He doubted why anyone would wish to use the alley as it was littered with rubbish and bins from the café. On the visit with Grace McCombie there was effluent in the alley. Mr Davison did not recall whether there were push bars on the two gates.

41. Whilst I have observed earlier that he was preoccupied with the enormity of the project he had assumed, he satisfied me that he had not seen members of the public using the alley whilst he was there and that he had a recollection of the Grey's Court gate being locked. As to the Cloth Market, his recollection as to tenants having keys may have related to those needed to enter the doorway to the building as opposed to the gate.

42. Giuseppe Giacomini (1996-1998) was the tenant of the restaurant, Café Fabio, at 10 Cloth Market from 1996 to 1998. He said that there was always a gate onto the Cloth Market which was kept shut; that was the wrought iron gate. It could be opened with a push bar from the inside but no-one could enter from the Cloth Market side. It was a fire exit and he used it to take in deliveries. His chefs sometimes opened it to go for a smoke. Occasionally people got into the alley to urinate or for other purposes, but that occurred if the gate had not been shut properly. He would shout at them to leave.

43. He had also worked at L'Aragosta at the other end of the alley in the early 1980's for 5^{1/2} years, in evidence he changed this to 2 years. He also knew the area as he had been in Newcastle since 1976 and used to visit Grey's Club, L'Aragosta, and Mama Mia, another restaurant. He recognised the present gate at the Grey's Court end as being present at that time and said it was kept closed but could be opened with a push bar from the inside. It was only used by the staff of the restaurant. He said there was a rusty metal gate about 100 yards down from the Cloth Market gate. He was uncertain if it was there when he worked at L'Aragosta or only whilst he operated Café Fabio. He recalled squeezing through the gate on a couple of occasions to visit his friend at L'Aragosta. He placed the gate in the position of the barred intermediate gate.

44. Simon McIlwraith (2001-2002) who gave evidence about White Hart Yard also recalled Ship's Entry. He first visited the alley in 2001/02 when he was working for the Ladhars on interior design and planning work. At that time there was a door at the Cloth Market entrance which prevented entry and the alley was overgrown and impassable. He recalled the gate at

the other end had a push bar but not the door. He said the public could not get through.

45. Michael Ladhar (2000 to date) recalled Ship's Entry was locked up and impassable due to accumulated rubbish and vegetation. The door onto the Cloth Market was smashed open on one occasion. It was replaced. When that happened again the doorway was boarded up and screwed shut. He was not challenged about his recollection. The period he was talking of can have been no earlier than 2000.

46. The late Dave Ladhar said in his hearsay statement that Ship's Entry was locked up. It was only used after the Easteye purchase in 2001 by some short-term tenants. He arranged for it to be boarded up after some tenants left. There was a middle wrought iron gate around the boundary between 10 Cloth Market and 11-13 Grey Street. It was secured by a padlock but opened when the club was open and closed when it was not; the entry served as a fire escape from the club. The gate went missing in 2017 but was discovered in a property owned by the Defendants.

47. Written statements from Nigel and Jill Robinson (2001-2009) were put into evidence as hearsay on the basis that the Defendants did not wish to cross-examine them. In the period 2001 to 2009 Mrs Robinson was the owner of 11-13 Grey Street. They both recalled the gate at the Grey's Court end which they said was kept shut with a locking mechanism on the inside operated by a push bar. Both say that the alley was not open to the public. Mrs Robinson said her property had a fire escape route over the alley towards Grey's Court, not the other way. There was a gate just to the Cloth Market side of the fire escape. She did not recall ever trying to pass through the gate.

48. Mrs Robinson referred to a drain at the corner of the Dog's Leg which needed to be cleared as it used to block with dead pigeons and rubbish. Michael Steedman (1963-2007) also recalled the blocked drain. Water from the blocked drain used to leak into the basement of his antiquarian bookshop on Grey Street after heavy rain. From about 2001 to 2002 his assistant used to enter Ship's Entry to unblock the drain. In order to get past the gate he had to manipulate the lock with a screwdriver. When he left he pulled the gate shut and it locked automatically. After 2002 Mr Steedman had to undertake this task himself. Until he closed his shop in 2007 he unblocked the drain about a dozen times.

49. I was referred to a document entitled The Grey Street Initiative Investigation which I was told, by Mr Morgan, was a local authority led initiative to promote the enhancement of the area. Mr Pryor did not dissent. The document dates from 1988 and sets out a history of the Cloth Market and its buildings and a description of what was to be seen at the time. The Cloth Market entrance is described, by reference to Santino's as "*a narrow opening to the right with a decorative wrought iron gate to Ship's Entry.*". It records that apart from Santino's on the ground floor, the remainder of 10 Cloth Market and all the buildings along the north of the alley were vacant. It describes the Dog's Leg which it says "*runs through a barred gateway to Grey's Court.*" The entry relating to 13 Grey Street reports the presence of S. Aikman & Robertson, typewriter repairers on the first floor above no. 11 and goes on "*...The original main staircase is blocked below second-floor level because the roof has fallen in, so the upper storeys are inaccessible.*" The document finishes, "*Ship Entry was in a very dirty condition at the time of the survey. The occupants of Nos 8 (Balmbra's) and 10*

(Santino's) *seem to dump rubbish in the alley and it has not been collected for some months.*"

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5358
DPP v Instone (DC)

[2022] 1 WLR

Queen's Bench Division

A

***Director of Public Prosecutions v Instone and another**

[2022] EWHC 1840 (Admin)

2022 June 30;
July 15

Lord Burnett of Maldon CJ, Holgate, Saini JJ

B

Highway — Right of way — Dedication — Defendants charged with aggravated trespass on land adjacent to highway — Judge finding land presumed to have been dedicated as highway — Whether presumption capable of arising without evidence of actual use of way by public — Whether opportunity for public to use way sufficient to give rise to presumption — Highways Act 1980 (c 66), s 31(1) — Criminal Justice and Public Order Act 1994 (c 33), s 68

C

In the course of a protest outside the main entrance gate to a newspaper print works, the defendants placed a large obstruction on a paved area which lay between the gate and the carriageway of the adjoining highway. As a result of their actions the defendants were charged with aggravated trespass, contrary to section 68 of the Criminal Justice and Public Order Act 1994¹. At trial the deputy district judge accepted the defendants' submission of no case to answer, holding that although the paved area was in the same ownership as the print works, it was deemed to have been dedicated as a highway pursuant to section 31 of the Highways Act 1980² after public use as of right for 20 years, and that the prosecutor was therefore unable to prove that the defendants were trespassers. In reaching that conclusion the deputy district judge took into account that the land was not fenced off, so that the public were able to enjoy free passage over it, and that there were no notices displayed by the landowner or other conduct on its part to show that there was no intention to dedicate the paved area as a highway.

D

E

On the prosecutor's appeal by way of case stated—

Held, allowing the appeal, that the presumption regarding the dedication of land as a highway, whether under section 31(1) of the Highways Act 1980 or at common law, could only arise where a way over land had actually been enjoyed by the public as of right and without interruption for a full period of 20 years; that, thus, the mere fact of a way being open to the public if they chose to use it could not, without more, give rise to the presumption if there was no evidence of actual use of the way by the public; that, in the present case, the evidence went no further than to show that there was nothing to stop members of the public from walking over the paved area, which was merely evidence of a physical opportunity to cross that land and not evidence of actual use capable of giving rise to the presumption of dedication under section 31(1) of the 1980 Act; that it followed that there was no evidence from which the court could have inferred that any part of the paved area had been, or even might have been, dedicated as a highway, with the consequence that the presumption in section 31(1) simply did not arise; that, in those circumstances, the absence of any notice or other conduct by the landowner sufficient to show that there was no intention to dedicate the paved area as a highway was irrelevant and the prosecutor did not bear any burden of proving that the paved area had not been dedicated as a highway; that it followed that the deputy district judge had not been entitled to conclude that the paved area was a highway, nor even that that was possibly the case, and had not been entitled to conclude that the prosecution had failed to prove that the defendants had

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¹ Criminal Justice and Public Order Act 1994, s 68: see post, para 22.

² Highways Act 1980, s 31: see post, para 25.

- A trespassed on that land for the purposes of section 68 of the Criminal Justice and Public Order Act 1994; and that, accordingly, the decision that there was no case to answer would be set aside and the case would be remitted to the magistrates' court for the trial to continue (post, paras 33–45, 46, 47).

R (Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs [2008] AC 221, HL(E) and *Easteys Ltd v Malhotra Property Investments Ltd* [2020] EWHC 2606 (Ch) considered.

B

The following cases are referred to in the judgment of Holgate J:

Easteys Ltd v Malhotra Property Investments Ltd [2020] EWHC 2606 (Ch)

R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335; [1999] 3 WLR 160; [1999] 3 All ER 385, HL(E)

R (Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs [2007] UKHL 28; [2008] AC 221; [2007] 3 WLR 85; [2007] 4 All ER 273, HL(E)

C

R (Lewis) v Redcar and Cleveland Borough Council (No 2) [2010] UKSC 11; [2010] 2 AC 70; [2010] 2 WLR 653; [2010] 2 All ER 613, SC(E)

The following additional cases were cited in argument or referred to in the skeleton arguments:

- D *Carter-Brown v Crown Prosecution Service* [2017] EWHC 1955 (QB); [2017] ACD 113, DC

Kotegaonkar v Secretary of State for Environment, Food and Rural Affairs [2012] EWHC 1976 (Admin); [2012] ACD 105

R v G [2012] EWCA Crim 1756; [2013] Crim LR 678, CA

R v Galbraith [1981] 1 WLR 1039; [1981] 2 All ER 1060; 73 CrAppR 124, CA

E

Sprintroom Ltd, In re [2019] EWCA Civ 932; [2019] 2 BCLC 617, CA

CASE STATED by Deputy District Judge Lowe sitting at Liverpool, Knowsley and St Helens Magistrates' Court

On 5 May 2021, following a trial on 4 and 5 May 2021, Deputy District Judge Lowe sitting at Liverpool, Knowsley and St Helens Magistrates' Court acquitted the defendants, Miriam Instone and Peaceful Warrior, of a charge of aggravated trespass, contrary to section 68(1) of the Criminal Justice and Public Order Act 1994, concluding that an area of paved land on which the protest had taken place, although in the same ownership as the print works at which the protest was directed, had become part of the highway pursuant to section 31 of the Highways Act 1980, with the result that the prosecutor had been unable to prove trespass on the land as an essential element of their case and there was no case to answer. The prosecutor appealed by way of case stated.

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The questions for the opinion of the High Court are stated in the judgment of Holgate J, post, para 21.

The facts are stated in the judgment of Holgate J, post, paras 1–20.

- H *James Boyd* (instructed by *Crown Prosecution Service*) for the prosecutor.

Owen Greenhall (instructed by *Hodge Jones & Allen, Liverpool*) for the defendants.

The court took time for consideration.

15 July 2022. The following judgments were handed down.

A

HOLGATE J

Introduction

1 This is an appeal by way of case stated from the decision on 5 May 2021 of the Liverpool, Knowsley and St Helens Magistrates' Court that the respondents, Miriam Instone and Peaceful Warrior, had no case to answer in respect of an alleged offence of aggravated trespass contrary to section 68(1) of the Criminal Justice and Public Order Act 1994 ("the 1994 Act"). On the evening of 4 September 2020 a group of Extinction Rebellion protestors blocked the main entrance to the premises of Newsprinters Ltd ("Newsprinters") at Kitling Road, Prescott, Knowsley. It was common ground that that land was owned by Newsprinters, but the issue was whether it had, or might have, become part of the highway so that section 68 was not applicable.

B

2 The group positioned a boat with a trailer across the Kitling Road entrance. The group also placed a van across the rear entrance to the premises. The intention was to prevent any access to or from the site.

3 The protestors sought to make these barriers more effective by positioning themselves on or underneath the vehicles and by tethering themselves together or to the vehicles.

D

4 As the direct result of these actions Newsprinters were unable to conduct their lawful business of distributing newspapers from the premises that evening.

5 At the request of the site manager, Merseyside Police attended and attempted to persuade the protestors to remove themselves and the blockages from the entrances. They refused to do so. The police had to deploy specialist officers to remove each protestor safely.

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6 During the protest the first respondent, Ms Instone, attached herself to the underside of the boat at the Kitling Road entrance. She placed one of her arms through a tube linked to the second respondent, Peaceful Warrior, who was lying on the opposite side on the ground. They were in this position for about nine hours before being removed.

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7 On 26 October 2020 an information was laid by the appellant, the Director of Public Prosecutions, alleging that the respondents had trespassed on the Kitling Road entrance and prevented access to and from the land by employees and vehicles, with the intention of obstructing or disrupting a lawful activity in which persons were engaged, namely the printing and distribution of newspapers and magazines contrary to section 68 of the 1994 Act.

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8 The matter was heard by Deputy District Judge Lowe on 4 and 5 May 2021.

The hearing in the magistrates' court

9 Evidence was given by Mr Lee Taylor, the operations manager for the site. He had been employed by Newsprinters for 14 years. He was responsible for, amongst other things, the maintenance of the land around the perimeter fence.

H

10 Newsprinters' premises lie to the north of Kitling Road, an adopted highway. Mr Taylor explained that the perimeter fence and gate were set

A back from Kitling Road at the entrance so that large vehicles, such as lorries and vans, would not block the road.

I1 Photographs and measurements prepared by the police for the hearing in the magistrates' court show a security fence and gate located about ten metres back from the edge of the tarmacked carriageway of Kitling Road. About ten metres further inside the line of that fence and gate there was a barrier which could be lowered and raised.

B I2 A footpath ran along the northern edge of Kitling Road. On either side of the bell mouth entrance into Newsprinters' site the footpath curved in towards the perimeter fence.

C I3 The area of the bell mouth between the perimeter fence and the tarmacked surface of Kitling Road and between the two curved pavements was entirely paved. Mr Taylor gave evidence that this paved area was maintained by Newsprinters. The documents of title are understood to show that this area fell within the company's leasehold ownership.

I4 Mr Taylor stated that the respondents carried on their protest at a point on the paved area located about 7.1 metres from the tarmacked surface of Kitling Road and 2.8 metres from the line of the perimeter fence, referred to as "point B".

D I5 The prosecution contended that at the location where the respondents carried on their protest they were trespassing on Newsprinters' land.

E I6 Plainly, members of the public wishing to cross the site entrance could simply walk in a straight line along the alignment of the pavement adjacent to the carriageway of Kitling Road. However, Mr Taylor accepted in evidence "that there was nothing to prevent members of the public that crossed the entrance from deviating away from the line of the pavement onto the paved area maintained by Newsprinters". There was no physical obstruction to prevent them from doing this.

F I7 The respondents contended that as Newsprinters had not objected to the public having access over that part of their land and had not made it clear that such access was enjoyed only by virtue of the company's implied consent, there was a presumption that the land had become part of the highway, relying on section 31 of the Highways Act 1980. On that basis the respondents could not have been trespassers.

I8 Para 7 of the case stated says:

"Having considered the evidence put before me by the applicant I found that

G "(i) the land on which the respondents had placed themselves and from which they had refused to move was land owned by Newsprinters.

"(ii) this land had been maintained by Newsprinters for at least fourteen years.

"(iii) it was not enclosed by a fence or other structure.

"(iv) members of the public were able to enjoy free passage over the land.

H "(v) there was no notice displayed by Newsprinters or other conduct on their part [to] negate the operation of section 31 Highways Act 1980."

I9 Para 8 of the case stated says:

"I was of the opinion that as the provisions of section 31 Highways Act applied to the land sufficient evidence had been placed before me to

conclude that the land had become part of the highway and that consequently the applicant was unable to prove an essential element of its case, viz that the respondents were trespassers.” A

20 On those findings and for that reason the judge decided that there was no case to answer. But it will be noted that the judge went further than simply applying the tests for deciding a submission of no case to answer. He made a positive finding on the evidence that the land had been dedicated as part of the highway. B

The questions for the High Court

21 The judge has stated the following questions:

“1. Was it open to me to conclude that as the public were able to enjoy free passage over land which in all other respects belonged to Newsprinters that land had by virtue of section 31 Highways Act become part of the highway? C

“2. That consequently the applicant had failed to prove that the respondents were trespassers on that land?

“3. That I was correct in acceding to the submission that there was no case to answer?” D

Statutory framework

22 At the relevant time^{1*} section 68(1) and (5) of the 1994 Act provided:

“(1) A person commits the offence of aggravated trespass if he trespasses on land [in the open air] and, in relation to any lawful activity which persons are engaging in or are about to engage in on that or adjoining land [in the open air], does there anything which is intended by him to have the effect— (a) of intimidating those persons or any of them so as to deter them or any of them from engaging in that activity, (b) of obstructing that activity, or (c) of disrupting that activity.” E

“(5) In this section ‘land’ does not include— (a) the highways and roads excluded from the application of section 61 by paragraph (b) of the definition of ‘land’ in subsection (9) of that section; or (b) . . .” F

23 So far as is material, section 61(9) of the 1994 Act provides:

“‘land’ does not include— (a) . . . (b) land forming part of— (i) a highway unless it is a footpath, bridleway or byway open to all traffic within the meaning of Part III of the Wildlife and Countryside Act 1981, is a restricted byway within the meaning of Part II of the Countryside and Rights of Way Act 2000 or is a cycle track under the Highways Act 1980 or the Cycle Tracks Act 1984; or (ii) . . .” G

24 Section 66(1) of the Wildlife and Countryside Act 1981 defines a “footpath” as “a highway over which the public have a right of way on foot only, other than such a highway at the side of a public road”. So trespass on a highway, including a footpath running alongside the carriageway of a H

* *Reporter’s note.* The superior figure in the text refers to a note which can be found at the end of the judgment of Holgate J on p 5366.

A highway, cannot give rise to an offence under section 68 of the 1994 Act. But trespass on a footpath elsewhere may do so.

25 Section 31 of the Highways Act 1980 (“the 1980 Act”) deals with the presumed dedication of land as a highway. So far as is material section 31 provides:

“Dedication of way as highway presumed after public use for 20 years

B “(1) Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.

“(1A) . . .

C “(2) The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice such as is mentioned in subsection (3) below or otherwise.

D “(3) Where the owner of the land over which any such way as aforesaid passes— (a) has erected in such manner as to be visible to persons using the way a notice inconsistent with the dedication of the way as a highway, and (b) has maintained the notice after the 1st January 1934, or any later date on which it was erected, the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway.”

E “(5) Where a notice erected as mentioned in subsection (3) above is subsequently torn down or defaced, a notice given by the owner of the land to the appropriate council that the way is not dedicated as a highway is, in the absence of proof of a contrary intention, sufficient evidence to negative the intention of the owner of the land to dedicate the way as a highway.”

A summary of the parties’ submissions

F 26 On behalf of the prosecution, Mr James Boyd submitted that there could be no implied or presumed dedication of land without actual use of a way by the public. Here there was no evidence of any actual use by the public of the paved area belonging to Newsprinters, let alone use over the requisite period of 20 years. Furthermore, the mere fact that there was nothing to prevent members of the public crossing the access from deviating away from the line of the pavement on to the privately owned paved area, could not, as a matter of law, found an inference of actual use by the public.

G 27 Mr Boyd also submitted that, in any event, there could be no rational basis for inferring actual use by the public over the area which happened to be occupied by the respondents during their protest. That would involve someone having to walk about seven metres away from Kitling Road before crossing the entrance and then walking seven metres back towards Kitling Road before carrying on with their journey. That deviation would be substantially longer than crossing the entrance along the line of the pavement. There was no evidence of any such route being taken to avoid traffic entering Newsprinters’ site.

H 28 On behalf of the respondents, Mr Owen Greenhall submitted that the burden of proof lies on the prosecution to establish that the respondents were trespassing on land which was not a highway, should a defendant

choose not to admit that point. A defendant is not under any burden, whether legal or evidential, to raise the issue. A court is entitled to dismiss a charge of aggravated trespass on this point if it concludes that it is possible that the land in question forms part of a highway. It does not have to reach a definitive conclusion that the land is part of the highway.

29 Mr Greenhall submitted that in this case the evidence of Mr Taylor, together with the photographic material, were sufficient to raise a possibility that members of the public have crossed the junction at or near the perimeter fence for a sufficient period to result in the dedication of that land as a highway. There had been no need for the respondents to adduce direct evidence of actual use for that issue to arise. Mr Greenhall relied upon the decision of Judge Kramer in *Easteye Ltd v Malhotra Property Investments Ltd* [2020] EWHC 2606 (Ch) for the proposition that an inference of actual use by the public may be inferred without direct evidence of that use (paras 139–140).

30 Mr Greenhall submitted that the appellant was treating the evidence of Mr Taylor too narrowly. It had to be seen in context. The entrance was used by large vehicles. It was therefore realistically possible that members of the public would have wished to remain on the pavement for as long as possible, so as to be able to cross the access at its narrowest point and to obtain the clearest view into the site.

31 Lastly, Mr Greenhall submits that the judge was entitled to rely upon *R (Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs* [2008] AC 221. That decision laid down the principle that to rebut a presumption under section 31(1) of the 1980 Act there must be evidence of some overt acts on the part of the landowner to show public users of the land that he had no intention to dedicate it as a highway. The test is objective (see e.g. paras 20 and 39). There was no such evidence here.

Discussion

32 The judge decided that the prosecution were unable to prove that the respondents had trespassed on the land belonging to Newsprinters solely because in his view sufficient evidence had been placed before him to conclude that that land had become part of the highway.

33 However, the judge did not appreciate that the presumption regarding the dedication of a highway, whether under section 31(1) of the 1980 Act or at common law, can only arise if a way over land has *actually* been enjoyed by the public as of right and without interruption for a full period of 20 years. Unless that test is satisfied there is no presumption to be rebutted.

34 Parliament enacted the words “actually enjoyed by the public as of right and without interruption for a full period of 20 years” to assimilate the law on public rights of way to that of private rights of way. The words “as of right” have the same meaning in both contexts, that is the user must not be by force, or by stealth, or with the permission of the owner (“nec vi, nec clam, nec precario”). The principle is that there must be actual, open public user. A landowner cannot be said to have acquiesced in a user of which he did not know or could not reasonably have known, and so could not reasonably have been expected to resist (see e.g. Lord Hoffman in *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335, 350–353, *Godmanchester*, paras 52 and 57, *R (Lewis) v Redcar and Cleveland Borough Council (No 2)* [2010] 2 AC 70, paras 17–20, 30, 66–67 and 91).

A 35 In *Easteys* [2020] EWHC 2606 (Ch) the judge also said this at para 143:

B “The law then, which is unchanged, was that user by the public could evidence an intention to dedicate; see *Poole v Huskinson* (1843) 11 M & W 827. It has never been the law that the fact that a way is open to the public if they chose to use it, but as to which there is no evidence of use, is, without more, evidence of an intention to dedicate. The rationale for the use having to be open and as of right is that it brings home to the owner of the way that a public right is being claimed; *R (Lewis) v Redcar and Cleveland Borough Council (No 2)* [2010] 2 AC 70 per Lord Walker JSC at para 36. The reference in *Souch* [*Souch v East London Railway Co* (1873) LR 16 Eq 108], therefore, to the public being allowed to enter must refer to actual use, not the mere opportunity for the public to enter if they had so wished, and cannot be relied upon as an indication that such use was inferred in that case.”

36 I entirely agree with that passage, although I would note that the judge was in fact referring to Lord Walker of Gestingthorpe JSC’s judgment in *Lewis* at para 30 rather than para 36.

D 37 Applying these principles to the present case, I am unable to accept Mr Greenhall’s submissions.

38 First, there was no evidence before the court of actual user or enjoyment by the public of the paved area belonging to Newsprinters over any period of time, let alone the 20-year period as of right required for presumed dedication. The evidence went no further than to say that there was nothing to stop members of the public walking over the paved area. E They were able to enjoy free (ie unobstructed) passage over that land (see the judge’s question 1). That was simply evidence of a mere physical opportunity to cross the paved area, and not actual use asserting a right which the landowner needed to resist if it did not intend to dedicate the land as a highway. Accordingly, there was no evidence from which it would have been permissible for the court to infer that any part of the paved area had been, or even might have been, dedicated by the owner as a highway. In my F judgment, for these reasons alone the appeal should succeed.

39 Second, the judge did not draw any inferences about actual use or enjoyment in his findings. Instead, he went straight to the point that Newsprinters had not displayed a notice or done anything else which would have been inconsistent with dedication under section 31(1) of the 1980 Act. That was wrong as a matter of law. Unless a court can and does properly G conclude on the evidence that there has been actual enjoyment as of right of a way capable of being dedicated as a highway without interruption for at least 20 years, the presumption in section 31(1) does not arise. In such circumstances, the absence of any notice or other conduct by the landowner sufficient to indicate his intention not to dedicate the land as a highway is irrelevant. The land cannot have become a highway by presumed dedication.

H 40 This is an important point of principle because the respondents’ argument could otherwise be repeated in a great many instances across the country where a private access road serving, for example, industrial, commercial or residential premises is connected to a vehicular highway bounded by a public pavement. Mere evidence that members of the public had an opportunity to deviate from the line of the pavement to walk over an

area of private land in order to cross the access road, would suffice to raise a presumption of dedication, without any evidence of actual use or enjoyment as of right. That approach is contrary to long-established principle.

41 Third, it follows that where, as here, there is no evidence of actual use or enjoyment of a way as of right for 20 years, the prosecution bears no burden of proving in a prosecution under section 68 of the 1994 Act that the area on which a trespass occurred was not dedicated by the owner as a highway.

42 In these circumstances, it is unnecessary to address counsel's further submissions.

43 For the reasons set out above, the judge was not entitled to conclude at the close of the prosecution's case that the area of Newsprinters' land occupied by the respondents was a highway (nor would he have been entitled to conclude that that was possibly the case). He was not entitled to conclude that the prosecution had failed to prove that the respondents had trespassed on that land.

Conclusion

44 For the above reasons I would give the answer "no" to each of the questions in the case stated.

45 Subject to the views of my Lords, I would allow the appeal, set aside the decision that there is no case to answer, and remit the case to the magistrates' court for the trial to continue.

Note

1. Prior to amendments made by the Police, Crime, Sentencing and Courts Act 2022 which do not affect this appeal.

SAINI J

46 I agree.

LORD BURNETT OF MALDON CJ

47 I also agree.

Appeal allowed.

Decision of no case to answer set aside.

Case remitted to magistrates' court for continuation of trial.

JO MOORE, Barrister

Highways Act 1980

1980 CHAPTER 66

Highways Act 1980 (1980 c 66)

UK Parliament Acts > H > HH-HN > Highways Act 1980 (1980 c 66) > Part III Creation of Highways (ss 24-35)

31 Dedication of way as highway presumed after public use for 20 years

(1) Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.

[(1A) Subsection (1)—

(a) is subject to section 66 of the Natural Environment and Rural Communities Act 2006 (dedication by virtue of use for mechanically propelled vehicles no longer possible), but

(b) applies in relation to the dedication of a restricted byway by virtue of use for non-mechanically propelled vehicles as it applies in relation to the dedication of any other description of highway which does not include a public right of way for mechanically propelled vehicles.]

(2) The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice such as is mentioned in subsection (3) below or otherwise.

(3) Where the owner of the land over which any such way as aforesaid passes—

(a) has erected in such manner as to be visible to persons using the way a notice inconsistent with the dedication of the way as a highway, and

(b) has maintained the notice after the 1st January 1934, or any later date on which it was erected, the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway.

(4) In the case of land in the possession of a tenant for a term of years, or from year to year, any person for the time being entitled in reversion to the land shall, notwithstanding the existence of the tenancy, have the right to place and maintain such a notice as is mentioned in subsection (3) above, so, however, that no injury is done thereby to the business or occupation of the tenant.

(5) Where a notice erected as mentioned in subsection (3) above is subsequently torn down or defaced, a notice given by the owner of the land to the appropriate council that the way is not dedicated as a highway is, in the absence of proof of a contrary intention, sufficient evidence to negative the intention of the owner of the land to dedicate the way as a highway.

(6) An owner of land may at any time deposit with the appropriate council—

(a) a map of the land . . . , and

31 Dedication of way as highway presumed after public use for 20 years

(b) a statement indicating what ways (if any) over the land he admits to have been dedicated as highways; and, in any case in which such a deposit has been made, . . . declarations [in valid form] made by that owner or by his successors in title and lodged by him or them with the appropriate council at any time—

(i) within [the relevant number of] years from the date of the deposit, or

(ii) within [the relevant number of] years from the date on which any previous declaration was last lodged under this section,

to the effect that no additional way (other than any specifically indicated in the declaration) over the land delineated on the said map has been dedicated as a highway since the date of the deposit, or since the date of the lodgment of such previous declaration, as the case may be, are, in the absence of proof of a contrary intention, sufficient evidence to negative the intention of the owner or his successors in title to dedicate any such additional way as a highway.

[(6A) Where the land is in England—

(a) a map deposited under subsection (6)(a) and a statement deposited under subsection (6)(b) must be in the prescribed form,

(b) a declaration is in valid form for the purposes of subsection (6) if it is in the prescribed form, and

(c) the relevant number of years for the purposes of sub-paragraphs (i) and (ii) of subsection (6) is 20 years.

(6B) Where the land is in Wales—

(a) a map deposited under subsection (6)(a) must be on a scale of not less than 6 inches to 1 mile,

(b) a declaration is in valid form for the purposes of subsection (6) if it is a statutory declaration, and

(c) the relevant number of years for the purposes of sub-paragraphs (i) and (ii) of subsection (6) is 10 years.]

[(6C) Where, under subsection (6), an owner of land in England deposits a map and statement or lodges a declaration, the appropriate council must take the prescribed steps in relation to the map and statement or (as the case may be) the declaration and do so in the prescribed manner and within the prescribed period (if any).]

(7) For the purposes of the foregoing provisions of this section “owner”, in relation to any land, means a person who is for the time being entitled to dispose of the fee simple in the land; and for the purposes of subsections (5)[, (6), (6C) and (13)] “the appropriate council” means the council of the county [, metropolitan district] or London borough in which the way (in the case of subsection (5)) or the land (in the case of [subsections (6), (6C) and (13)]) is situated or, where the way or land is situated in the City, the Common Council.

[(7A) Subsection (7B) applies where the matter bringing the right of the public to use a way into question is an application under section 53(5) of the Wildlife and Countryside Act 1981 for an order making modifications so as to show the right on the definitive map and statement.

(7B) The date mentioned in subsection (2) is to be treated as being the date on which the application is made in accordance with paragraph 1 of Schedule 14 to the 1981 Act.]

(8) Nothing in this section affects any incapacity of a corporation or other body or person in possession of land for public or statutory purposes to dedicate a way over that land as a highway if the existence of a highway would be incompatible with those purposes.

(9) Nothing in this section operates to prevent the dedication of a way as a highway being presumed on proof

31 Dedication of way as highway presumed after public use for 20 years

of user for any less period than 20 years, or being presumed or proved in any circumstances in which it might have been presumed or proved immediately before the commencement of this Act.

(10) Nothing in this section or section 32 below affects [section 56(1) of the Wildlife and Countryside Act 1981 (which provides that a definitive map and statement] are conclusive evidence as to the existence of the highways shown on the map and as to certain particulars contained in the statement), . . .

[(10A) Nothing in subsection (1A) affects the obligations of the highway authority, or of any other person, as respects the maintenance of a way.]

(11) For the purposes of this section “land” includes land covered with water.

[(12) For the purposes of subsection (1A) “mechanically propelled vehicle” does not include a vehicle falling within section 189(1)(c) of the Road Traffic Act 1988 (electrically assisted pedal cycle).]

[(13) The Secretary of State may make regulations for the purposes of the application of subsection (6) to land in England which make provision—

(a) for a statement or declaration required for the purposes of subsection (6) to be combined with a statement required for the purposes of section 15A of the Commons Act 2006;

(b) as to the fees payable in relation to the depositing of a map and statement or the lodging of a declaration (including provision for a fee payable under the regulations to be determined by the appropriate council).

(14) For the purposes of the application of this section to land in England “prescribed” means prescribed in regulations made by the Secretary of State.

(15) Regulations under this section made by the Secretary of State may make—

(a) such transitional or saving provision as the Secretary of State considers appropriate;

(b) different provision for different purposes or areas.]

End of Document

Wildlife and Countryside Act 1981

1981 CHAPTER 69

Wildlife and Countryside Act 1981 (1981 c 69)

UK Parliament Acts > W > WH-WN > Wildlife and Countryside Act 1981 (1981 c 69) > Part III
Public Rights of Way (ss 53-66)

Part III

Public Rights of Way

Ascertainment of public rights of way

53 Duty to keep definitive map and statement under continuous review

(1) In this Part “definitive map and statement”, in relation to any area, means, subject to section 57(3) [and 57A(1)],—

(a) the latest revised map and statement prepared in definitive form for that area under section 33 of the 1949 Act; or

(b) where no such map and statement have been so prepared, the original definitive map and statement prepared for that area under section 32 of that Act; or

(c) where no such map and statement have been so prepared, the map and statement prepared for that area under section 55(3).

(2) As regards every definitive map and statement, the surveying authority shall—

(a) as soon as reasonably practicable after the commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence, before that date, of any of the events specified in subsection (3); and

(b) as from that date, keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence, on or after that date, of any of those events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of that event.

(3) The events referred to in subsection (2) are as follows—

(a) the coming into operation of any enactment or instrument, or any other event, whereby—

(i) a highway shown or required to be shown in the map and statement has been authorised to be stopped up, diverted, widened or extended;

(ii) a highway shown or required to be shown in the map and statement as a highway of a particular description has ceased to be a highway of that description; or

(iii) a new right of way has been created over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path [or a restricted byway];

53 Duty to keep definitive map and statement under continuous review

(b) the expiration, in relation to any way in the area to which the map relates, of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path [or restricted byway];

(c) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows—

(i) that a right of way which is not shown in the map and statement subsists *or is reasonably alleged to subsist* over land in the area to which the map relates, being [a right of way such that the land over which the right subsists is a public path[, a restricted byway] or, subject to section 54A, a byway open to all traffic];

[(ia) in the case of an authority in Wales, that a right of way which is not shown in the map and statement is reasonably alleged to subsist over land in the area to which the map relates, being such a right of way as is mentioned in sub-paragraph (i);]

(ii) that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description; or

(iii) that there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification.

(4) The modifications which may be made by an order under subsection (2) shall include the addition to the statement of particulars as to—

(a) the position and width of any public path[, restricted byway] or byway open to all traffic which is or is to be shown on the map; and

(b) any limitations or conditions affecting the public right of way thereover.

[(4A) Subsection (4B) applies to evidence which, when considered with all other relevant evidence available to the surveying authority, shows as respects a way shown in a definitive map and statement as a restricted byway that the public have, and had immediately before the commencement of section 47 of the Countryside and Rights of Way Act 2000, a right of way for vehicular and all other kinds of traffic over that way.

(4B) For the purposes of subsection (3)(c)(ii), such evidence is evidence which, when so considered, shows that the way concerned ought, subject to section 54A, to be shown in the definitive map and statement as a byway open to all traffic.]

(5) Any person may apply to the authority for an order under subsection (2) which makes such modifications as appear to the authority to be requisite in consequence of the occurrence of one or more events falling within paragraph (b) or (c) of subsection (3); and *the provisions of Schedule 14 [the provisions of Schedule 13A (in relation to England) and Schedule 14 (in relation to Wales)]* shall have effect as to the making and determination of applications under this subsection.

[(5A) Evidence to which subsection (4B) applies on the commencement of section 47 of the Countryside and Rights of Way Act 2000 shall for the purposes of subsection (5) and any application made under it be treated as not having been discovered by the surveying authority before the commencement of that section.]

(6) Orders under subsection (2) which make only such modifications as appear to the authority to be requisite in consequence of the occurrence of one or more events falling within paragraph (a) of subsection (3) shall take effect on their being made; and *the provisions of Schedule 15 [the provisions of Schedule 14A (in relation to England) and Schedule 15 (in relation to Wales)]* shall have effect as to the making, validity and date of coming into operation of other orders under subsection (2).

End of Document



Local Government (Miscellaneous Provisions) Act 1982

1982 CHAPTER 30

PART XII

MISCELLANEOUS

40 Nuisance and disturbance on educational premises

- (1) Any person who without lawful authority is present on premises to which this section applies and causes or permits nuisance or disturbance to the annoyance of persons who lawfully use those premises (whether or not any such persons are present at the time) shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £50.
- (2) This section applies to premises, including playgrounds, playing fields and other premises for outdoor recreation—
 - (a) of a school maintained by a local education authority; or
 - (b) of a further education establishment provided by such an authority.
- (3) If—
 - (a) a police constable ; or
 - (b) subject to subsection (5) below, a person whom a local education authority have authorised to exercise the power conferred by this subsection,has reasonable cause to suspect that any person is committing or has committed an offence under this section, he may remove him from the premises.
- (4) The power conferred by subsection (3) above may also be exercised, in relation to premises of an aided or special agreement school, by a person whom the school governors have authorised to exercise it.
- (5) A local education authority may not authorise a person to exercise the power conferred by subsection (3) above in relation to premises of a voluntary school without first obtaining the consent of the school governors.

Status: This is the original version (as it was originally enacted).

- (6) Except as provided by subsection (7) below, no proceedings under this section shall be brought by any person other than—
 - (a) a police constable ; or
 - (b) subject to subsection (8) below, a local education authority.
- (7) Proceedings under this section for an offence committed on premises of an aided or special agreement school may be brought by a person whom the school governors have authorised to bring such proceedings.
- (8) A local education authority may not bring proceedings under this section for an offence committed on premises of a voluntary school without first obtaining the consent of the school governors.
- (9) Expressions used in this section and in the Education Act 1944 have the meanings assigned to them by that Act.
- (10) This section shall come into force on the expiry of the period of two months beginning with the date on which this Act is passed.

Cotham SoC Appendix 24

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PHIPSON ON EVIDENCE

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dispute a factual precondition must satisfy an initial evidential burden before the privilege-holder is called upon to satisfy the legal burden (i.e. by allowing inspection of the contested documents or facing cross-examination).¹¹

(d) Conflicting presumptions

Presumptions may conflict with each other. Often they will simply neutralise each other, leaving the matter to be determined as if no presumptions applied. It is necessary to identify whether the conflicting presumptions are of the same type (rebuttable or irrebuttable, fact or law) and whether they relate to the same issue.¹²

6-05

2. BURDEN OF PROOF IN CIVIL CASES

(a) General rule

So far as the persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issue.¹³ Where a given allegation, whether affirmative or negative, forms an essential part of a party's case, the proof of such allegations rests on that party.¹⁴ If, when all the evidence is adduced by all parties, the party who has this burden has not discharged it, the decision must be against him.¹⁵ This is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons.¹⁶ The service of a notice to prove documents pursuant to CPR r.32.19 does not shift the burden of proof.¹⁷

6-06

This rule is adopted principally because it is just that he who invokes the aid of the law should be the first to prove his case; and partly because, in the nature of things, a negative is more difficult to establish than an affirmative. The burden of proof is fixed at the beginning of the trial by the state of the pleadings, and it is settled as a question of law, remaining unchanged throughout the trial exactly where the pleadings place it, and never shifting.

In deciding which party asserts the affirmative, regard must be had to the substance of the issue and not merely to its grammatical form; the latter the pleader

¹¹ cf. *Westminster Airways Ltd v Kuwait Oil Co Ltd* [1951] 1 K.B. 134; *Alfred Crompton Amusement Machines Ltd v Customs & Excise Commissioners (No.2)* [1972] 2 Q.B. 102; *West London Pipeline & Storage Ltd v Total UK Ltd* [2008] EWHC 1729 (Comm); [2008] 2 C.L.C. 258 at [86]; *Eso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 C.L.R. 1. For a detailed examination of this, and other burdens of proof during interim judicial fact-finding, see Rosemary Pattenden: "The proof rules of pre-verdict judicial fact-finding in criminal trials by jury" (2009) L.Q.R. 79 at 79–97.

¹² The attitude of the courts has thus varied according to the presumptions in question and the circumstances in which the attempt was made to rely on them. See, for example, *Monckton v Tarr* (1930) 23 B.W.C.C. 504 CA; *Taylor v Taylor* [1965] 1 All E.R. 872, Cairns J; *R. v Willshire* (1881) 6 Q.B.D. 366 CCR. There is a helpful discussion in Keane, *The Modern Law of Evidence*, 10th edn (Oxford: Oxford University Press 2014). See also *Blackstone's Criminal Practice* (Oxford: Oxford University Press, 2013), para.F3.73.

¹³ *Robins v National Trust Co* [1927] A.C. 515 at 520; *Huyton-with-Roby UDC v Hunter* [1955] 1 W.L.R. 603.

¹⁴ *Emmanuel v Avison* [2020] EWHC 1696 (Ch) at [54].

¹⁵ *Pickup v Thames Insurance Co* (1878) 3 Q.B.D. 594 at 600; *Wakelin v L & SW Railway* (1886) 12 App. Cas. 41 at 45.

¹⁶ *Constantine Line v Imperial Smelting Corp* [1942] A.C. 154 at 174, per Lord Maugham.

¹⁷ *Emmanuel v Avison* [2020] EWHC 1696 (Ch) at [57].

can frequently vary at will.¹⁸ Moreover, a negative allegation must not be confused with the mere traverse of an affirmative one. The true meaning of the rule is that where a given allegation, whether affirmative or negative, forms an essential part of a party's case, the proof of such allegation rests on him.¹⁹ An alternative test, in this connection, is to strike out of the record the particular allegation in question, the onus lying upon the party who would fail if such a course were pursued.²⁰

In all but the simplest cases, the burden of the issues will be divided, each party having one or more cast upon him.

However not every decision made by a judge during or in preparation for a trial is susceptible to analysis in terms of the burden and standard of proof.²¹ Many decisions in and before trials involve weighing competing factors and the judge exercising evaluative judgment.

(b) Deciding cases on the burden: cases where no findings are possible and/or all explanations are improbable

6-07

While a judge or tribunal of fact should make findings of fact if it can, in exceptional cases it may be forced to the conclusion that it cannot say that either version of events satisfies the balance of probabilities. In such a case the burden of proof may determine which party succeeds.²² The judge or tribunal of fact may only dispose of a case on this basis if it cannot reasonably make a finding one way or the other on a disputed issue.²³ A judge should only do this where the state of the evidence is so unsatisfactory that no other course was open to them.²⁴

Where there are two improbable theories, the elimination of one does not automatically lead to the acceptance of the other, equally improbable, theory.²⁵ The judge is not bound always to make a finding one way or the other.²⁶ He has open to him the third alternative, saying that the party on whom the burden of proof lies in relation to any fact has failed to discharge that burden.²⁷

The judge must be satisfied on the evidence that a particular fact or state of af-

¹⁸ *Soward v Leggatt* (1836) 7 C. & P. 613.

¹⁹ *Abrath v North Eastern Railway* (1883) 11 Q.B.D. 440 at 457, per Bowen LJ; *Doe v Johnson* (1844) 7 M. & Gr. 1047, per Tindal CJ; *Toleman v Portbury* (1870) L.R. 5 Q.B. 288; *Williams v East India Co* (1802) 3 East 192.

²⁰ *Mills v Barber* (1836) 1 M. & W. 425 at 427.

²¹ *Misick v R.* [2015] UKPC 31; [2015] Cr App R 23. That was a criminal appeal. The same propositions apply equally in civil trials.

²² *Morris v London Iron & Steel Co Ltd* [1972] 2 All E.R. 496; cf. *Baker v Market Harborough Industrial Co-op Society Ltd* [1953] 1 W.L.R. 1472; *Bray v Palmer* [1953] 1 W.L.R. 1455; *Stephens v Cannon* [2005] EWCA Civ 222; [2005] C.P. Rep. 31 at [38]–[46]. *Cooke v Watermist Ltd* [2014] EWHC 125 (Pat) is a good example of a case decided on the burden of proof. A hearing officer concluded that, due to lack of documentary evidence and credible witnesses, he was unable to make findings of fact and dismissed the claim for co-inventorship on the basis that the claimant had failed to discharge the burden of proof. The High Court held that he was entitled to do so, applying *Stephens v Cannon* (ibid).

²³ *Stephens v Cannon* [2005] EWCA Civ 222; [2005] C.P. Rep. 31 at [46].

²⁴ *A (Children)* (Care Proceedings: Burden of Proof) [2018] EWCA Civ 1718; [2018] 4 W.L.R. 117.

²⁵ *Rhesa Shipping Co SA v Edmund (The Popi M)* [1985] 1 W.L.R. 948; *Plater v Sonatrach* [2004] EWHC 146 (QB), Nelson J, 4 February 2004; cf. *Alexander v Midland Bank Plc* [2000] I.C.R. 464.

²⁶ Compare *Woodhouse v Webster* [2009] I.C.R. 818 at [36]–[37], per Mummery LJ.

²⁷ Lord Brandon, *Rhesa Shipping Co SA v Edmunds (The Popi M)* [1985] 1 W.L.R. 948. Lord Brandon also stated that: "No judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence

fairs is more likely to have occurred than not. If a judge concludes that the occurrence of an event is extremely improbable, a finding by him that it is nevertheless more likely to have occurred than not does not accord with common sense.²⁸

Elimination of an improbable theory may of course lead to the acceptance of a competing theory that is not improbable where the available evidence supports this.²⁹

However a judge should not aggregate percentages of unlikely events, to find that it is more likely than not that one of those unlikely events occurred. Such an aggregation of percentages is not a proper approach to the judicial function of the simple application of the balance of probabilities.³⁰ A court had to look at each possibility, both individually and together, with the evidence before deciding whether a matter more probably occurred than not.

(c) Examples

Some examples of the incidence of the persuasive burden in civil cases are as follows:

6-08

- (a) *contract*: in actions on contract, the burdens of proving the existence of the contract,³¹ breach and damages are all on the claimant; while the defendant has the onus of facts pleaded in confession and avoidance, e.g. infancy, release, rescission, accord and satisfaction, fraud;
- (b) *negligence*: the burden is on the claimant to assert negligence, but where the defendant alleges contributory negligence the burden lies on him³²;
- (c) *causation*: it is for the claimant to prove causation of loss³³;
- (d) *mitigation*: on the other hand, the burden is on the defendant to show that the claimant failed to mitigate his loss³⁴;
- (e) *bailment*: in bailment cases, the burden is on the bailee to disprove negligence once the claimant has proved the bailment.³⁵ The rule applies to gratuitous bailment in the same way that it applies to bailment for reward³⁶;

or otherwise, deciding on the burden of proof is the only just course for him to take" (approved in *Sienkiewicz v Greif (UK) Ltd* [2011] UKSC; [2011] 2 A.C. 229 at [193]).

²⁸ Lord Brandon, *The Popi M* [1985] 1 W.L.R. 948.

²⁹ *Ide v ATB Sales Ltd* [2008] EWCA Civ 424; [2009] R.T.R. 8; *Dattec Electronic Holdings v UPS* [2007] UKHL 23; [2007] 1 W.L.R. 1325; *ACE European Group Ltd v Chartis Insurance UK Ltd* [2013] EWCA Civ 224 at [35].

³⁰ *A (Children) (Care Proceedings: Burden of Proof)* [2018] EWCA Civ 1718; [2018] 4 W.L.R. 117.

³¹ In the case of ordinary commercial express agreements, it is not normally necessary to prove that there was an intention to create legal relations: *Chitty on Contracts*, 31st edn (London: Sweet & Maxwell, 2012), para.2-162.

³² *Wakelin v L & SW Rwy* (1886) 12 App. Cas. 41; *Gokal v Nand* [1939] A.C. 106; *White v Barry Railway* 15 T.L.R. 474; *Wood v LCC* [1941] 2 K.B. 232; *Moore v R Fox & Sons* [1956] 1 Q.B. 596; *Eso Petroleum Co Ltd v Southport Corp* [1956] A.C. 218; *Walsh v Holst & Co Ltd* [1958] 1 W.L.R. 800; *Fowler v Lanning* [1959] 1 Q.B. 426; *Dixon v Cementation Co* [1960] 1 W.L.R. 746; *Fraser v BN Furman Productions* [1967] 2 Lloyd's Rep. 1; *Radburn v Kemp* [1971] 1 W.L.R. 1502 at 1507.

³³ *The Solholt, Sotiros Shipping v Shmeiet Solholt* [1983] 1 Lloyd's Rep. 605.

³⁴ *Roper v Johnson* (1873) L.R. 8 C.P. 167; *Garnac Grain Co v Fauré & Fairclough* [1968] A.C. 1130 at 1140; *Lombard North Central Plc v Automobile World (UK) Ltd* [2010] EWCA Civ 20 at [72].

³⁵ *Coldman v Hill* [1919] 1 K.B. 443; *Houghland v RR Low (Luxury Coaches)* [1962] 1 Q.B. 694; *Schwarzschild v Harrods Ltd* [2008] EWHC 521.

³⁶ *Port Swettenham Authority v TW Wu and Co* [1979] A.C. 580 at 590.