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

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Between:

EASTEYE LIMITED

and

MALHOTRA PROPERTY INVESTMENTS LIMITED

MALHOTRA PROPERTY LIMITED

PFS (NEWCASTLE) LIMITED

THE COUNCIL OF THE CITY OF NEWCASTLE UPON TYNE

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(Judgment as handed down in writing at a remote hearing by Skype for Business)

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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

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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".[2][3] 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 undercoft 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.

<u>The legal bases of the Defendants' public law claims.</u>

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.

<u>The evidence in relation to White Hart Yard</u>

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 crossexamination, 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 which 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 crossexamined on the basis that such interpretation did not fall within in his remit under the directions for surveying evidence. Mr Pryor indicated that, the point having been made, he did not require Mr Morgan to crossexamine 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 noparking 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 in 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 Ladbrokes 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 negatived 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 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 an 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 Balmbra'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.

<u>Evidence as to modern user of Ship's Entry</u>

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 Bridgwater 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 Malhtora 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

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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

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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 negativing 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 complied 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 of 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 Balmbra'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 Balmbra'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 is 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 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 though 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 Balmbra'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 Balmbra'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 a 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 Balmbra'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 Balmbra'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.

<u>Findings for the period 1980-90 as to the use of White Hart Yard and Ship's Entry</u>

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 Balmbra'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.

<u>1990 onwards</u>

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 Balmbra'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 Balmbra'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 as 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 Balmbra'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. Balmbra'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 is 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.

<u>Conclusions as to public use of White Hart Yard</u>

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 Balmbra's for an unspecified period. They would have been able to use the alley whilst Balmbra'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 Balmbra'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 Balmbra'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 Balmbra's between 1962 and 1994 and there is evidence that in 1984 Balmbra'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 Balmbra'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 at 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 statue 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 <u>on</u> the property but <u>of</u> 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

<u>The presence of unlocked gates</u>

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 if 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

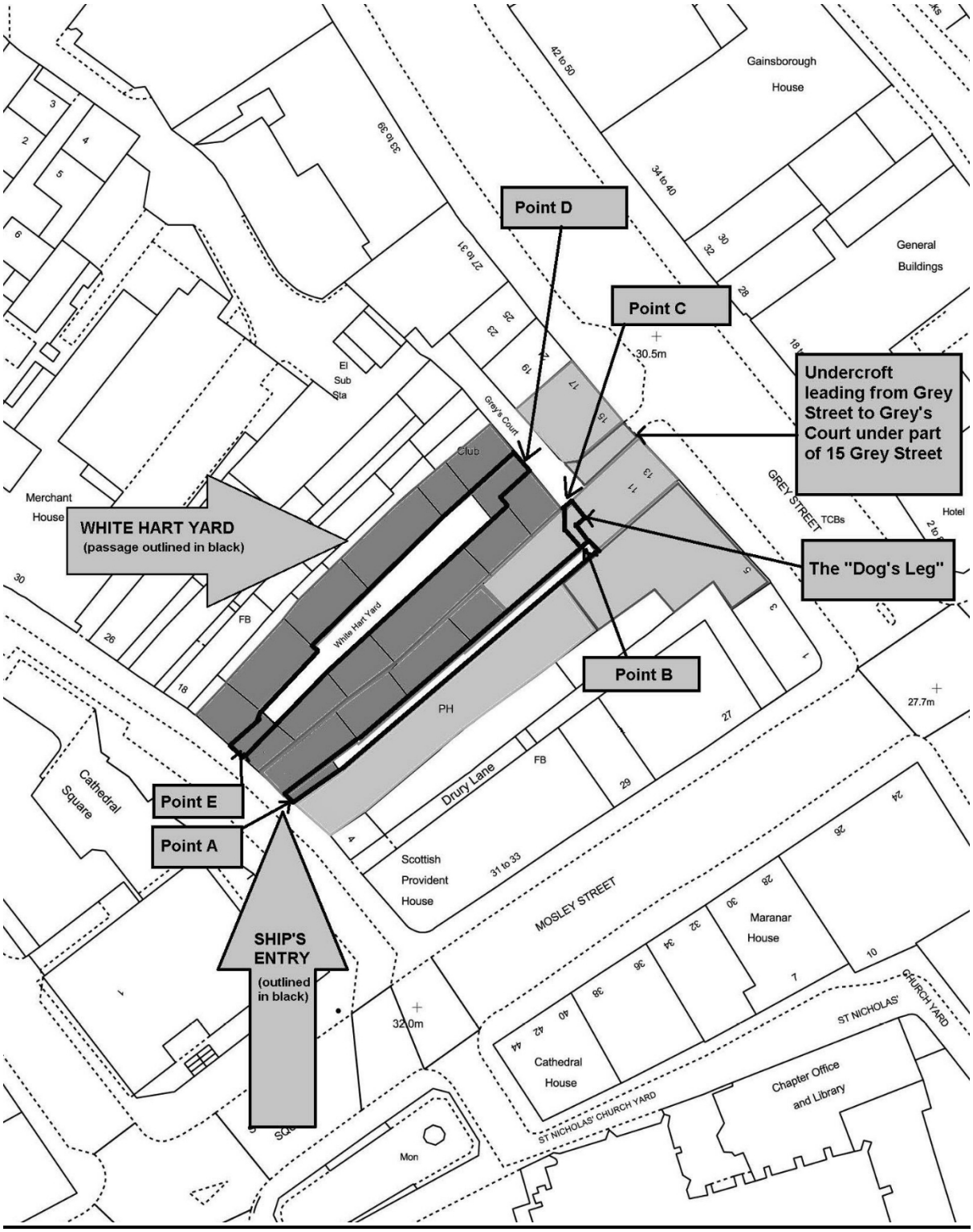
350. The date of calling into question in the modern era can be no later than 2002, based on my factual conclusions, so I look at the period back to 1982. What can be seen in that period is that although Bass, in the guise of Balmbra's, were abusing their access to the alley, the landowner was taking 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


Point D
Point C
Undercroft leading from Grey Street to Grey's Court under part of 15 Grey Street
The "Dog's Leg"
Point B
WHITE HART YARD
(passage outlined in black)
Point E
Point A
SHIP'S ENTRY
(outlined in black)
Gainsborough House
General Buildings
Merchant House
Cathedral Square
Scottish Provident House
Drury Lane
MOSLEY STREET
Maranar House
Cathedral House
Chapter Office and Library
ST NICHOLAS' CHURCH YARD
GREY STREET
Grey's Court
White Hart Yard
Club
PH
FB
TCBs
Hotel
El Sub Sta
Mon
30.5m
27.7m
32.0m

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 crossexamination 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 Balmbra'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 (19892008) 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 (19821999). 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 mid1990s 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 Balmbra'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 crossexamination 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 Ships 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.

<u>The Claimant's lay witness evidence concerning Ship's Entry.</u>

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 shows 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 September1984 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 writers 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 Balmbra'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 as 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 (1980to 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 1997and 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, Balmbra'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 Balmbra'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 Balmbra'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 Balmbra'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 Balmbra'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 whist 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. 11and 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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